Public and private enforcement of EU competition law in the age of big data

edited by

L. Calzolari, A. Miglio, C. Cellerino, F. Croci, J. Alberti

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VIA PO, 21 - TEL. 011-81.53.111
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Introduction

This book constitutes the final output of the COMP.EU.TER Project (Public and Private Enforcement of EU Competition Law in the Age of Big Data), co-funded by the Training of National Judges Programme of the European Union (GA HT.6149 SI2.858159).

Over two years, the COMP.EU.TER Project provided training to national judges and apprentice judges on the enforcement of EU competition law in the digital era. Training activities were organized by the Universities of Turin, Milan and Genoa in the form of seminars, lectures and online materials made available on the project's e-learning platform (www.compeuter.unito.it). In addition, the project benefitted from a wider network of associated partners (the Universities of Antwerp, Ferrara, Aberdeen, Rotterdam, Warsaw and Zaragoza) which contributed by providing materials for the COMP.EU.TER e-learning platform and promoting the training activities among the respective national judiciaries.

On 30th November and 1st December 2023, the Final Conference of the COMP.EU.TER Project was held at the Palazzo di Giustizia in Milan, which houses both the Court of Milan and the Court of Appeal of Milan. Over two days, the speakers addressed a selected audience of national judges from over ten Member States, tackling the most relevant developments in the public and private enforcement of EU competition law in the context of digital markets.

The aim of the COMP.EU.TER Project has been, primarily, to raise the awareness of national judges about the challenges posed by the application to the digital world of traditional competition law concepts developed in the "analogic" world. Not only do the big data revolution and the up-surging diffusion of data analytics facilitate the commission of existing antitrust violations, but they also originate new types of anticompetitive behaviours that could not be committed in the analogic world (e.g. algorithmic collusion, behavioural discrimination). In addition, the structure and the dynamics of digital markets put traditional tools of competi-

tion law enforcement under strain, increasing the burden of both administrative authorities and courts.

Against this backdrop, the COMP.EU.TER Project has sought to better prepare national judges for the task of enforcing EU competition law in digital markets, by helping them familiarise with the most recent legislation, case law and practice. The book shares this goal, and its primary targets are national judges dealing with competition law in the courts of the Member States. We hope that the book may guide them in this difficult task, in a context where profound transformations in technology, market structure and regulatory landscape present the enforcers with unprecedented challenges. For similar reasons, we expect it to provide useful insights to legal practitioners and academics interested in understanding the way EU competition law is and will be applied to digital markets.

The structure of the book broadly reflects the programme of the COMP.EU.TER Final Conference, and covers three major themes.

The first three chapters guide the reader through the structural features of digital markets and their impact on competition, addressing cross-cutting issues and presenting the general framework for the application of EU competition law to digital markets.

In the introductory chapter, Francesco Munari addresses, with ample references from practice, the specificities of digital markets in terms of economies of scale, network effects, multi-sidedness, value of data and vertical integration. He shows how those factors lead to the emergence of digital ecosystems – rather than mere dominance or even super-dominance – built by the largest market players. The concluding paragraph highlights the shortcomings of traditional *ex post* enforcement with respect to anticompetitive conducts of the largest digital service providers and hints to the paradigm shift represented by *ex ante* regulatory schemes.

Building on Munari's overview, Valeria Caforio and Laura Zoboli zoom in on the effects that those specific features of digital markets have on the creation and the preservation of market power. Based on a careful analysis of the role data generation and collection perform in building market power, they argue that big data operate as a set of entry barriers that can fortify dominance in markets where goods and services are enhanced through data utilisation.

In a similar vein, in light of the societal transformations brought about by digital technology, María Campo Comba examines the expansion of the goals of EU competition law to non-economic objectives, offering a comprehensive and detailed analysis of the relevant practice of the

Commission and some National Competition Authorities as well as of the case law of the Court of Justice.

Another set of chapters focuses on specific obligations imposed on undertakings in digital markets either by Articles 101 and 102 TFEU or by the recently adopted Digital Markets Act (DMA).

Daniel Mandrescu discusses in detail the challenges of applying Article 102 TFEU to multisided online platforms, focusing in particular on market power leveraging and discriminatory strategies implemented by platforms. The chapter emphasises the flexibility of Article 102 TFEU due to its open-ended character, while at the same time inviting caution in its application to new practices emerging in digital markets.

The chapter by Jan Blockx shifts emphasis from Article 102, which has so far dominated EU competition law enforcement in the context of digital markets, to Article 101 TFEU, providing a comprehensive account of cases where competition authorities and courts have investigated possible instances of algorithmic collusion.

Finally, Claudio Lombardi presents the brand-new regulatory approach introduced by the DMA, analysing its scope of application and dissecting the complex legal regime of gatekeepers. He concludes that the DMA, with its emphasis on speed, flexibility, and certainty, is «a significant step towards ensuring a fair and competitive digital market».

In keeping with the COMP.EU.TER Project's focus, all remaining chapters specifically address the role of national courts, focussing on the private enforcement of competition and quasi-competition rules and, more generally, of legislation applicable to digital markets, also taking into account interferences with other sets of rules, such as data protection law.

Alberto Miglio's chapter provides an overview of issues of jurisdiction and applicable law that may arise in competition law cases in the digital domain, from the characterisation of claims between platforms and users to the lack of coordination between the DMA and EU legislation on private international law.

Luca Calzolari discusses the impact that commitment decisions, firstly introduced in the realm of EU competition law by Article 9 of Council Regulation (EC) 1/2003 and recently included also among the enforcement tools of the DMA, have had on public and private enforcement of EU competition rules. The chapter focuses on the application of commitment decisions by national courts and, in particular, on their evidential value in the context of follow-on actions brought by third parties to, *inter*

alia, secure compliance with the commitments or seek damages in case of default.

Filippo Croci's chapter on the private enforcement of the DMA complements the substantive analysis by Lombardi, pointing to the many questions left open by the (deafening) silence of the DMA with regard to its private enforceability before national courts. In particular, Filippo Croci highlights to what extent the lack of a proper legislation on private enforcement can be only partially overcome by the general provisions enshrined in Article 39 of the DMA and by the extension of the applicability of Directive (EU) 2020/1828 on representative actions to violations of the DMA. On these bases, the chapter investigates the possible features and prospects of the private enforcement of the DMA.

Last but not least, Chiara Cellerino discusses the interplay between private enforcement of competition law and data protection claims, a highly relevant topic especially after the judgment of the Court of Justice in *Meta Platforms* (C-252/21).

Like every collective enterprise, this book owes its existence to the shared effort of various people and institutions, to whom our gratitude goes.

First, the whole COMP.EU.TER Project would not have been possible without the generous funding provided by the European Commission under the call "Training of National Judges in EU Competition Law".

We are also grateful to all the judges who took part in the training activities despite their numerous and intense commitments, for their interest in the COMP.EU.TER Project and the precious feedback they gave us.

We were honoured to receive the support of the Association of European Competition Law Judges (AECLJ) and, in particular, of its President Dr. Adam Scott OBE TD, who enthusiastically accepted to help us promote our training activities and to take part in the Project's Final Conference. Moreover, the Past President of AECJLJ, Marina Tavassi (former President of the Court of Appeal of Milan), and the current Member of the Executive Committee, Silvia Giani (former Judge of the Court of Appeal of Milan and recently appointed as President of the Chamber specialised in business matters and competition law of the Court of Milan), were also essential for the success of the Conference.

We are also grateful to the Italian School for the Judiciary (Scuola Superiore della Magistratura, SSM), local sections of Turin, Genoa and Milan, that has supported us through the implementation of the Project.

We are obviously indebted to all those (speakers, chairs, judges, and

other participants) who took part in the Final Conference and to the Milan Bar Association that hosted the main conference in the wonderful venue of the Biblioteca Ambrosoli at the Palazzo di Giustizia of Milan, and would like to acknowledge the contribution of ITA.CA – Italian Case-Law on Private Antirust Enforcement [1] to its organisation.

Finally, we are grateful to Silvia Giudici and Mario Barbano for their invaluable support in multiple stages of the implementation of the COMP.EU.TER Project and for their help in the editing process.

The book is updated to 15 February 2024.

Luca Calzolari - Alberto Miglio
Chiara Cellerino - Filippo Croci - Jacopo Alberti

[1] Available at https://itaca.europeanlitigation.eu/.

Competition on Digital Markets: An Introduction

Francesco Munari [*]

1. Preliminary remarks: "real" competition issues in digital markets surpass predictive studies

It has been less than a decade since the publication of the first (and seminal) works dealing with the interaction between the so-called fourth industrial revolution and anticompetitive practices, and in particular speculating about what new anti-competitive conduct might have developed in digital markets [1].

Those studies mainly focused on the possibility of having algorithms capable of colluding autonomously, or on other forms of artificial intelligence capable of fragmenting the market by offering different conditions

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[*] Full professor of EU Law at the University of Genoa, Italy – Partner Deloitte Legal. I wish to thank Prof. Luca Calzolari for valuable insights in discussing and preparing this chapter. Any mistake or omission remain entirely (and obviously) on myself.

[1] See for example the seminal work of A. EZRACHI, M.E. STUCKE, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, Cambridge, 2016.

to virtually every user, thus discriminating between them. At that time, they might evoke futuristic scenarios that would hardly become true. Reality, however, has probably exceeded what had been anticipated by the early scholars that engaged in this exercise: so much so that the enforcement practice of competition authorities around the world, including the European Commission (the "Commission") and the Member States' National Competition Authorities ("NCAs"), has begun to offer multiple examples of digital infringements of relevant provisions on cartels and abuses of dominant position, such as Article 101 [2] and 102 TFEU [3].

This is particularly true if one focuses on those conducts which, although closely related to the digital world, tellingly have always appeared as much more realistic, i.e. not so much on new forms of antitrust infringements committed by artificial intelligence, but rather on conducts involving "Big Data": their economic and competitive value has proven to be enormous and their collection, analysis and use has allowed "Big Tech" firms (Google, Apple, Facebook, Amazon, and Microsoft, often referred to as "GAFAM") to increase their market power [4] and extend it across several markets at a pace never witnessed on physical markets, while at the same time making them able to exclude their competitors or to exploit consumers and business customers in innovative ways.

The above has caused several studies to be carried out, with a view to investigating whether digital markets enjoy features unknown to traditional markets or whether peculiarities exist in the competitive game taking place in these markets [5].

Indeed, the general belief is that there is not a single feature characterizing and distinguishing digital markets from other "traditional" markets. Rather, what is distinctive about digital markets is the *concurrent* and *cumulative* presence of a remarkably large number of characteristics [6]

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[2] See J. BLOCKX *Dawn of the Robots: First Cases of Algorithmic Collusion*, in this *Book*, p. 117.

[3] See D. MANDRESCU, *Applying Article 102 TFEU to Multisided Online Platforms Discrimination, Leveraging and Undefined Abuses of Dominance*, in this *Book*, p. 87.

[4] See V. CAFORIO, L. ZOBOLI, *Decoding Antitrust: Market Definition and Market Power within the Data Value Chain*, in this *Book*, p. 35.

[5] Among the most recent, see G7 Competition Authorities, *Compendium of Approaches to Improving Competition in Digital Markets*, Hiroshima Summit, 8 November 2023, p. 10.

[6] Obviously, reference is made here to economic notions on which tons of ink has

that, by contrast, are usually found *in isolation* in traditional markets [7]. This circumstance is paramount, is acknowledged by the Digital Markets Act ("DMA") [8], and brings unprecedented consequences in the affected economic/social sectors: firms grow much more rapidly and significantly, firms become "super-dominant" and win all the market, markets "tip" in favour of one firm only [9]. In the following paragraphs we shall try to discuss these issues in more details.

2. The characteristics of economies of scale and of marginal and distributional costs in digital markets

Digital markets are usually characterized by strong economies of scale, that are complemented by the absence of marginal and distributional costs. It is common ground that an increase in organizational size and/or in production levels usually leads to a decrease in the average cost of production per unit of output. In fact, the increase in size and/or output results in greater efficiency, because initial investments and other fixed costs borne by a given company to become operative and to grow are spread over a larger number of final products.

In the analogic world, however, the decrease in unit cost when outputs

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been spilled by many prominent scholars and the present paper neither intends nor claims to make any in-depth analysis of them; rather, taking the risk of oversimplifying, we only wish to outline the functioning of digital markets, for illustrative purposes only. A few references to the key works and contributions dealing with specific concepts and notions that will be discussed below will be provided below regarding each of them.

[7] See also F. LANCIERI, P.M. SAKOWSKI, *Competition in Digital Markets: A Review of Expert Reports*, in *Stanford Journal of Law, Business & Finance*, 2021, Vol. 26, Iss. 1, p. 65, p. 74.

[8] Cf. Recital 13 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[9] While already used in the past for example to refer to the position of Tetra Pak II International SA on a traditional market (Court of Justice, case C-333/94P, *Tetra Pak II* [1996] ECLI:EU:C:1996:436), the concept of super-dominance has been recently used by the General Court to describe the position of Google on the market for online general search services (General Court, case T-612/17, *Google* [2021] ECLI:EU:T:2021:763, paras 182-183).

increase is not a forever process and indeed it experiences limitations: if output exceeds a certain level, unit costs may increase again and this increase may be even greater than the value of the increase in output, thereby giving rise to so-called diseconomies of scale. When marginal costs are higher than marginal revenues, economic operators have no incentive to increase production, for the costs to produce the additional units would exceed the profits. For example, this may happen when new investments are needed to increase production over a certain threshold but, to be paid off, the investment would require an increase in output on a scale that the firm does not believe it can achieve: in this scenario, the more rational choice for the firm is to keep production levels below the threshold that would make the investments necessary. In other words, the rational choice may be to refrain from growing.

In contrast, in digital markets the cost of production is much less than proportional to the number of customers served [10]. More precisely, the cost of servicing additional digital consumers with information goods (e.g., having a consumer carrying out one more search through a search engine; connecting one more user in a social network; or listing one more product in a digital marketplace) is close to zero [11]; the above implies that "traditional" constraints on companies' growth do not affect players which are active in digital markets [12].

In addition to this, in the digital world there are essentially no distribution costs for online services: just as the cost for the user to send an email remains the same (i.e., zero, net of environmental costs [13]), regardless of whether the email is addressed to the colleague next door of the sender or to a recipient located on the other side of the world, the same happens to a company offering its services globally: the only limited costs suffered by such company essentially correspond to the resources needed to overcome language and regulatory barriers. Besides, the lack of distributional costs

[10] G. PETROPOULOS, *Competition Economics of Digital Ecosystems*, in OECD, *Competition Economics of Digital Ecosystems*, 2020, available at www.oecd.org.

[11] Cf. Final Report of the Stigler Committee on Digital Platforms, September 2019, p. 36 (the "Stigler Report").

[12] For example, «[i]*t took only five years for Facebook* […] *to go from a million users in 2004, the year of its founding, to more than 350 million users in 2009, when it overtook MySpace for good*» (cf. Stigler Report, cit., p. 37).

[13] A. MAWBY, *The Environmental Cost of Email*, in *Fight Climate Change*, 22 May 2022, available at www.fightclimatechange.earth.

for digital services provides the explanation why in our sectors new markets often have a worldwide dimension from the very beginning [14], unless "non-market" restrictions apply, such as political or geo-political ones.

3. Direct network effects in digital markets …

Many digital markets experience very strong network effects [15]. A market exhibits network effects when the value of a product (a good or, more often, a service) increases with the number of customers using it. Again, this concept clearly predates the digital revolution: the textbook and most common example of (direct) network effect is indeed the landline telephone: the more users have already a phone, the more likely is that a perspective user will decide to purchase one, as the expected benefit of the purchase (the possibility to communicate with other people) is higher. It is no coincidence that the theory of network effects began to be studied precisely in parallel with the invention and mass diffusion of such tool.

When a user joins a network, this creates multiple gains: first, there is the individual and private gain to that user, who can begin to use the product benefitting from the community of all other users already in the network; secondly, there is a collective benefit in favour of such other users, who not only can now interact also with the new user but also benefit from the higher appeal of the whole network [16]; lastly, there is a second private gain for the network itself and therefore for its owner [17]: the in-

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[14] So that, inter alia, «*it is hard to analyse digital markets with the traditional concepts of geographical or product markets*» (M. LIBERTINI, *Digital Markets and Competition Policy. Some Remarks on the Suitability of the Antitrust Toolkit*, in *Orizzonti del Diritto Commerciale*, 2021, Vol. 9, Sp. Iss., p. 337, p. 338).

[15] Cf. J. ROHLFS, *A Theory of Interdependent Demand for a Communications Service*, in *Bell Journal of Economics and Management Science*, 1974, Vol. 5, Iss. 1, p. 16; M.L. KATZ, C. SHAPIRO, *Network Externalities, Competition, and Compatibility*, in *American Economic Review*, 1985, Vol. 75, Iss. 3, p. 424.

[16] Cf. J.M. YUN, *Overview of Network Effects & Platforms in Digital Markets*, in D. H. GINSBURG, J. D WRIGHT (eds.), *The Global Antitrust Institute Report on the Digital Economy*, Global Antitrust Institute, Arlington, 2020, p. 2.

[17] D.F. SPULBER, C.S. YOO, *Access to Networks: Economic and Constitutional Considerations*, in *Cornell Law Review*, 2003, Vol. 88, Iss. 4, p. 885, p. 922.

crease of the users makes the network more desirable not only to existing users but also to each additional user, thereby rendering the network more valuable [18].

Direct network effects cause the network to grow, what, in turn, strengthens and consolidates the owner's market position [19], as users increasingly benefit from being on the same network as other users. This phenomenon is common to a plethora of digital markets, from social networks to peer-to-peer online marketplaces (such as eBay).

4. … and indirect ones

What is relevant for digital markets, however, is that direct network effects are almost invariably coupled with just as much strong indirect – or cross-group – network effects. Below we will see that this circumstance is due to, and inherently related to, the fact that in digital markets the market structure is very often two- or multi-sided. In fact, indirect network effects occur when a given network is used by two (or more) different groups of users that are interrelated and somewhat interdependent with each other. In this case, the benefit users belonging to one group derive from the network may become greater when the number of users belonging to another group increases [20].

Strictly speaking, not even cross-group network effects are a novelty or peculiarity of digital markets, as there were and are several examples of this phenomenon in the "analogic world" as well: brick-and-mortar

[18] For an assessment of how this value can be calculated from an economic perspective see for example B. METCALFE, *Metcalfe's Law After 40 Years of Ethernet*, in *Computer*, 2013, Vol. 46, Iss. 12, p. 26.

[19] See for example United States Court of Appeals, District of Columbia Circuit, 253 F.3d 34, *United States v. Microsoft Corp.* [2001]; United States Court of Appeals, District of Columbia Circuit, 147 F.3d 935, *United States v. Microsoft Corp.* [1998].

[20] Sometimes, network effects can occur at a "local" level, even in the digital economy. For example, customers of ride sharing services care less about the size of the entire network and instead place a high value on a subset of network participants, specifically those located in the same city (cf. C. YOO, *Network Effects in Action*, in D.H. GINSBURG, J.D WRIGHT (eds.), *The Global Antitrust Institute Report on the Digital Economy*, cit., p. 159; F. ZHU, M. IANSITI, *Why Some Platforms Thrive and Others Don't*, in *Harvard Business Review*, 2019, Vol. 97, Iss. 1, p. 118, p. 121).

shopping malls, newspapers, and yellow pages[21] are among the most quoted examples; the value consumers place on a shopping mall depends on the number and quality of stores available but, at the same time, the value that retailers place on the mall (and thus, for example, their willingness to pay the rent) depends on the number of consumers who are likely to visit the mall. The same was true also regarding the relationship between the publishers of yellow pages and both their end- and business-customers: the former attributed value to the yellow pages based on the number of listings, and the latter were willing to pay listing fees based on the number of end customers who were likely to be reached and to use the yellow pages.

However, indirect network effects become exponentially larger in the context of the digital economy, both quantitatively and qualitatively. This is not a coincidence: the digital economy is based precisely on the role of online intermediaries, namely digital platforms, which can connect end users with business users. Indeed, the examples mentioned above are nothing but the ancestors of today's digital platforms, although in digital markets the scale of this phenomenon is enormously larger.

Indirect network effects can be reciprocal or asymmetrical[22], with the latter being particularly common in digital markets. A clear example of the first case is represented by computers, video game consoles and, more recently, app-stores. Here, the relation between end users (the consumers) and business users (the developers of software, videogames, or apps) of the network (the computer, the console, or the app-store) is characterized by a clear two-way indirect network effect. The end users benefit when more and better developers are attracted to the network, because this leads to more and better software, games, and apps: when this occurs and they have more products at their disposal, end users are likely to consider the network more valuable[23]. At the same time, however, developers are more likely to decide to design new product for networks having a large basis of end users: after all, the end users of the

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[21] Cf. M. RYSMAN, *Competition between Networks: A Study of the Market for Yellow Pages*, in *The Review of Economic Studies*, 2004, Vol. 71, Iss. 2, p. 483.

[22] G. SHIER, T. BYRNE, *Economic Principles*, in M. WIGGERS, R. STRUIJLAART, J. DIBBITS (eds.), *Digital Competition Law in Europe*, Alphen aan den Rijn, Kluwer International, 2023, p. 7.

[23] Stigler Report, cit., p. 38.

network are the perspective clients for the software, games and apps designed by the developers.

Another example is represented by online marketplaces: an increase of the sellers means more choice for the buyers, and at the same time an increase of the buyers means more opportunities for sellers. Thus, when indirect network effects are reciprocal, the network increases its value when the number of both end and business users increases.

Asymmetric indirect network effects, by contrast, occur when the increase in the number of the participants belonging to one of the other group(s) benefits the latter but not vice versa. An example is represented by advertising-funded content platform, such as social networks [24]. Here, an increase of the users is surely a positive factor for advertisers: by advertising on the platform, they can reach a larger group of potential customers. However, an increase of advertisers (and therefore of the ads) is unlikely to be considered a desirable development by users who usually prefer an ad-free experience.

5. The multi-sided market structure of digital markets

As it is already evident from the examples provided above, indirect network effects are inherently connected to another feature characterizing the structure of digital markets, i.e. their multi-sidedness. By definition, two or multi-sided markets involve indirect network effects, as the value that one group of users obtains from the network is determined not by the size of the entire network, and rather by the size of the other group of users [25].

From the viewpoint of the economic operator acting as an intermediary and connecting business users with end users, the greater the number of economic sectors that are brought into communication by platforms, the more the number of platforms themselves is reduced in favour of a small number of dominant players leading a few "digital ecosystems" [26]. In this situation, the importance of the intermediators is substantially en-

[24] G. SHIER, T. BYRNE, *Economic Principles*, cit., p. 7.

[25] Cf. C. YOO, *Network Effects in Action*, cit., p. 168.

[26] See *supra*, para 4.

hanced, what has led to their qualification as "gatekeepers" of digital markets, as expressly acknowledged in the DMA [27]. Gatekeepers enjoy the power to pick and decide winners and losers in the adjacent markets, discourage the switching to rival services, and punish undertakings that come too close to their domain [28].

Again, this is not a new phenomenon, because examples exist also in the pre-digital world. This is true for instance in credit cards, where the value attached to the network by merchants is not determined by the total network's size, but rather by the number of cardholders; conversely, the networks' value to cardholders is determined by the number of merchants participating in it [29].

Another non-digital multi-sided market is the market for newspapers [30]. A newspaper can indeed be considered as an intermediary connecting advertisers (wishing to reach a target audience) and readers (wishing to access news and information). The newspaper provides a medium for both sides of the market to interact. The newspaper benefits from (asymmetric) indirect network effects, as more readers make the newspaper more valuable to advertisers, but not vice versa.

Digital markets are the realm of online platforms. Virtually all online platforms (regardless of their core business, e.g. a marketplace, a social network, a search engine) act as intermediaries between different groups of users who benefit from each other's participation. Regardless of their activity, online platforms facilitate interaction, coordination, and exchange among two or more distinct and interdependent groups of customers. And in fact, the terms multi-sided platforms and

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[27] See C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139.

[28] J.S. KANTER, *Digital Markets and 'Trends Towards Concentration'*, in *Journal of Antitrust Enforcement*, 2023, Vol. 11, Iss. 2, p. 143.

[29] For examples in the Commission's practice, see, Commission Decision of 17 October 2007 in case AT.38606 – *Groupement des cartes bancaires*; 19 December 2007 in case AT.34579 – *Mastercard I*; 29 April 2019 in case AT.39398 – *Visa MIF*. For a comparison with US case-law, see J. SIDAK, R. WILLIG, *Two-Sided Market Definition and Competitive Effects for Credit Cards After United States v. American Express*, in *The Criterion Journal on Innovation*, 2016, Vol. 1, p. 1301.

[30] C. IHLSTROM ERIKSSON, M. AKESSON, J. LUND, *Designing Ubiquitous Media Services - Exploring the Two-Sided Market of Newspapers*, in *Journal of Theoretical and Applied Electronic Commerce Research*, 2016, Vol. 11, Iss. 3, p. 1.

multi-sided markets are considered almost as a synonymous of the digital economy [31].

With that said, a critical feature of multi-sided markets is that, quite often, the different sides of the markets are also strictly interdependent: *inter alia*, this means that the optimal pricing and output strategy to be adopted by the intermediary on one side of the market depends on the demand and supply conditions on the other side. The optimal price and output strategy for one kind of customers may therefore depend on how competition works on the other side.

This leads to the possibility to have so-called "Zero Price Markets", because platforms can – and indeed very often do – offer "free services" to one kind of users (e.g. consumers) and profit from the revenue made from another kind of users (e.g. advertisers) [32]: in the light of what has been discussed above (network effects etc.), offering free services can be the best strategy to maximize the overall profit, as this may lead to significantly increase the number of users on the "free" side of the market, thereby making the users operating on the other side of the market more willing to purchase the services sold by the platform [33].

By the same token, the "free services" affect one pillar of the traditional antitrust discourse, *i.e.* the dogma of the rational choice of consumers: a zero-price service tends to obfuscate the capacity of the buyer to select the theoretical best option existing in the market. And this, as we shall see below, seems relevant for our analysis.

6. The value of data in digital markets

Irrespective of the possibility of subsidizing the service offered "free of charge" with the revenues earned on any of the other sides of the market on which a platform is active, in fact data have *per se* a funda-

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[31] Cf. J.M. YUN, *Overview of Network Effects*, cit., p. 2.

[32] A. FLETCHER, *Digital competition policy: Are ecosystems different?*, in OECD, *Competition Economics of Digital Ecosystems*, cit., p. 3: «[t]his is why a number of digital services – such search and social media – are provided free to consumers. The services are effectively paid for by business users who seek the attention of the consumers on the other side of the platform».

[33] M. LIBERTINI, *Digital Markets and Competition Policy,* cit., p. 339.

mental importance in the digital economy. In other words, also (and probably especially) in digital markets «*there ain't no such thing as a free lunch*» [34] and the price paid by customers in exchange for allegedly free services is represented by their data [35], whether of personal nature or not [36].

When a given online service attracts more and more users, the platform providing such service also gathers more data, that enjoy a two-fold nature [37], i.e. as by-product of any digital activity and as a key input to provide digital services. Analytics tools are normally used to examine data and extract knowledge and value. For a platform, reaching a critical threshold of users and data is therefore crucial to operate, become and remain competitive on the market.

The collection and availability of data is therefore relevant from several perspectives, including antitrust. In fact, if the need to reach a large mass of users and data is necessary for the platform to be able to offer the service representing its core business and to compete on the market, one can imagine that the possession of data is a barrier to entry in the market, securing incumbents from competition from newcomers. At a first glance, the qualification of data as entry barrier would seem belied by their ubiquity, replicability and non-rivalry. In this sense, one might argue that data are unlikely to represent *per se* a source of market power [38] or a barrier to entry of competitors in a given market [39].

And yet, in a diachronic sense the above conclusion appears less per-

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[34] To quote the well-known adage used by M. FRIEDMAN, *There's No Such Thing as a Free Lunch*, Open Court Publishing Company, Chicago, 1975. Concerning the issue at stake see already J. KOPONEN, A. MANGIARACINA, *No Free Lunch: Personal Data and Privacy in EU Competition Law*, in *Competition Law International*, 2013, Vol. 9, Iss. 2, p. 183.

[35] See already D.S. EVANS, *The Antitrust Economics of Free*, in *Competition Policy International*, 2011, Vol. 7, Iss. 1, p. 71.

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

[37] A. FLETCHER, *Digital competition policy*, cit., p. 2.

[38] G. PITRUZZELLA, *Big Data, Competition and Privacy: A Look from the Antitrust Perspective*, in *Concorrenza e del Mercato*, 2016, Vol. 23, p. 15, p. 20.

[39] D.S. TUCKER, H. WELLFORD, *Big Mistakes Regarding Big Data*, in *Antitrust Source, American Bar Association*, 2014, p. 7, available at www.papers.ssrn.com.

suasive. The most immediate example comes from search engines [40], that rely on the analysis of data, i.e. past search queries: by exploring the links between (past) search queries and the subsequent clicks by (past) users, search engines learn from their users' behaviours to deliver more relevant and higher quality results for each query: the more data on past search queries they have, the better their services become [41].

Yet, these data are not available to newcomers. On zero-price markets, it is difficult to enter into such markets without quality; but without data from past search queries, new and smaller providers of search engines services cannot offer the same quality as larger providers and incumbents [42]. Therefore, the so-called click-and-query data are crucial for the success of search engines.

The same holds true, however, also for other services offered in digital markets: data help platforms to profile users, hence constantly enhancing their capacity to tailor prospected purchasers for potential sellers located on the other side of the market. Again, this value is not available for newcomers or smaller competitors.

With that said, the example of search engines is also interesting because it provides the opportunity to highlight an additional issue characterizing the application of competition law in digital markets, namely the challenge which sometimes arises in tailoring typical antitrust concepts to this environment. The idea that a search engine's results improve as the number of its users increases, coupled with the fact that qualitative improvement in results eventually attracts more users to that search engine, seems to mirror the typical pattern of network effects: after all, the value of the services offered to users by the search engine depends on how many other users have used it.

However, network effects (whether direct or indirect) occur on the demand side: people prefer to use a given product or service because oth-

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[40] Cf. M.E. STUCKE, A.E. EZRACHI, *When Competition Fails to Optimize Quality: A Look at Search Engines*, in *Yale Journal of Law & Technology*, 2016, Vol. 18, p. 70, G. PITRUZZELLA, *Big Data and Antitrust Enforcement*, in *Italian Antitrust Review*, 2017, Vol. 1, p. 77, p. 79.

[41] *Inter alia*, M. SHAEFER, G. SAPI, L. SZABOLCS, *The effect of Big Data on Recommendation Quality. The Example of Internet Search*, DICE Discussion Paper No 284, 2018.

[42] See L. CALZOLARI, *International and EU Antitrust Enforcement in the Age of Big Data*, in *Diritto del Commercio Internazionale*, 2017, Vol. 31, Iss. 4, p. 855, p. 871, also for further references.

ers people do. By contrast, the positive feedback loop that attracts more and more users to a given search engine occurs on the supply side. New users prefer to use the existing search engine not because other people do, and rather because the search engine offers better results than newcomers do, because of its wider customer base. Search engines improve the quality of their services by getting more users and therefore more queries and learning from them. This concept is called learning by doing: production is generally improved through practice and experience.

For some scholars, this positive outcome should not be altered or chilled by antitrust rules addressing the dominant position of the global incumbent [43]; the above may be understandable from a pure antitrust perspective focused on consumer welfare, and yet the impression is that a more thorough analysis is still ongoing: as highlighted above, in a zero-price market consumer preferences are at best less clear; moreover, even quality of the services can be hardly measured without a comparison among competing providers (or platforms): but this often implies the use of time which most customers would consider as wasted (e.g. very seldom the same search is done on two or more engines); therefore, the decrease in quality (including the issue of profiling some results better than others for customers) is not so easily perceivable. In fact, in digital markets the "knowledge illusion" is particularly striking [44], and this casts in doubt one of the main tenets of many antitrust lawyers, i.e. the rational choice of consumers/firms in the market.

Additionally, the availability of large dataset may also allow the platform to expand its business quickly and easily into other sectors and markets adjacent to the core one in which it already operates. The latter is the most problematic scenario from an antitrust perspective, insofar as it means that platforms can cross-leverage their data-driven market advantages across distinct sectors and businesses, thereby extending their market power (and possibly dominance) across markets [45], whether existing or new [46].

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[43] R.H. BORK, J.G. SIDAK, *What does the Chicago school teach about internet search and the antitrust treatment of Google?*, in *Journal of Competition Law & Economics*, 2012, Vol. 8, Iss. 4, p. 663.

[44] See S. SLOMAN, P. FERNBACH, *The Knowledge Illusion. Why We Never Think Alone*, Penguin, London, 2017.

[45] See for example L.M. KHAN, *The Ideological Roots of America's Market Power Problem*, in *Yale Law Journal Forum*, 2018, Vol. 127, p. 960, p. 961.

[46] «For example, generative AI, which becomes a hot topic in the world in 2023, is

In other words, the fact that the services offered by platforms are based on collecting and extracting value from data brings other quite relevant consequences: more precisely, and as addressed below, digital markets are characterized also by very strong economies of scope.

7. Economies of scope and vertical integration

Economies of scope occur when the costs already sustained by a company to produce a given product reduce the costs that shall be born to produce a different product [47]. Hence, an economy of scope occurs when there are sharable inputs in the production process so that the joint production of two (or more) products is more cost effective than producing each of those two (or more) products independently [48].

Although here the focus is on the scope of the activities of a company, the effect is very similar to the one described above concerning economies of scale: thanks to the combination of two or more products lines, larger firms offering more types of products can lower their average costs, just as they can do by producing more units of the same products. In the end, what matters is that the cost savings give larger companies an advantage over smaller competitors producing only one or few products.

As said, in digital markets, economies of scope are likely to be particularly intense. The cost structure characterizing the activities of online platforms (i.e., high fixed and low marginal costs) and the relative ease with which the same core infrastructure can be used to offer digital services across a range of different markets [49]; consequently, online platforms represent the perfect candidate to benefit from economies of scope [50]. Indeed, digital products typically involve a clear modular de-

clearly a service backed by massive amounts of data and thus it once again highlighted the importance of accessibility to data assets» (G7 Competition Authorities, *Compendium*, cit., p. 8).

[47] See for example J.C. PANZAR, R.D. WILLIG, *Economies of Scale in Multi-Output Production*, in *The Quarterly Journal of Economics*, 1977, Vol. 91, Iss. 3, p. 481.

[48] J.C. PANZAR, R.D. WILLIG, *Economies of Scope*, in *American Economic Review*, 1981, Vol. 71, Iss. 2, p. 268.

[49] A. FLETCHER, *Digital Competition Policy*, cit., p. 5.

[50] G. SHIER, T. BYRNE, *Economic Principles*, cit., p. 8 and p. 241.

sign, where production inputs can be used for more final products, because of the high level of standardization [51].

The above explains why online platforms can thus easily offer more products and services to users at a lower cost than a firm that offers only one service by using their existing digital infrastructure and user base. For example, the decision to sell more types of products (e.g., not only books but virtually everything) has very limited direct costs for the marketplace that chooses to pursue this strategy, as the Amazon experience clearly tells us [52]. The same applies to the decision of a social media to offer to users not only the possibility to interact between them but also to access news, jobs offer or dating profiles that have been selected for them directly by the platform [53].

The latter example further shows that, as already recalled, in digital markets production inputs do not include hardware or software components only; in fact, a fundamental component (and driver) is made by data [54]: as long as a digital platform has a sufficiently large user base on its primary market, the data collected on such market can be used by the

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[51] M. BOURREAU, *Some Economics of Digital Ecosystems*, in OECD, *Competition Economics of Digital Ecosystems*, cit., p. 4, noting that «[f]or example, Apple uses and re-uses its in-house processors across its product lines for iPhone, iPad, and Mac, rather than developing a specific processor for each device. Similarly, the progress made in artificial intelligence and algorithms allows companies like Google or Facebook to improve a whole range of services».

[52] Indeed, «[i]f Amazon has established an online infrastructure for delivering ebooks, the incremental cost of using this to deliver digital audio and video may be substantially lower than would be the stand-alone cost of this activity» (cf. A. FLETCHER, *Digital competition policy*, cit., p. 5) To be sure, a "cost" of this strategy might be represented by the consequences of moving from being a specialist market place to be a generalist one, which can make a company's fortunes (see Amazon) or lead to its failure, depending on how the repositioning is perceived by customers who, as the market place loses its name of specialist site, might decide to turn to other generalist market places.

[53] Indeed, «Facebook recently entered the dating market with Facebook Dating, a service that relies on the data collected from social network users to find relevant matches» (cf. M. BOURREAU, *Some Economics*, cit., p. 4).

[54] The «*importance of data as an input for many digital services*» shows that «*where applicable, those with significant data collection and processing capabilities have a sizeable competitive advantage*» (K. VAN HOVE, A. PAPAEFTHYMIOU, *Revising the Competition Law Rulebook for Digital Markets in Europe: A Delicate Balancing Act*, in *Competition Policy International*, 11 October 2020, available at www.competitionpolicy international.com).

platform to design and improve the products offered on other markets and therefore to expand their activities into new areas [55]. The peculiarity is that the competitive advantage that the platform is often able to gain from analysing the data collected on its core market often enables the platform to enter into different but connected markets more quickly and with higher quality products compared to those that could be created by the "ordinary" newcomers that do not have at their disposal such data availability [56].

As the platform system fades the boundaries between different products and markets [57], digital markets are characterized by a growingly high degree of vertical integration; indeed, more and more these markets present a market structure in which the platform is also active in downstream and/or upstream markets from the one represented by its stronghold. Thus, the platform is increasingly found to compete (also) with its customers [58], what has been depicted as the realm of so-called frenemy relations [59], as business users rely (and need) the platform to reach their customers but at the same time shall fear the platform as a prospective competitor [60].

Cross-sector leverage of data-driven competitive advantages may lead to competitors' exploitation and foreclosure. For example, online platforms can collect and analyse sales data to early detect new successful products sold on the platform by third parties (manufacturers or retailers). Once that a successful product is detected, online platforms may benefit

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[55] A. FLETCHER, *Digital Competition Policy*, cit., p. 5.

[56] Stigler Report, cit., p. 37.

[57] Indeed, «[t]he platform system makes it easier, for large platform businesses, to entry different markets than their "native" sectors. The boundaries between product – or service markets become weak, and businesses which have market power can easily extend their power to other markets, even though they are new entrants into these markets» (cf. M. LIBERTINI, *Digital markets and competition policy*, cit., p. 339).

[58] For example, «Amazon has continually utilized its market power to enter new market verticals such as the Whole Foods market, through which even rivals rely on Amazon-owned infrastructure» (B. Atrakchi-Israel, Y. Nahmias, Metaverse, *Competition, and the Online Digital Ecosystem*, in *Minnesota Journal of Law, Science & Technology*, 2023, Vol. 24, Iss. 1, p. 235, p. 238).

[59] A. EZRACHI, M.E. STUCKE, *Virtual competition*, cit., p. 145.

[60] See for example F. ZHU, *Friends or foes? Examining platform owners' entry into complementors' spaces*, in *Journal of Economics & Management Strategy*, 2019, Vol. 28, Iss. 1, p. 23.

from the information gathered in many ways, such as by disintermediation, by launching similar products or by informing their investment decisions [61].

A reality check fully confirms that, in the last few years, GAFAM and other Big Tech Firms have achieved very high degrees of diversification in different ways. While this trend may increase the value of the platform also for its users (both end users and business ones) the extension of the platform activities downstream, upstream or "to the side" mainly ends up benefiting the platform itself, which can consolidate its market position by creating in adjacent markets some sort of "protective fences" (i.e., barriers to entry) that shield the platform's core business from competition [62].

Again, the image is that of the "ecosystem", in which the offering of services, either directly from the platform itself, or from third parties (app developers, vendors on market places etc.), ends up creating a few alternative quasi-integrated systems among which users can choose. As discussed below, the above has clear consequences on the development of competition, on the one side, because the existence of ecosystems increases switching costs for users, thus reinforcing lock-in effects; on the other side, because competitive pressure seems to develop more among these ecosystems than with respect to individual activities and services.

8. Digital competition: from tipping markets …

Even considered individually, each of the characteristics discussed in the previous paragraph may affect the competitive dynamic of a given market. But when considered in their joint existence and development, they determine the rapid and unlimited growth of undertakings: for the dominant players, economies of scale and scope, network effects and the lack of marginal and distributional costs end up to render a market subject to "tipping".

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[61] L. CALZOLARI, *International Antitrust Enforcement*, cit., p. 873.

[62] This goal can be reached also (and significantly) through mergers, as mergers can «help platforms preserve their monopoly position and forestall competition by engaging in 'moat-building', a strategy through which platforms create barriers that protect their realm from outside threats» (J.S. KANTER, *Digital Markets*, cit., p. 143).

A tipping market is a market that is prone to shift from a competitive state to a monopolistic or oligopolistic one [63]. Indeed, markets subject to tipping not only present clear trends toward high levels of concentration, but actually tend also to concentrate around a single, super-dominant undertaking which takes the whole market [64]. Saying that a market has tipped in favour of a given undertaking means that the latter has taken most or all the market share, leaving little or no room for competitors, i.e. has "won the market". In other words, in a tipping market… the winner takes all [65].

Thus, digital markets, be they social media, search engines, e-commerce, or online advertising, tend to tip in favour of the platform that can attract the most users or advertisers. But not only: the growth of the undertaking whose destiny is to win the market and the concentration of such market around the former very often proceed at a breakneck pace, unparalleled in the "non-digital" world [66]. Once this has happened, however, lock-in effects and switching costs then tend to protect the market position of the winner, even if a better product or standard were to emerge [67]. For instance, even if Mastodon is generally considered to be a

[63] In economics, «tipping is the snowball effect that kicks in once a product crosses a critical point of user adoption, catapulting the supplier away from competition and towards a monopoly equilibrium» (N. PETIT, N.M. BELLOSO, *A Simple Way to Measure Tipping in Digital Markets*, in *Promarket*, 6 April 2021, available at www.promarket.org).

[64] The markets where digital platforms «operate exhibit several economic features that, while not novel per se, appear together for the first time and push these markets towards monopolization by a single company» (cf. Stigler Report, cit., p. 3; see also F. LANCIERI, P.M. SAKOWSKI, *Competition in Digital Markets*, cit., p. 75).

[65] Stigler Report, cit., p. 35.

[66] Indeed, «while a traditional business often starts with local implementation followed by gradual expansion through investment as reputation and financial resources increase, many online businesses aim at rapid large-scale expansion. This rapid growth may reduce the length of the competition-for-the-market phase, as market winners can establish dominance and begin exercising their market power quickly» (cf. Stigler Report, cit., at p. 36).

[67] To sum up, the idea is that «even if a better, superior product or standard were to emerge, customers may stick with the inferior product because its network is larger and the market has already tipped in its favor. This effect is compounded in the presence of switching costs; but even with nominal switching costs, there could still be a path dependency if there is a coordination problem that inhibits migration. A particular user might prefer a competing product or standard for various reasons, including an objective-

superior product *vis-à-vis* Twitter/X, the number of users of the former still remains less than 2 million after some years of operation, while Thread, the new "competitor" launched by Meta by the end of 2023, has surpassed in a few days more than 100 million users [68].

Monopolization may not necessarily be the only ultimate outcome of digital markets, and we experience some different outcomes, such as the markets for online video streaming services [69]; yet, the acquisition of huge market power by the market leaders is a very common feature when it comes to digital markets [70].

With this said, tipping markets pose significant challenges for antitrust authorities, as their analysis requires approaches that are not the same normally used in other cases, in order to handle issues such as market power assessment, potential competition, and consumer welfare.

In markets with tipping effects, the competitive process works differently than in other markets and the focus is shifted «*from competition in the market to competition for the market*» [71]. While strong competition characterizes the first stage, as different companies struggle to become the leading provider of a given service (i.e., to win the market) [72], when the market has been won by one undertaking, it is generally witnessed a long period of weak competition and the winner can exercise its market power being somehow shielded from competitive pressure.

One example is the market for search engines services: while in the digi-

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ly superior set of features; however, without the ability to bring over a large proportion of other users in a collective switch, the theory is that the competing network will stall». (cf. J.M. YUN, *Overview of Network Effects*, cit., p. 5).

[68] See J. JÜRGENS, *Eine Mammutaufgabe*, in *ZeitOnline*, 12th November 2023, available at www.zeit.de.

[69] Cf. O. PAKULA, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, in *UCLA Entertainment Law Review*, Vol. 28, 2021, p. 147. There are of course other exceptions: for example, the market for travel sites consists of numerous players all vigorously competing with one another without collapsing into monopoly. In addition, Uber's first-mover advantage was unable to prevent the emergence of Lyft as a serious competitor (cf. C. YOO, *Network Effects in Action*, cit.).

[70] M. LIBERTINI, *Digital Markets and Competition Policy*, cit.

[71] Stigler Report, cit., p. 29 and p. 35.

[72] For example, «Uber and Lyft have hotly contested the market for ride-sharing–and spent billions of dollars subsidizing riders' fares along the way. One 2016 estimate suggested that payments from Uber customers covered only about 40% of the cost of their rides» (also for the references see Stigler Report, cit., p. 39).

tal "pre-history" the first ever search engines were operated through a manual indexing mechanism, the first truly automated search engine was launched by Altavista and Yahoo in 1995; only in 1998 Google was founded and Bing, Microsoft's search engine, came into operation in 2009. In the early 2000s competition among these search engines was intense and market shares were evenly divided [73], but eventually the market tipped in favour of Google, which, at least in Europe, has now been holding a market share of more than 90 percent for more than a decade [74]; at the same time, the first mover Altavista shut down in 2013, after having been purchased by Yahoo.

A more recent example, still in the "struggle for the market" stage, seems artificial intelligence and, in particular, so-called generative one: ChatGPT, Bard and Bing are just some of the current market players operative in this pioneering moment, and it remains to be seen whether in the future the market will reward only one of these. Remarkable is, however, the fact that many of the companies active in this new sector are directly or indirectly connected to one of the GAFAMs, this confirming the market landscape and features highlighted above.

9. … to digital ecosystems

Once again, by no means tipping markets constitute a new phenomenon. There are countless analogous cases in traditional markets. An example can be found in the market for video cassette recorders in the 1970s and 1980s. In those years, two main formats were developed by competing undertakings, Sony and JVC; Sony launched the Betamax technology in 1975 and JVC launched VHS in 1976. The former was better from a qualitative perspective, but the latter was cheaper and allowed longer recording. These features, coupled with the ability by JVC to ensure that the VHS standard was backed from other makers and content providers, more and more consumers chose VHS, until the market eventually tipped in its favour: by the end of the 1980s, JVC held a market share higher than 90% [75].

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[73] For further data see J. GANDAL, *The Dynamics of Competition in the Internet Search Engine Market*, Working Paper No CPC01-17, 2001.

[74] Commission Decision of 27 June 2017 in case AT.39740 – *Google Search (Shopping)*.

[75] J.D. CARRILLO, G. TAN, *Platform Competition with Complementary Products*, in

However, the concern characterizing many digital markets nowadays is that it seems no longer coming the time when the dominant firm will have to face competitors again and "defend itself" against competition for the market.

At first glance, the above might seem counterintuitive: for many observers, the digital economy is the realm of so-called "garage-to-riches" stories, and in the relatively short life of digital economy, newcomers have often quickly emerged and replaced the incumbents, becoming successful companies worth billions in revenues.

Furthermore, some example would seem to confirm this background: for instance, until the mid-1990s Nintendo and Sega dominated the games console industry, when Sony and Microsoft were able to rapidly disrupt the market with their PlayStation and Xbox consoles, and evolving from newcomers to incumbents and then to dominant undertakings in a few years [76]. In social networks, a well-known example is MySpace: My Space was the first social network to spread worldwide around the early 2000s, reaching a rather significant mass of users, some 115 million individuals logged in in April 2008. Despite the first mover advantage, and just when the market was believed to be tipping in its favour, the (then) newcomer Facebook proved to be stronger than network effects and able to turn the tide: while in 2019 Facebook had more than 2.3 billion individual users, the users of MySpace dropped to around 8 million [77].

And yet, the second glance shows more persuasive arguments for a different and more concerned analysis: in the MySpace story, the then dominant firm measured its (apparently high) share in market for social networking services counting a very small number of users compared to the potential users. Hence, the then measurable market share was in fact neither high, nor characterized by true network effects capable of protecting MySpace when the overall number of social network users literally exploded in the early 2000s. In addition, MySpace was probably a less immersive social network than Facebook and its other peers, offering

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International Journal of Industrial Organization, 2021, Article No 102741. J.P.H. DUBÉ, G.J. HITSCH, P.K. CHINTAGUNTA, *Tipping and Concentration in Markets with Indirect Network Effects*, in *Marketing Science*, 2010, Vol. 29, Iss. 2, p. 216.

[76] Cf. G. SHIER, T. BYRNE, *Economic Principles*, cit., p. 11.

[77] For this data see H. JENKINS, *Tipping: Should Regulators Intervene Before or After? A Policy Dilemma*, 2021, available at www.oxera.com.

fewer services and, in this sense, providing limited – if any – indirect network effects and switching costs to new social networks.

In this sense, at present, the market structure of digital markets appears different: due to the level of super-dominance [78] of the major platforms in their respective core business markets and to their level of vertical and horizontal integration, the advent of newcomers able of disrupt the market and replace them may be an increasingly rare event [79]. Suffice it to consider that, according to a simple empirical observation, in the last 15 years GAFAMs have increased – and not just maintained – their market power, often extending it to many sectors related to their core [80]; conversely, the rise of newcomers to the status of established market players capable of competing with the GAFAMs and contending their markets appears to be less probable [81].

Additionally, other obstacles happen to exist in respect of the typical drivers on which competition is based: in zero-price markets the user faces hurdles in measuring actual quality of the services, this marking a substantially harder life for newcomers to persuade prospective customers to

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[78] For example, "[w]ith 23 million daily active users and 32 million monthly active users Facebook has a market share of more than 95% (daily active users) and more than 80% (monthly active users)» (Bundeskartellamt decision of 6 February 2019 in case B6-22/16 – *Facebook*, para 17).

[79] Indeed, «the resulting market concentration will tend to dampen its competitive incentives over time unless the platform market remains contestable. Such contestability may again be limited by user expectations; once a platform has gained a strong market position, it can be hard to supplant, since this would require many users shifting at once» (cf. A. FLETCHER, *Digital competition policy*, cit., p. 3).

[80] According to the so-called Furman report, already in 2019, the level of concentration was significantly high in all digital markets and in particular in (*i*) the market for online search, where Google is super-dominant, and the only competitor is represented by Microsoft Bing; (*ii*) the market for social media services, where Meta is dominant, and the only competitors are represented by Twitter and Snapchat; (*iii*) the market for digital advertising, which is a duopoly dominated by Google and Facebook; (*iv*) the market for mobile app, which is too a duopoly dominated by Apple and Google; and (*v*) the market for online commerce through online marketplaces, where Amazon is dominant, with some competition from eBay (see Report of the Digital Competition Expert Panel, *Unlocking digital competition*, 2019, p. 24 ff., available at www.assets.publishing.service.gov.uk).

[81] And indeed, the lack of entry of competitors in these important markets–despite high profits–suggests either barriers to entry or exclusionary conduct, or both (cf. Stigler Report, cit., p. 34).

change their preferences. And when the market has tipped in favour of one firm, monopolistic viz. abusive behaviours can be more easily adopted with lessened risk to lose market shares [82], this bringing often to price increases or decreases in quality and innovations [83].

The "ecosystem" eventually built by dominant firms exerts a growing attraction on users and shields the firm from new entrants [84]. The platform becomes the centre of the ecosystem and, by offering new services and entering new markets, allows and fosters interactions between an ever-increasing number of different categories of different users.

Each of the ecosystems tends therefore to be formed around the original core digital service (e.g., search engine for Google, social network for Meta and so on), and from this nucleus, like spokes, other services are offered. Very likely, they end up to overlap with those offered – on a primary or secondary basis – within the other ecosystems, where competition from third party specialist firms can also be present [85].

However, the fact remains that an attack to the "core" becomes more and more implausible, with limited or no possibility to imagine a Star Wars scenario, in which the Rebel Alliance defeats the Empire's world-destroying battle station.

In this situation, competition more likely tends to develop among the ecosystems themselves, rather than with respect to the individual services. The offering of more services (directly from the platform itself, but also from third parties, such as app developers, vendors on market places etc.) ends up creating a few alternative quasi-integrated systems among which users can choose. This model appears to be an "on steroids" version of the "old" model of competition among video game consoles: the user chooses one console not so much because of the technical quality of the hardware but also (and perhaps most important-

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[82] «The winning firm can raise price or maintain a sluggish attitude to innovation, yet benefit from what Jean Tirole called "lucky demand conditions" in relation to utilities. The firm that gets ahead continues to get increasingly ahead, without needing to worry about demand echoing John Hicks's classic statement that "the best of all monopoly profits is a quiet life» (cf. N. PETIT, N.M. BELLOSO, *A Simple Way to Measure Tipping in Digital Markets*, cit.

[83] A EZRACHI, M. STUCKE, *How Big-Tech Barons Smash Innovation and How to Strike Back*, Harper Business, New York, 2022.

[84] M. LIBERTINI, *Digital Markets*, cit., p. 340.

[85] M. BOURREAU, *Some Economics of Digital Ecosystems*, cit., p. 1.

ly) in consideration of the set of products (games) that they can access if they enter that ecosystem.

On the one hand, this explains why the main platforms (almost) continually offer new ancillary services to their users (e.g. streaming services with Amazon prime), sometimes even at loss: the strategy is to tighten the bond between the user and the platform (or better, the ecosystem) and ensure that the user never "abandons", because that could lead to the risk of that user then entering a different ecosystem. In other words, the platforms attempt to reinforce their lock-in effects over users to protect their core business: the streaming services makes the Amazon prime subscription more valuable for consumers and reduce the risk that consumers will switch to a different online market place, because this decision would also result in the dropping of all ancillary services.

On the other hand, the above demonstrates that digital platforms often defy simple horizontal competition and vertical distribution relationships [86] and can compete against each other even without offering substitutable products or services for sale [87]: competition may emerge also from companies active in different markets, as long as their products or services have the possibility the reduce the users' dependence on the platform or undermine the network effects or the fences protecting the platform's dominant position. Precisely for this reason, platforms' defensive tactics to retain their position often target potential competitive threats coming from firms that are not direct competitors [88], including start-ups and innovative companies, which are often the target of (killer) acquisitions [89].

Undoubtedly, this scenario is new in the antitrust tradition, and poses serious challenges in the understanding of the ultimate market dynamics,

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[86] J.S. KANTER, *Digital Markets*, cit., p. 143.

[87] D.A. CRANE, *Ecosystem Competition*, in OECD, *Competition Economics of Digital Ecosystems*, cit., p. 2.

[88] J.S. KANTER, *Digital Markets*, cit., p. 143. And indeed, digital incumbents tend to isolate their own value propositions by simply neutralizing the unique offerings of others (cf. D.A. CRANE, *Ecosystem Competition*, cit., p. 2).

[89] J.M. YUN, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, in D. H. GINSBURG, J. D WRIGHT (eds.), *The Global Antitrust Institute Report on the Digital Economy*, cit., p. 652; R. DE CONINCK, C. VON MUELLERN, *Big Tech Acquisitions and Innovation Incentives*, in *Network Law Review*, 7 July 2023, available at www.network lawreview.org.

in the capabilities of the existing rules to cope with such dynamics, in the goals that eventually the enforcement of competition rules should pursue. And this is only one part of the story, because it leaves out the delicate overlapping between competition rules and other rules protecting other paramount values in our legal systems, starting from data protection of the individual to the citizens' right to preserve their democratic choices [90].

10. Conclusive doubts: faced with the limited effectiveness of "traditional" competition rules in digital markets, is a new mindset required? Will the *ex ante* approach provide adequate solutions?

The characteristics of digital markets as summarized in the previous paragraphs, coupled with the intense effects they have produced in the competitive scenario existing in the business, have induced virtually all antitrust authorities – including the Commission and several NCAs – to take serious action in our sector [91]. The clear policy message sent to the Big Tech and Big Data firms, as well as to all stakeholders and users, is that antitrust enforcement would not stop at the boundaries of the digital world; instead, competition authorities would do everything in their powers to defend and promote competition in digital markets [92].

However, despite the attention paid to the conduct of GAFAMs and the number of cases brought against them in many jurisdictions, many point out that competition law and its enforcement have not been able to fully meet the challenges posed by digital markets, nor to protect competition in these markets [93].

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[90] See P. MANZINI, *Antitrust e privacy: la strana coppia*, in P. MANZINI (ed.), *I confini dell'antitrust. Diseguaglianze sociali, diritti individuali, concorrenza*, Giappichelli, Torino, 2023, p. 123.

[91] Indeed, it has been recently observed that «competition authorities continue to dedicate an enormous amount of activity to digital markets» (see G7 Competition Authorities, *Compendium*, cit., p. 5).

[92] For an overview of the most important cases handled in this filed by the Commission and the competition authorities of the G7 countries see again G7 Competition Authorities, *Compendium*, cit., p. 51 ff.

[93] For example, A.C. WITT, *Platform Regulation in Europe – Per se rules to the rescue?*, in *Journal of Competition Law & Economics*, 2022, Vol. 18, Iss. 3, p. 670, p. 671.

This is true for cases brought pursuant e.g. to Article 102 TFEU or similar provisions, which are deemed to have not been able to significantly affect the behaviours of the most important digital platforms and to limit the growth of their market power and to ensure that markets remain contestable.

Even more true is the outcome of the merger control enforcement, whose impact seems to have been even more humble [94]: these competition law provisions represent the pillar of competition policy that, in theory, could have assumed a key role in limiting exponential increase in e.g. GAFAM market power. Unfortunately, these rules have proven to be useless to counteract the digital markets' predisposition to tip, or to limit the aggressive acquisition strategy carried out by the Big Data companies whenever a firm, even potentially, and even if active in markets not in direct competition, appears to have the potential to interfere with their market dominance. In fact, more than 500 acquisitions made by Google, Amazon, Facebook, and Apple over the past 15 years; and yet, only eight have been investigated by an antitrust authority and no prohibition decision has ever been issued [95].

Did something go wrong? Indeed, a persuasive answer recognizes that the traditional antitrust theories and tools encounter significant problems to manage competition issues in digital markets [96]. For instance, especially in those jurisdictions where competition law is based on the so-called consumer welfare standard, the "free" nature of many online services makes it difficult to build a theory of harm in many allegedly anticompetitive or anyway problematic behaviours carried out by dominant firms in digital markets; consequently, in many cases data-driven efficiency defences are likely to succeed [97].

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[94] F. JENNY, *Competition Law Enforcement and Regulation for Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward*, in *Concurrences*, September 2021, available at www.concurrences.com.

[95] A.C. WITT, *Platform Regulation in Europe*, cit., p. 677.

[96] Indeed, «[t]he scale and importance of data, the difficulty in understanding the operation of algorithms, and other complexities mean authorities may need new tools, capabilities, and approaches to investigate and understand anti-competitive behaviour in digital markets» (cf. G7 Competition Authorities, *Compendium*, cit., p. 10).

[97] And indeed, the "Competition policy for the digital era" report commissioned in 2019 by Margrethe Vestager suggested that the time frame and standard of proof of the consumer welfare approach should be rethought to avoid under-enforcement. See also F. JENNY, *Competition Law Enforcement*, cit.

By the same token, it has proved to be rather complex to apply in the digital world the legal concepts that have traditionally guided antitrust enforcement: from defining the relevant market to analysing market power.

Thus, in those few cases of acquisitions by GAFAMs that have been analysed by an antitrust authority, the authorities have failed to meet the burden of proof necessary to block a merger, for example because the acquisition of a small start-up active in a market different from that of the purchasing platform does not give rise to "traditional" anticompetitive effects [98]. Besides, the duration of complex antitrust investigations like those concerning digital markets often proves to be excessive compared to the evolving pace of technology and digital services, this substantially limiting the relevance and efficacy of competition law enforcement [99].

In this sense, some provocative ideas to attempt a mindset change in our analysis are worth pointing out: consider, for instance, the strain Big Data companies make to profile each and every customer of theirs; their goal is to extract as many information as possible from an individual to tailor whatever needs she has and fulfil them with goods or services. Can we imagine this as a sort of attempt to segregate markets? And if so, can we reasonably assume that a market definition for antitrust purposes could be the individual, whose preferences are "trapped" in a digital ecosystem narrowing more and more her curiosity and eventually intelligence? And what might competition law say about these issues? Is antitrust the legal tool fit for this purpose? Clearly, markets are severely affected by algorithms, data extraction and artificial intelligence. But how efficiently can we use rules on cartels and monopolies to tackle these market distortions?

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[98] In many cases, the purchase of a start-up will simply be below threshold, and thus will not even be brought to the attention of the authorities, which explains why the number of investigations related to GAFAM mergers is as limited as indicated above. This also explain why, according to Article 14 of the DMA «gatekeeper shall inform the Commission of any [i.e., even those which fall below the quantitative thresholds set by Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings] intended concentration within the meaning of Article 3 of Regulation (EC) 139/2004, where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules».

[99] A.C. WITT, *Platform Regulation in Europe*, cit., p. 677.

From another perspective, consider that what really matters for the big players in digital markets is to secure the users' time in their favour *vis-à-vis* competing platforms: if you spend some hours a day captured by Instagram, TikTok or *what's-its-name*, and this is the time you dedicate to "leisure" activities, probably the mere circumstance that time is a finite dimension is the highest entry barrier for a competing platform to "conquer" this user (i.e. this "market" in the sense provocatively set out above). If this is true, as it appears, can we somehow address time as "the relevant market" for the purposes of establishing market power of platforms? Can we borrow some reasoning that has been made for radio frequencies to secure plurality of information in the tele-communication industry? Alas, this is certainly not the place for deepening further, but in a disintegrated society in which every user connected to a platform eventually counts to achieve market power, it might seem not inopportune a more sophisticated reasoning on competition and available time.

Conclusively, and again this is not unprecedented in our society, competition law seems lacking the possibility to provide all the answers, and possibly it can provide just a few. Therefore, it comes as no surprise that in recent years many jurisdictions have considered to establish different mechanisms alongside antitrust to meet the challenges posed by the digital revolution. The focus has thus shifted from *ex post* enforcement with respect to anticompetitive conducts of GAFAMs, to the possibility of adopting regulatory schemes – of which the DMA is probably the most important so far – capable of complementing competition rules and set *ex ante* duties and prohibitions that shall be complied with by these dominant operators to maintain – among other things – the fairness and contestability of digital markets.

But this is totally another story, and here my thoughts come therefore to an end.

Decoding Antitrust: Market Definition and Market Power within the Data Value Chain

Valeria Caforio [*] *and Laura Zoboli* [**-***]

1. Introduction

In the dynamic landscape of the data economy, the traditional paradigms of market definition within the realm of competition law face unprecedented challenges. The proliferation of digital platforms and the exponential growth of data-driven business models may necessitate a re-evaluation of established methodologies [1]. The intricacies of data collection, processing, and utilization introduce unique considerations that demand a nuanced approach to delineating markets. As data emerges as a crucial currency in the digital ecosystem, the delineation of relevant markets often transcends traditional product-centric perspectives to incorporate the multifaceted nature of data-driven ecosystems. The interconnect-

[*] Ph.D. in Legal Studies at Bocconi University, Italy.

[**] Assistant Professor (*Ricercatrice TD-B*) of Commercial Law at the University of Brescia, Italy.

[***] Although the chapter is the result of a collaborative effort, paragraphs 1, 2, 3 and 4 are attributed to Valeria Caforio, paragraphs 5, 6 and 7 to Laura Zoboli.

[1] G. SURBLYTE, *Data as a Digital Resource*, Max Planck Institute for Innovation & Competition Research Paper, 12/2016, available at www.ssrn.com.

edness of platforms, the network effects generated by vast datasets, and the potential for dominant positions in the digital sphere underscore the importance of refining market definition criteria.

This chapter delves into the dynamic evolution of defining the relevant market and, consequently, examining cases of market power within the data economy. In doing so, it intricately explores the broader interplay among competition law, technological advancements, and the inherent dynamics of data markets. Within this overarching framework, a fundamental principle asserts that the true worth of data lies in the insights it can offer, thereby stimulating the generation of novel knowledge [2]. Furthermore, the value of data is intricately connected to the concept of big data, characterized as «the information asset with such high volume, velocity, and variety that specific technology and analytical methods are required for its transformation into value» [3].

Beyond the narrative that positions data as a valuable resource for companies, a new perspective has emerged – data as a source of market power for undertakings holding substantial datasets and possessing the necessary technology for storage, mining, and analysis. Antitrust law, concerned with delineating market power, relies on measurements such as market shares, entry barriers, and buyer power, following the definition of a relevant product and geographic market. However, the unique features of digital markets, such as the increasing importance of data in business models and the application of a zero-price scheme in two-sided markets, pose challenges to traditional methods of measuring market power. Consequently, data may not only confer market power on collectors but also challenge established tools used in antitrust analysis.

This chapter aims to investigate whether a definitive link exists between data control and undertakings' market power. After providing a framework from market definition to market power in competition law (paragraph two), the chapter makes a quick overview of how the definition of a market is construed in the context of data (paragraph three). It

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[2] OECD, *Big Data: Bringing Competition Policy to the Digital Era*, 2016, available at www.oecd.org. Several authors recognize the fact that data "by itself" has little or no value. See A. LAMBRECHT, C.E. TUCKER, *Can Big Data Protect a Firm from Competition?*, 2015, available at www.papers.ssrn.com; and D.L. RUBINFELD, M.S. GAL, *Access Barriers to Big Data*, in *Arizona Law Review*, 2017, Vol. 59, Iss. 2, p. 339, p. 342.

[3] A. DE MAURO, M. GRECO, M. GRIMALDI, *A Formal Definition of Big Data Based on its Essential Features*, in *Library Review*, 2016, Vol. 65, Iss. 3, p. 122.

then delves into an examination of markets where companies with data dominance may operate, distinguishing between the upstream market for data generation and collection (paragraph four) and the downstream markets where data serves as inputs (paragraph five) and is used or traded as an six (paragraph five). Ultimately, the chapter concludes in paragraph seven, by rejecting the assertion that market power inherently stems from data, suggesting instead that while possession of big data may hold relevance in certain scenarios, its actual impact necessitates a case-specific evaluation.

2. From market definition to market power in competition law

Competition law centres on market power, a crucial element that can disrupt the well-functioning of a market driven by competition. In reality, perfect competition remains more of a theoretical concept than a practical market scenario, leading to the pervasive presence of market power among economic actors [4]. Recognizing this, the primary challenge in dealing with market power is to determine the extent of power that warrants the attention of antitrust authorities [5]. In conjunction, the second challenge is assessing whether an undertaking possesses relevant market power under antitrust law and developing accurate measurement methods.

To address the initial concern, antitrust law focuses exclusively on significant or substantial market power ("SMP") due to the varying degrees of market power. As mentioned, while market power is inherent in imperfectly competitive markets, it is only undertakings with a specific degree of market power that can impact competition and potentially harm consumer welfare.

In the realm of industrial economics, market power denotes an undertaking's capacity to set prices above marginal costs or limit output below

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[4] R. SCHMALENSEE, *Another Look at Market Power*, in *Harvard Law Review*, 1982, Vol. 95, Iss. 8, p. 1789, p. 1790.

[5] On this issue see O. BROOK, M. EBEN, *Abuse Without Dominance and Monopolization Without Monopoly*, in P. AKMAN, O. BROOK, K. STYLIANOU (eds.), *Research Handbook on Abuse of Dominance and Monopolization*, Edward Elgar Publishing, Cheltenham, 2022, p. 259.

the competitive level [6]. This concept is applicable to any undertaking operating in markets without perfect competition, where the economic rationale prompts undertakings facing a downward-sloping demand curve to charge prices above the competitive level [7]. However, the economic definition, while encompassing various degrees of market power, fails to distinguish the SMP relevant for antitrust law [8]. Adapting this formulation, SMP is defined as the ability to sustain prices significantly above the competitive level for a prolonged period, thereby earning supranormal economic profits [9]. Furthermore, acknowledging that undertakings in real markets compete not only on price and quantity but also on factors like quality, variety, and innovation, the definition of market power expands to include behaviours influencing these competitive parameters [10].

In EU competition law, the concepts of "dominance" or "dominant position" applied *inter alia* by the European Commission (the "Commission") and the Member States' National Competition Authorities ("NCAs") are equivalent to market power, exclusively encompassing SMP [11]. In contrast to economic perspectives, these legal notions serve as a screening mechanism to identify conduct that could potentially disrupt market equilibrium [12]. The attainment of a dominant position becomes a prerequisite for the appli-

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[6] D.W. CARLTON, J.M. PERLOFF, *Modern Industrial Organization*, 4th ed., Pearson Addison Wesley, Boston, 2005, p. 642.

[7] G. HAY, *Market Power in Antitrust*, in *Antitrust Law Journal*, 1992, Vol. 60, Iss. 3, p. 807, p. 813.

[8] A. JONES, B. SUFRIN, *EU Competition Law. Text, Cases and Materials*, 5th ed., Oxford University Press, Oxford, 2014, p. 59.

[9] G. HAY, *Market Power in Antitrust*, cit., p. 814.

[10] S. BISHOP, M. WALKER, *The Economics of EC Competition Law*, 3rd ed., Sweet and Maxwell, Mytholmroyd, 2010, pp. 3-041. This is particularly evident in markets where good and services are offered at a price of zero, where, for example, quality may become the main dimension of competition. See also Commission Guidelines of 24 February 2009 on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the "Guidance Paper").

[11] More specifically, one could refer to Recitals 25 to 28 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive") where the concepts of SMP and of dominance were elided, that confirms the correspondence between them, and the category of dominance as defined in the case law of the Court of Justice and the General Court.

[12] G. HAY, *Market Power in Antitrust*, cit., p. 814.

cation of Article 102 TFEU, addressing abuses of such dominance [13]. Primary EU competition law, however, lacks a direct definition of dominance. According to the recent Guidelines on the application of Article 101 TFEU to horizontal cooperation agreements, «[m]arket power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time» [14]. This definition transcends mere control over prices, encompassing the overall ability of an undertaking to act without constraint from competition, influencing various competitive variables such as price, product, innovation, variety, and quality without effective reactions from rivals [15].

Having established that only SMP (or dominance) is pertinent in antitrust law, the next question concerns the practical determination of this power. This necessitates the development of a method for assessing market power. Antitrust authorities commonly employ an indirect approach, relying heavily on an undertaking's market share – defined as the proportion of total output, sales, or capacity it holds – as a key metric [16]. While there exists a positive correlation between market share and market power, the former only serves as a proxy for evaluating the latter [17]. Market share assessment must be coupled with considerations of barriers to entry and buyer power, representing other competitive constraints an undertaking encounters in a specific geographic area, notably the competitive pressure from potential rivals and the bargaining power of their business counterparts [18].

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[13] See para 4 of the Guidance Paper, cit.

[14] See ft. 40 of the Commission Guidelines of 21 July 2023 on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements.

[15] That is, by reducing quantity, diminishing quality, limiting variety, or offering outdated products in a significant and long-lasting way. In this sense, see Annex to the Commission communication of 31 March 2023 Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, where price, production, innovation, variety or quality of goods or services are listed as parameters of competition.

[16] EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION, *Glossary of terms used in EU competition policy – Antitrust and control of concentrations*, Publications Office of the European Union, Luxembourg, 2003, p. 31.

[17] Para 13 of the Guidance Paper, cit.

[18] See paras 16-18 of the Guidance Paper, cit.

To conduct this overall assessment, competition authorities resort to the definition of a relevant market, a tool employed to delineate the boundaries of competition between undertakings [19]. Initially, they identify the relevant product market, encompassing all products or services deemed substitutable to those of the undertaking under scrutiny based on characteristics, prices, and intended use from both the demand and supply sides [20]. Subsequently, the relevant geographic market is identified, representing the area in which the concerned undertakings supply or purchase products or services under sufficiently homogeneous competitive conditions [21]. Within these identified boundaries, authorities calculate market shares for the undertakings under investigation and their actual competitors, evaluate countervailing buyer power, and identify barriers to entry.

While the assessment of market power stands as a fundamental yet preliminary step in antitrust analysis [22], it is crucial to clarify that even if an undertaking demonstrates dominance resulting from market power derived from data possession – a hypothesis requiring substantiation – the application of antitrust law necessitates a case-by-case establishment that the undertaking has engaged in conduct detrimental to consumer welfare.

Against this background, as already mentioned, the chapter aims to challenge and overcome the assumption that undertakings possessing big data inherently wield market power, establishing a potential correlation or even a cause-effect link between data possession and SMP. To interrogate this proposition, one must embrace the traditional approach employed in the antitrust evaluation of market power. The initial step involves defining a relevant market, followed by verifying the existence of a dominant position within that market. In the context of data, this requires a meticulous analysis of each stage within the data-value chain, treating them as distinct upstream and downstream markets, as the next paragraph will explain.

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[19] Para 6 of the Commission Notice of 8 February 2024 on the definition of the relevant market for the purposes of Union competition law (the "Commission Notice on market definition").

[20] Paras 12(a) and 25-37 of the Commission Notice on market definition, cit.

[21] Paras 12(b) and 38-44 of the Commission Notice on market definition, cit.

[22] Para 9 of the Guidance Paper, cit.

3. Market definition in the context of data

In general terms, when discussing the definition of the relevant market and data, several aspects can be addressed, two of which are specifically relevant for the purposes of this chapter.

Firstly, one may question whether it is appropriate to speak of a relevant data market and, moreover, whether such a market can be properly defined according to traditional antitrust standards. Secondly, one may wonder whether data have any impact on the definition of other markets, particularly two-sided markets, where one side of the market involves zero pricing. In fact, on that side of the market, a company's services – typically, a platform facilitating transactions between two parties – are offered in exchange for users' personal data rather than money.

Addressing the first issue is pivotal in answering the central inquiry of this chapter: does data ownership confer market power? Indeed, as mentioned, asserting that data endow a company with market power necessitates the identification of a relevant data market, wherein data are exchanged as commodities [23]. However, as elaborated subsequently, this proposition presents several complexities.

Primarily, genuine data exchanges occur solely within data markets in the strictest sense, where companies specialize in selling data packages – referred to as data brokers – to other entities. In such scenarios, there exists a discernible demand and supply, with data serving as the commodity exchanged and traded at a certain price [24]. Yet, such data exchanges represent only a small fraction of the myriad ways companies utilize data, which may still confer market power.

Moreover, even if a data market exists in theory, defining it practically using antitrust methodology poses challenges. As expounded earlier, delineating the boundaries of a product market necessitates evaluating substitutability from both demand and supply perspectives. This task is particularly daunting concerning data, which, as elucidated later, exhibit high substitutability. Consequently, a relevant data market may have uncertain boundaries or be so large that acquiring significant market power proves challenging for a company.

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[23] I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, in *World Competition*, 2015, Vol. 38, Iss. 4, p. 473, p. 489.

[24] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, in *Antitrust Source, American Bar Association*, 2014, p. 4, available at www.papers.ssrn.com.

To ensure the analysis encompasses not only narrowly defined data markets but also other markets in which data play a pivotal role – such as serving as inputs to produce or enhance goods and services – the chapter elects to scrutinize the different stages of the data production chain. These stages are: *i*) data generation and collection; *ii*) data utilization as production input; and *iii*) data utilization as output, i.e., as a commodity. In this context, *i*) constitutes an upstream market, while *ii*) and *iii*) constitute downstream markets.

Regarding the second issue, one may assert that the significance of data in certain markets complicates the definition of a relevant market. This complication is particularly pronounced in markets where companies provide services at a zero price, instead collecting users' data in exchange. How does one define the relevant market in such cases? It becomes evident that it is not data per se that render defining the relevant market challenging, but rather the absence of a positive price that hinders the application of the "Small but Significant Non-transitory Increase in Price" ("SSNIP") test – the tool generally employed to assess substitutability among products and services within the same relevant market [25]. Consequently, scholars have developed an alternative test, the "Small but Significant Non-transitory Decrease in Quality" ("SSNDQ") one, to simulate consumer reactions to a hypothetical monopolist implementing a minor yet significant decrease in product quality. Theoretically, if consumers opt for alternative goods, these should be considered substitutes akin to the SSNIP test. However, it is essential to acknowledge that such a test, along with the broader decision to consider other variables influencing competition, presents quantification challenges, given that quality is a subjective variable that defies straightforward comparison [26].

[25] See para 29 of the Commission Notice on market definition. See also See D. MANDRESCU, *The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms*, in *European Competition & Regulatory Law Review*, 2018, Vol. 2, Iss. 4, p. 244.

[26] M. MAGGIOLINO, *I big data e il diritto antitrust*, Egea, Milano, 2018, p. 251. See also para 20 of the Commission Notice on market definition, and especially fn 40.

4. Market power in the generation and collection of data

The initiation of the data-value chain involves the generation and/or collection of data by companies, with multiple avenues available for acquiring data. Undertakings can gather their own generated data, such as sales transactions or website interactions, collect data from external sources like user-generated data or third-party data, or opt to purchase data from entities specializing in data trading, such as data brokers or other data marketplaces [27]. Irrespective of the approach, acquiring substantial amounts of data is generally straightforward for companies.

On one side of the spectrum, obtaining data is often deemed affordable, even for start-ups [28]. Various tools and technical methods for online information collection, including web scraping tools, tracking algorithms, or fingerprinting devices, require minimal financial investments. Activities centred around collecting offline data, such as loyalty programs, surveys, or purchase analyses, can be undertaken without incurring substantial costs [29]. Alternatively, companies can choose to procure specific datasets or data packages from third parties, including data brokers or entities looking to monetize their data assets, even if data commercialization is not their primary business focus. Recent studies highlight that these solutions are generally economically accessible, enabling companies lacking the time or resources to gather big data independently to select pertinent information from specific third-party sources [30].

On the flip side, sources of data, both in the physical and digital realms, are numerous and often interchangeable, resulting in multiple op-

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[27] See AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Competition Law and Data*, 2016, p. 12, available at www.bundeskartellamt.de, which distinguish between "first-party data", when data derives from the interactions between an undertaking and its own actual or prospective customers, and "third-party" data, that is «data that are collected by another entity, if such data is available to [the undertaking under scrutiny]». In this case, available means "for free". Indeed, also data that can be purchased from another undertaking can be defined as "third-party data", but they are not freely available to other companies.

[28] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit., p. 7.

[29] FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*, 2016, pp. 3-4, 3, available at https://www.ftc.gov/reports/big-data-tool-inclusion-or-exclusion-understanding-issues-ftc-report.

[30] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit., p. 3.

erators recording the same event through different instruments [31]. Individuals leave traces of their actions offline and online, contributing to a wealth of data that can be harnessed for valuable information [32].

The amalgamation of the relatively low cost of data collection or acquisition and the multitude of data sources commonly positions a company with substantial datasets for analysis. Against this backdrop, as previously mentioned, the determination of whether possession of big data confers market power necessitates evaluating whether the scrutinized company is or could be dominant in a relevant market for big data generation or collection. This empirical task, conducted on a case-by-case basis, encounters challenges in defining such a market for antitrust purposes. Antitrust law typically requires a relevant market to have a product offered to consumers, indicating both supply and demand [33]. However, undertakings collecting big data often use the extracted information internally to enhance their products and services, making it challenging to identify a data market when the data is not explicitly marketed to consumers [34]. Instead, attention can be directed to markets where the products and services enhanced by big data are sold to end consumers, where an undertaking may achieve dominance based on product and service quality rather than big data possession.

Moreover, establishing an undertaking's dominance in a relevant data market proves to be intricate. Due to the ubiquity and non-rivalrous na-

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[31] D.L. RUBINFELD, M.S. GAL, *Access Barriers to Big Data*, cit., p. 350.

[32] D.D. SOKOL, R.E. COMERFORD, *Does Antitrust Have a Role in Regulating Big Data* in R.D. BLAIR, D.D. SOKOL (eds.), *Cambridge Handbook of Antitrust, Intellectual Property and High Tech*, Cambridge University Press, Cambridge, 2017, p. 293, p. 298; and A. LAMBRECHT, C.E. TUCKER, *Can Big Data Protect a Firm from Competition?*, cit., p. 7.

[33] See para 12 of the Commission Notice on market definition, which reads: «(a)The relevant product market comprises all those products that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their prices and their intended use, taking into consideration the conditions of competition and the structure of *supply and demand on the market*. (b)The relevant geographic market comprises the geographic area in which the undertakings involved *supply or demand relevant products*, in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to be assessed, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas» (emphasis added).

[34] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit., pp. 4-5.

ture of data, it is often abundant and accessible to multiple parties simultaneously without diminishing availability [35]. Data's easily substitutable nature complicates the application of the SSNIP test [36], potentially leading to the definition of a relevant market within broad boundaries and dilution of the company's market power. Consequently, concluding the existence of a dominant position becomes challenging [37].

5. Market power and control of data as a fundamental input of production

Turning attention to the supply side, companies, post-data collection and analysis, can employ the acquired information internally to innovate, enhance products, and tailor offerings for more effective consumer targeting. Data analysis uncovers correlations, predicts market demand, gauges consumer willingness to pay, anticipates trends, and mitigates market uncertainties, positioning data as a pivotal input for production [38]. If a company dominates the upstream market for data generation and collection, holding exclusive control over a crucial dataset, it may employ a

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[35] *Ivi*, p. 7.

[36] See D. MANDRESCU, *The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms*, cit., p. 244.

[37] The residual scenario that could somehow represent an exception to such an assumption is the one in which a particular category of data identifies by itself a relevant market, not admitting true substitutes capable of responding to a specific market demand. As an example, in the 1990s, the Italian NCA (the Autorità Garante della Concorrenza e del Mercato, "AGCM") found that Cerved, an Italian company specializing in collecting commercial information from chambers of commerce, held a dominant position in the market for commercial information services. This was due to the uniqueness of the information it provided, which could not be obtained from alternative sources. As a result, Cerved's competitors were reliant on acquiring this information from Cerved in order to operate. See AGCM Decision of 24 October 1991 in case A4 – *Ancic/Cerved*. See M. MAGGIOLINO, *I big data e il diritto antitrust*, cit., p. 177.

[38] D.L. RUBINFELD, M.S. GAL, *Access Barriers to Big Data*, cit., p. 353. On price personalization realized thanks to big data see M. BOURREAU, A. DE STREEL, *The Regulation of Personalized Pricing in the Digital Era*, in OECD, *Personalised Pricing in the Digital Era*, 2018, available at www.oecd.org; M. MAGGIOLINO, *Personalized Prices in European Competition Law*, Bocconi Legal Studies Research Paper, 2984840/2017, available at www.papers.ssrn.com.

foreclosure strategy to marginalize rivals or deter new entrants into downstream markets. In these instances, data essentially serves as a fundamental input for production [39].

Consequently, if a company dominates the upstream market for generating and collecting data, holding exclusive control or availability, either de jure or de facto, of a specific substantial dataset crucial for developing an intermediate or final product, the undertaking may potentially execute a foreclosure strategy. This strategy aims to exclude or marginalize current rivals or deter new entrants into the downstream market dealing with products and services based on big data [40].

However, the actual validation of this hypothesis raises uncertainties, necessitating further investigation. Initially, data, due to its described characteristics, is seldom exclusive to a specific company or controlled by a single entity [41]. While certain situations may arise claiming exclusive de facto control [42], exclusivity alone doesn't establish a company's market power [43]. Demonstrating the indispensability of a specific dataset, with no substitutes, is essential for proving dominance, a challenging task given the difficulty in proving a company's dominance in the data collection and generation market [44].

The debate over whether data can be deemed a key input for competi-

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[39] I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, cit., p. 477; and H.A. SHELANSKI, *Information, Innovation, and Competition Policy for the Internet*, in *University of Pennsylvania Law Review*, 2013, Vol. 161, Iss. 6, p. 1663, p. 1680.

[40] D.L. RUBINFELD, M.S. GAL, *Access Barriers to Big Data*, cit., p. 362; and M. MAGGIOLINO, *I big data e il diritto antitrust*, cit., p. 165. See also OECD, *The Evolving Concept of Market Power in the Digital Economy,* OECD Competition Policy Roundtable Background Note, 2022, available at www.one.oecd.org. This could be achieved through different conduct: for example, excusive dealing, refusals to deal or tying.

[41] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit., p. 7.

[42] M. MAGGIOLINO, *I big data e il diritto antitrust*, cit., p. 174. See also I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, cit., p. 501, who refers to the Twitter case, where the claimant argued that «Twitter data is not substitutable to user information from other social networks including Facebook».

[43] In the same way as ownership of an intellectual property right does not imply being in a dominant position. See Court of Justice, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECLI:EU:C:1995:98.

[44] M. MAGGIOLINO, *I big data e il diritto antitrust*, cit., 175.

tion in a downstream market is ongoing, with arguments supporting and opposing this proposition [45]. Essentiality, in practical terms, implies that without access to a resource, new competitors may be hindered from entering the downstream market, or existing competitors may be marginalized or excluded [46]. EU case law introduces concepts like "indispensability," "essential facilities," or "objective necessity" [47] when resource access is vital to competition [48].

Data-driven markets seem not to fulfil the necessary conditions for applying the essential facility doctrine [49]. Determining the indispensability of a resource, particularly a specific set of data, remains a question, as the criteria require demonstrating the absence of valid substitutes [50]. Even data not publicly accessible, like user- or Internet-of-Things ("IoT") generated data, may not be deemed indispensable due to the numerous poten-

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[45] Several authors are against the application of the essential facility doctrine to data. See, among others, D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit.; A.V. LERNER, *The Role of 'Big Data' in Online Platform Competition*, 2014, available at www.ssrn.com; D.D. SOKOL, R. COMERFORD, *Antitrust and Regulating Big Data*, in *George Mason Law Review*, 2016, Vol. 23, Iss. 5, p. 1129, p. 1142; and G. COLANGELO, M. MAGGIOLINO, *Big Data as a Misleading Facility*, in *European Competition Journal*, 2017, Vol. 13, Iss. 2-3, p. 249.

[46] Notably, input foreclosure does not require that competitors be pushed out of the market or completely barred from entry through the creation of barriers. Rather, it is enough for them to be marginalized into a niche of the market, i.e., to face increased production costs, which diminishes their capacity and motivation to compete downstream. See Commission Decision of 14 November 2006 in case M.4180 – *Gaz de France/Suez* paras 876-931; and Commission Decision of 3 April 2007 in case M.4576 - *AVR/Van Gansewinkel* paras 33-38. In practical terms, this scenario occurs, for instance, when the value of a resource has a substantial influence on the downstream product being offered, or when that input serves as a critical element indispensable for creating, marketing or correctly identifying the downstream product for sale.

[47] Paras 83-84 of the Guidance Paper, cit.

[48] *Ibidem*.

[49] Court of Justice, case C-7/97, *Oscar Bronner v Mediaprint and Others* [1998] ECLI:EU:C:1998:569. See also Court of Justice, joined cases 6/73 and 7/73, *ICI and Commercial Solvents v Commission* [1974] ECLI:EU:C:1974:18; joined cases C-241/91 P and C-242/91, *RTE and ITP* v *Commission* [1995] ECLI:EU:C:1995:98; case C-418/01 *IMS Health*, [2004] ECLI:EU:C:2004:257; General Court, case T-201/04, *Microsoft v Commission* [2007] ECLI:EU:T:2007:28; Court of Justice, case C-170/13, *Huawei Technologies* [2015] ECLI:EU:C:2015:477.

[50] S.J. EVRARD, *Essential Facilities in the European Union: Bronner and Beyond*, in *Columbia Journal of European Law*, 2004, Vol. 10, Iss. 3, p. 491.

tial data sources [51]. Detecting exclusionary conduct in the data market proves challenging, as the facility owner would need to be active in the downstream market, seeking to reserve it by refusing access, which is not a common scenario in data-sharing refusals [52].

Addressing the non-introduction of a new product onto the market, determining which product or service can be developed through the re-use of a specific dataset before accessing it poses challenges. Fulfilling the "new product" requirement becomes complex, as competitors must specify the needed data and its specific purpose, which is often impossible without access to the data. Consequently, establishing ex ante the essential pieces of information in a dataset for generating a new product remains challenging [53].

Even if the conditions for applying the essential facility doctrine are met, managing a compulsory licensing system in the data market proves difficult due to challenges in identifying the specific dataset to be shared and defining conditions and time frames for sharing [54]. Consequently, proving the essentiality of a facility in the data market for competition is extremely intricate, especially when defining the parameters of the essential facility itself. This perspective aligns with the conclusions of the 2019 European Commission report on Competition Policy for the Digital Era, suggesting that the classical essential facility doctrine might not be suitable for data access cases, given the distinctive nature of data compared to classical infrastructures and intellectual property rights [55].

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[51] The reference is, in particular, to open or commercialized data. See J. DREXL, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access*, in *Journal of Intellectual Property, Information Technology and E-Commerce* Law, 2017, Vol. 8, Iss. 4, p. 257, p. 281, who affirms that «[p]ublicly accessible information is by nature non-rivalrous and can therefore be registered by anybody in a digital format».

[52] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit., p. 3.

[53] It could be added that considering data as an essential resource would lead to a misunderstanding. Indeed, data is not necessary to *develop* or *provide* products and services. It is more accurate to argue that access to big data, or to a specific category of data, enables a company to *improve* its goods and services, offering customers better and innovative options. Furthermore, if one were to identify an essential resource, it would not be the data itself, but the information extracted and revealed through data analysis. See J. DREXL, *Designing Competitive Markets for Industrial Data – Between Propertisation and Access*, cit., p. 281.

[54] G. COLANGELO, M. MAGGIOLINO, *Big Data as a Misleading Facility*, cit., p. 274.

[55] Commission, Expert report by J. CRÉMER, Y.A. DE MONTJOYE, H. SCHWEITZER, *Com-*

6. Market power in the markets for the commercialization of data

Upon the completion of data generation and collection, companies are faced with the decision of either internally leveraging the acquired information to enhance their offerings (as already discussed in paragraph four) or opting to sell it to other entities in its raw or aggregated form (as will be discussed in this paragraph) [56]. Importantly, the selection of one option does not necessarily negate the possibility of the other. A company actively involved in collecting substantial data can concurrently offer products and services while capitalizing on its datasets by selling them to third parties [57]. An emerging trend, however, reveals a shift towards exclusive focus by certain entities on commercializing information. The evolving landscape witnesses the rise of platforms that connect the demand and supply of commercial data, fostering the growth of data industries. In this evolving dynamic, a distinct data market emerges, conceptualizing data as a commodity, with data brokers acting as suppliers and companies seeking commercial information representing the demand side [58]. In both scenarios, a distinct data market can be aptly identified, treating data as a commodity, where data brokers act as suppliers, and companies seeking commercial information represent the demand side of the market [59].

In principle, establishing a nexus between data and market power is ostensibly more straightforward based on these assumptions. The evalua-

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petition Policy for the Digital Era, Publications Office of the European Union, Luxembourg, 2019, p. 98.

[56] Regarding the process of commercializing big data, companies can assume various roles. They can act as providers of raw data, pre-categorized and cleansed data, or aggregated and contextualized data. They may offer privacy protection services or develop techniques for big data analysis. Additionally, they can directly sell consumer clusters organized according to interests, purchasing habits, financial situations, travel plans, and many other characteristics demanded by their clients.

[57] I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, cit., p. 478; L. ZOBOLI, *Fueling the European Digital Economy: A Regulatory Assessment of B2B Data Sharing*, in *European Business Law Review*, 2020, Vol. 31, Iss. 4. p. 663.

[58] M. MAGGIOLINO, *I big data e il diritto antitrust*, cit., p. 188.

[59] D.S. TUCKER, H.B. WELLFORD, *Big Mistakes Regarding Big Data*, cit., p. 4. See also I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, cit., p. 490.

tion of the dominant position of an undertaking in a data market typically hinges on assessing its market share, reflective of the volume of data exchanged within a pertinent market. Consequently, a higher market share implies a more considerable degree of market power [60]. However, it is imperative to acknowledge that market power is not exclusively contingent on possessing substantial volumes of data. Similar to any other product or service, it is contingent upon the undertaking's capability, whether through skill or chance, to deliver a superior range of information concerning price, quantity, quality, or innovation [61]. Thus, the assertion that the possession of extensive data inherently confers market power necessitates qualification.

The consideration of market shares, alongside factors offering a comprehensive understanding of competition, such as the competitive pressure exerted by potential rivals and the bargaining power of demand, fortifies the hypothesis that large volumes of data can confer market power. Entry into data commercialization markets may be safeguarded by barriers such as technological, legal, or behavioural exclusivity imposed by the dominant entity. However, the assumption of universal barriers to entry in data markets warrants meticulous examination on a case-by-case basis [62].

An exploration of buyer power in the data commercialization market yields diverse conclusions. The demand side, often comprising small companies in early developmental stages seeking access to big data, typi-

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[60] Scholars have questioned how to measure a company's market power in data markets and, specifically, how to attribute value to data. In this respect, looking at an undertaking's ability to monetize information seems to be the most objective way. See I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, cit., pp. 501-502 who specifically affirms that: «[t]he question is how the existence of a dominant position in a market for data can be measured and in particular how value can be attributed to data. The amount or quality of data that an undertaking controls do not seem to constitute adequate indicators for market power, because the datasets of different providers cannot be easily compared in this regard. […] A more objective way to measure the competitive strength of providers active in a market for data would be to look at their ability to monetize the collected information. […] This way the analysis of dominance does not only take into account the value of the dataset in itself but also the success of a provider in putting in place relevant resources and technologies for monetizing the data».

[61] *Ibidem*.

[62] On the specific issue of barriers to entry to big data-markets see D.L. RUBINFELD, M.S. GAL, *Access Barriers to Big Data*, cit., p. 349.

cally possesses limited market power. However, scenarios exist where data brokers interact with large technology companies necessitating specific datasets, potentially endowing significant buyer power to these larger entities.

In conclusion, while the relationship between extensive data possession and market power may seem more straightforward in data commercialization markets, this statement necessitates evaluation. A comprehensive analysis, considering all pertinent elements in the assessment of market power, on a meticulous case-by-case basis, remains crucial. As the data economy continues to evolve, this nuanced understanding ensures a robust and adaptive approach to antitrust enforcement in this ever-changing landscape.

7. Conclusion

In navigating the intricate landscape of the data economy within the realms of competition law, this exploration has sought to redefine traditional paradigms, recognizing the unique challenges posed by the digital era and focusing on the category of market power. More broadly, the evolving dynamics of data-driven business models, digital platforms, and the centrality of data in contemporary markets necessitate a nuanced approach to market definition and the assessment of market power.

The narrative unfolded through the chapter delves into the core principles of competition law, beginning with the fundamental concept of market power. While recognizing the theoretical construct of perfect competition, we acknowledge the omnipresence of market power in reality, prompting a need to delineate its extent and implications for antitrust scrutiny. The EU's legal framework introduces the concept of "dominance", serving as a screening mechanism for conduct that may disrupt market equilibrium, emphasizing the need for independent operation from competitors and influence over various competitive parameters.

The application of antitrust law to the data economy requires a methodical examination, considering the distinct characteristics of digital markets. Market power, traditionally measured through market share, encounters challenges in the data-driven paradigm, where the value of data

often extends beyond traditional metrics. The assertion that possession of big data inherently confers market power is scrutinized, emphasizing the need for a case-by-case evaluation.

The exploration further dissected the data-value chain, distinguishing between the upstream market for data generation and collection and the downstream markets where data serves as inputs and is traded as a commodity. The complexities of market definition in the data context were unravelled, with attention to the intricate interplay between data control and market power.

In the generation and collection of data, the abundance of sources and the non-rivalrous nature of data present challenges in establishing dominance. The classical tools of antitrust analysis, such as the SSNIP test, face limitations in defining relevant markets, given the internal use of data by collecting undertakings. The potential market power derived from possessing substantial datasets is explored, and the chapter questions the assumption of market power inherent in big data possession.

Transitioning to the downstream markets, where data acts as a fundamental input for production, the concept of essential facilities and the application of the essential facility doctrine to data markets are critically examined. The intricacies of proving indispensability, the non-introduction of new products, and the challenges of managing compulsory licenses underscore the difficulties in establishing a facility's essentiality in the data market.

The exploration concludes by unravelling the markets for the commercialization of data, where companies face decisions to either enhance their products internally or sell data externally. A discernible trend of companies exclusively focusing on commercializing information leads to the emergence of data industries. The link between market power and data possession is seemingly more straightforward in this context, with market share playing a pivotal role. However, the conclusion emphasizes the need for a comprehensive evaluation, considering factors such as competitive pressure and barriers to entry.

Establishing the dominance of an undertaking solely based on its collection of big data becomes a challenging task, as this chapter has endeavoured to demonstrate. The intricate relationship between market power and data is far from obvious and, when discernible, necessitates a meticulous case-by-case assessment. Nevertheless, it would be remiss to overlook the emergence of a digital market equivalent to the "seven sisters" coined by

Italian entrepreneur Enrico Mattei to describe the major oil companies[63]. Today's tech giants, often referred to as the "GAFAMs", exhibit similar characteristics by amassing vast amounts of big data and frequently dominating their respective markets.

This raises an important question: if big data alone does not confer market power, how can this phenomenon be explained? The chapter proposes that rather than viewing big data as a direct source of dominance, it should be evaluated as a set of entry barriers that can fortify and strengthen an undertaking's dominant position in markets where goods and services are enhanced through data utilization. That being said, as already mentioned, the assessment of both market power and entry barriers in a specific market must be conducted on a case-by-case basis.

In summarising these findings, it becomes evident that the digital economy requires a flexible and adaptive approach to antitrust enforcement. The traditional tools and metrics may not seamlessly apply to the complexities of data-driven markets. Acknowledging the potential role of big data as an entry barrier unveils a new perspective on how market power can manifest in the digital era. The GAFAMs exemplify entities that leverage not just data but the strategic use of data as a formidable entry barrier, shaping markets to their advantage.

The insistence on a case-specific evaluation remains paramount, as the interplay of technological, economic, and legal factors necessitates a tailored understanding of each market. As the data economy continues to evolve, regulatory frameworks must evolve in tandem, embracing the intricacies of the digital age. The concluding insights, while emphasizing the need for a dynamic and adaptive approach to antitrust in the data economy, also highlight the crucial consideration of incentives, investment, and innovation. These factors play pivotal roles in shaping the regulatory landscape, ensuring that competition law remains a robust and effective tool in fostering innovation, protecting consumers, and maintaining market integrity.

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[63] See A. TONINI, *Il sogno proibito. Mattei, il petrolio arabo e le 'sette sorelle'*, Polistampa, 2008, *passim*.

Non-Economic Objectives Under Article 101 TFEU: Recent Trends

María Campo Comba [*]

1. Introduction

EU competition law may be at a turning point. The importance of the challenges that both the field and society face should make competition law scholars and practitioners re-think and re-discuss about the direction that EU competition law is taking, or, in other words, about the objectives pursued by EU competition law.

During the last years, major societal challenges have revived the never-ending debate about what competition law is all about, and whether and how competition law should face those new difficulties [1]. Two of

[*] Assistant Professor of EU Law at the Erasmus University Rotterdam, The Netherlands.

[1] I. LIANOS, *Polycentric Competition Law*, in *Current Legal Problems*, 2018, Vol. 71, p. 161; L. KHAN, *Amazon's Antitrust Paradox*, in *The Yale Law Journal*, 2018, Vol. 126,

these major challenges are high in the EU agenda, as well as in the agenda of a globalised world: the digitalisation challenge and the sustainability challenge. On the one hand, digitalisation has changed the way in which society interacts, works, does business, etc. and brings new scenarios to which legal systems need to adapt. On the other hand, the threat of destruction by humans that our planet faces requires all the efforts from governments, citizens, and even private companies, to face the climate emergency and ensure sustainable development [2]. These challenges have also made it to the forefront of the EU competition law agenda and make us question the role that our legal discipline has when it comes to digitalisation and sustainable development as modern societal (and market) challenges.

The consumer welfare/more economic approach to competition law that has been more or less followed, especially by the European Commission (the "Commission") [3], also in the EU legal order [4] at least during the last two decades, which, in short, aims at ensuring that consumers benefit from lower prices and higher output [5], has been questioned when it comes

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p. 711; S. HOLMES, *Climate Change, Sustainability and Competition Law*, in *Journal of Antitrust Enforcement*, 2020, Vol. 8, p. 354; A. GERBRANDY, *Changing Competition Law in a Changing European Union. The Constitutional Challenges of Competition Law*, in *The Competition Law Review*, 2019, Vol. 14, p. 33; A. EZRACHI, *Sponge*, in *Journal of Antitrust Enforcement*, 2017, Vol. 5, p. 46; T. WU, *The Curse of Bigness: Antitrust in the New Gilded Age, Columbia Global Reports*, Columbia Global Reports, New York, 2018; O. BROOK, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU*, Cambridge University Press, Cambridge, 2022.

[2] The UN Resolution No 66/288 of 27 July 2012, *The future we want*, refers to sustainable development as the development towards «an economically, socially and environmentally sustainable future for our planet and for present and future generations», and the UN Sustainable Development Goals ("SDGs") involve economic, social and environmental aspects of sustainable development.

[3] Still, the Court of Justice has in the last decades mentioned more than once the objective of competition law to protect the structure of the market. Among others: Court of Justice, joined cases C-501, C-513, C-515 and C-519/16 P, *GlaxoSmithKline Services* [2006] ECLI:EU:T:2006:265, para 63; Court of Justice, case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECLI:EU:C:1999:269.

[4] For example: Commission Guidelines of 27 April 2004 on the application of Article 81(3) of the Treaty; Commission Guidelines of 19 May 2010 on Vertical Restraints; and Commission Guidelines of 14 January 2011 on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal Cooperation Agreements.

[5] A. WITT, *The More Economic Approach to EU Antitrust Law,* Hart, Portland, 2016; V. DASKALOVA, *Consumer Welfare in EU Competition Law: What Is It (Not) About?*, in *The*

to addressing these challenges. Under this approach, non-economic objectives and considerations, such as *inter alia* sustainability, privacy, inequality concerns are not considered when assessing the anti-competitiveness of a conduct; rather, only the effects of such conduct on consumer welfare, measured through economic tools, are relevant for its antitrust assessment. However, digitalisation and the sustainable development challenge the above-mentioned interpretations and tools used in competition law analysis and enforcement. It becomes necessary to consider whether these challenges have also brought a change in the consideration of non-economic interests in competition law [6].

It is generally understood that competition law can be used as a 'sword' or as a 'shield' [7]. In this context, non-economic goals and considerations may be used as a 'sword', reinforcing competition law enforcement to fight against behaviour that harms non-economic interests. For example, the enforcement of Article 102 TFEU could be tightened to combat behaviour that would be considered abusive when taking into account non-economic considerations. The consideration of interests beyond consumer welfare, such as privacy or environmental concerns, could be used to strengthen the enforcement of Article 102 TFEU when it has shown signs of underenforcement [8].

Competition Law Review, 2015, Vol. 11, p. 121; A. JONES, B. SUFRIN, N. DUNNE, *Jones and Sufrin's EU Competition Law*, Oxford University Press, Oxford, 2019, pp. 28-30.

[6] Although at first glance it may seem an easy or intuitive task to differentiate between economic and non-economic objectives in competition law, there seems to be discrepancies in the use of terminology amongst experts on the field, specially between economists and jurists. In this paper, it is meant by economic objectives and considerations of competition law those related to efficiency considerations that either affect prices or have to do with quality or innovation. On the other hand, non-economic goals and considerations are those related to public policy interests that are non-market driven. Authors also refer to these interests as public interest considerations (N. DUNNE, *Public Interest and EU Competition Law*, in *The Antitrust Bulletin*, 2020, Vol. 65, p. 2), societal or non-market interests (A. GERBRANDY, *Changing Competition Law in a Changing European Union*, cit., p. 33), or sometimes also as non-competition interests (O. BROOK, *Non-Competition Interests in EU Antitrust Law*, cit.). The term "non-economic" goals or considerations was preferred in this case since it allows us to use it as an all-encompassing concept for those goals and considerations that seem to fall outside the consumer welfare/more economic approach that EU competition policy has followed in the last decades.

[7] S. HOLMES, *Climate Change, Sustainability and Competition Law*, cit., p. 384.

[8] See regarding the violation of data protection in relation to the violation of Article 102

However, this paper mainly focuses on the application of Article 101 TFEU and with the concept of competition law as a 'shield'. Article 101(1) TFEU prohibits «all agreements between undertakings, decisions by associations of undertakings and concerted practices […] which have as their object or effect the prevention, restriction or distortion of competition within the internal market». Saying that non-economic goals and considerations may be used as a 'shield' essentially means that they can be used to allow certain otherwise prohibited agreements when these, although presenting competitive issues, are beneficial to those non-economic goals. For example, a possible anticompetitive measure could be exempted from the application of Article 101(1) TFEU because it ensures environmental benefits.

Generally speaking, this result can be achieved in two ways. On the one hand, agreements pursuing non-economic objectives may be deemed to fall outside the scope of application of Article 101 TFEU; on the other hand, even if they fall under Article 101(1) TFEU, they can be considered to be exempted under Article 101(3) TFEU if they fulfil the conditions of that provision. However, the extent of these exceptions and the relevance of those non-economic objectives in the competition law analysis depends on the interpretations followed by the Commission and the EU Courts.

The Commission has recently updated numerous instruments to facilitate the possibility of taking into account non-economic objectives during the antitrust assessment of undertakings' behaviours [9]. In this paper, focus

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TFEU: Bundeskartellamt Decision of 6 February 2019 in case B6-22/16 – *Facebook*; Court of Justice, case C-252/21, *Meta Platforms, Inc. and Others v. Bundeskartellamt* [2023] ECLI:EU:C:2023:537.

[9] In relation to the interpretation and implementation of Article 101 TFEU, the Commission has recently revised the "Horizontal Block Exemption Regulations" (see Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements and Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements), the "Horizontal Guidelines" (see Commission Guidelines of 21 July 2023 on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements, hereinafter the "Revised Horizontal Guidelines"), the "Vertical Block Exemption Regulation" (see Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the Euro-

is placed on two recent developments brought by the Commission with regard to the necessity to adapt competition practice to the digital challenge and sustainable development challenge and which involve the pursuing of non-economic objectives under Article 101 TFEU. On the one hand, reference is made to the existence and growth of platform workers such as delivery riders, platform transport drivers, platform house cleaners, etc. These atypical workers, when entering into collective agreements, could fall under Article 101(1) TFEU. The Commission has clarified the legal regime applicable to this situation in the new Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (the "SSE Guidelines")[10]. On the other hand, following numerous calls for certainty and change, the Commission has included a chapter on sustainability agreements on the new Revised Horizontal Guidelines[11], where it gives guidance as to when such agreements could fall under the exemption of Article 101(3) TFEU.

In this context, this paper aims to analyse the recent trends concerning non-economic objectives under Article 101 TFEU, by focusing on the recent developments brought forward by the Commission, but also considering the position of the EU Courts. First, a general overview of the approach that the Commission and the EU Courts have followed in the last years regarding non-economic objectives and considerations in EU competition law will be provided. Second, the recent developments on Article 101 TFEU and collective labour agreements regarding platform workers are analysed. Then, the recent developments on Article 101 TFEU and sustainability agreements are examined.

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pean Union to categories of vertical agreements and concerted practices) and the "Vertical Guidelines" (see Commission Notice of 30 June 2022 Guidelines on vertical restraints).

[10] Commission Guidelines of 30 September 2022 on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons.

[11] Cf. Chapter 9 of the Revised Horizontal Guidelines.

2. An overview of the EU competition law approach to non-economic objectives

2.1. The more-economic approach: focus on consumer welfare and economic efficiency

Long story short, since the end of the nineties, the Commission adopted a so-called 'more economic approach' towards EU competition law [12]. Since then, EU competition law underwent a process of "economization" and "modernization", putting economic efficiency at the forefront of the competition law analysis. Neoclassical price theory was put at the centre of competition law, and the Commission has come to rest firmly on neoliberal economic theory [13]. As mentioned, consumer welfare and economic efficiency are the goals of competition law under this approach [14].

Before the "modernization", and in line with the ordoliberal approach to competition policy [15], EU competition law was more focused towards achieving an internal market and making the free movement of goods and services possible within that internal market [16]. For example, in the well-

[12] A.C. WITT, *The More Economic Approach to EU Antitrust Law,* cit.

[13] I. LIANOS, *Polycentric Competition Law,* cit., pp. 162 and 163.

[14] The more economic approach made it all across competition law: from merger control with the implementation of the merger regulation in the 1990s (Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings), to vertical agreements and cartel prohibition in general (Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, or Commission Guidelines of 14 January 2011 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements), and later to the implementation of an effects-based economic approach of the abuse of dominance provisions (Commission Guidance of 24 February 2009 on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the "Guidance Paper").

[15] A. GERBRANDY, *Rethinking Competition Law within the European Economic Constitution*, in *Journal of Common Market Studies*, 2019, Vol. 57, pp. 129 and 130.

[16] These continue to be, to certain extent, within the objectives of competition law nowadays in the EU and can be found in the Court of Justice judgments and Commission decisions: General Court, case T-168/01, *GlaxoSmithKline Services* [2006] ECLI:EU:T:2006:265, para 11 and paras 59-62; Court of Justice, case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999], ECLI:EU:C:1999:269, para 36; Commission Decision of 14 April 2010 in case COMP/39.351 – *Swedish Interconnectors*, para 7.

known *Metro I* case decided in 1977, the CJEU introduced the notion of workable competition as the competition «necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty» [17]. The CJEU considered that a lower degree of competition can also be optimal when an agreement is necessary for the pursuit of an economic or social objective. According to some empirical studies on the consideration of non-competition interests in Article 101 TFEU [18], in this phase the Commission took into account even broader types of benefits than those provided for by the case law, not putting a limit to the types of benefits to be assessed under Article 101(3) TFEU and assessing both economic and non-economic benefits that benefitted either individual consumers or society as a whole [19].

Following the "modernization", the so-called 'anticompetitive foreclosure' standard became the cornerstone of the Commission's antitrust analysis, understood as the exclusion of competitors that causes harmful effects to consumers [20]. Accordingly, the exclusion of competitors is only relevant when that exclusion generates harmful effects to consumers [21]. Rigorous methodologies are used to determine that harm. By referring the competition law analysis to legal-economic tests that assess the efficiency of different market actions and their benefit or damage to consumer welfare (many times simplified as short-term effects on price and output equalling consumer welfare), the criticised uncertainties of the previous approach were left behind [22].

Also, it is important to highlight that emphasis is added to countervailing efficiencies that compensate the restrictive behaviour (e.g., exception on Article 101(3) TFEU). According to the Commission's Guidelines on Article 101(3) TFEU of 2004 [23], non-economic benefits

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[17] Court of Justice, case C-26/76, *Metro I* [1977] ECLI:EU:C:1977:167, paras 20-21.

[18] See O. BROOK, *Non-Competition Interests in EU Antitrust Law*, cit., pp. 113 and 114.

[19] See for example Commission Decision of 23 December 1992 in case IV/33.814 – *Ford/Volkswagen*, para 25.

[20] See for example paras 19-22 of the Guidance Paper.

[21] *Ibidem.*

[22] H. SCHWEITZER, K.K. PATEL, *The Historical Foundations of EU Competition Law*, Oxford University Press, Oxford, 2013; A. GERBRANDY, *Rethinking Competition Law within the European Economic Constitution*, cit., p. 127.

[23] Commission Guidelines on the application of Article 81(3) of the Treaty, cit.

should only be taken into account if they are «goals pursued by other Treaty provisions» but only to the extent that they can be «subsumed» under the four conditions of Article 101(3) TFEU. This approach deviates from the previous practice and case law [24]. Rather than referring to benefits under the exception of Article 101(3) TFEU, the Commission hereby refers to objective economic efficiencies, requiring evidence to prove such efficiencies [25].

On the other hand, although they have not taken a clear position concerning non-economic objectives and Article 101(3) TFEU, EU Courts do not seem to have completely followed the Commission's modernized approach to competition law. However, it is also true that the EU Courts have had a more limited role on the interpretation of Article 101(3) TFEU after modernization.

While the CJEU's preliminary rulings have more than once referred to non-economic benefits, the CJEU has not clarified the scope of Article 101(3) TFEU [26]. Still, the CJEU recognizes that the protection of non-economic benefits (such as those related to financial services, IPRs, regulated professions, or sports) can be considered [27]. Also, the General Court noted that policy-linking clauses create the obligation to consider non-economic benefits under Article 101(3) TFEU [28]. More generally, with regard to the more-economic approach put forward by the Commission, the terms used by the CJEU are of relevance to this discussion. While the Commission referred to benefits under Article 101(3) TFEU as «efficiencies» that should be «calculated», the CJEU continued to use the previous legal balancing wording, referring to «objective advantages» that should be «examined» following «factual arguments and evidence» [29].

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[24] O. BROOK, *Non-Competition Interests in EU Antitrust Law,* cit., pp. 70 and 71.

[25] *Ibidem.*

[26] For a detailed analysis: *ivi*, pp. 139-149.

[27] Court of Justice, case C-238/05, *Asnef/Equifax* [2006] ECLI:EU:C:2006:734, para 67; joined cases C-403/08 and C-429/08, *Football Association Premier League* [2011] ECLI:EU:C:2011:631, paras 145-146; case C-1/12, *Ordem dos Técnicos Oficiais de Contas* [2013] ECLI:EU:C:2013:127, paras 100-101.

[28] General Court, case T-451/08, *Stim v Commission* [2013] ECLI:EU:T:2013:189. In this case, the non-economic benefit referred to the protection of culture, and the Court emphasised that such benefit was relevant, although it did not specify how it should be taken into account.

[29] Cf. para 56 of the Commission Guidelines on the application of Article 81(3) of the

It is also necessary to mention that the CJEU has developed case law concerning non-economic objectives outside the exception of Article 101(3) TFEU. In a line of cases, following the *Albany* one [30], the CJEU considered that collective bargaining agreements entered between employers and employees and intended to improve employment and working conditions fall outside the scope of Article 101(1) TFEU given their nature and purpose. The CJEU did not analyse this case under the exception of Article 101(3) TFEU, but considered that, reading the Treaty as a whole, the social policy objectives of the Union justified this broader and almost per se exception. In a different line of cases, following the *Wouters* case [31], the CJEU found that domestic policy considerations relating to the exercise of professional activities in the Member State may justify restriction to competition. The CJEU kept referring to these exceptions also after the modernisation phase. This line of cases will be further discussed in relation to the non-economic objectives and developments this paper focuses on in the next paragraphs.

2.2. Winds of change? The "fairness mantra" of the Commission

The pursuit of wider and non-economic objectives within competition law analysis, moving past a purely economic understanding of consumer welfare, has been discussed and defended by various scholars in the last few years [32]. Among the discussed objectives that go beyond consumer welfare and economic efficiency one can find environmental objectives, social inequality concerns, fair labour practices, privacy and potential

Treaty, cit. See also Court of Justice, case C-382/12 P, *MasterCard* [2014] ECLI:EU:C:2014:2201, paras 228, 232 and 234-235; joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline*, cit., paras 93-95, 102-103,128-129; O. BROOK, *Non-Competition Interests in EU Antitrust Law,* cit., pp. 148 and 149.

[30] Court of Justice, case C-67/96, *Albany* [1999] ECLI:EU:C:1999:430.

[31] Court of Justice, case C-309/99, *Wouters* [2002] ECLI:EU:C:2002:98.

[32] Among many others: I. LIANOS, *Polycentric Competition Law,* cit., p. 161; A. EZRACHI, M.E. STUCKE, *The Fight Over Antitrust Soul*, in *Journal of European Competition Law and Practice*, 2018, Vol. 9; L. KHAN, *The Ideological Roots of America's Market Power Problem*, in *Yale Law Journal Forum*, 2018, Vol. 127, p. 960; A. GERBRANDY, *Rethinking Competition Law within the European Economic Constitution*, cit., p. 127; N. DUNNE, *Public Interest and EU Competition Law*, cit., p. 256.

threats to democracy derived from the power of Big Tech [33]. The basic idea is that, while non-economic considerations are surely outside the substantive core of EU competition law according to the consumer welfare/more economic approach, the flexible and undefined nature of competition rules may provide enough room for a different understanding, if needed. EU competition rules are inherently flexible and broad. After all, in a *social market economy*, it makes little sense to develop a competition policy that purposely turns its back to the *social*, or to isolate a field of law from society in order to base it on purely economic terms [34].

In the last years, the Commission's rhetoric is indeed changing [35]. Commissioner Vestager has in numerous occasions emphasized the importance of «fairness» in competition law [36]. While the emphasis in the concept of "fairness" is new, the concept itself has been present in EU competition law since the Treaty of Rome (see for example the reference to "fair competition" in the Preamble to the TFEU, or the requirement of "fair share" in Article 101(3) TFEU, or to "fair trading conditions" in Article 102 TFEU [37].The concept of fairness is back on the competition policy agenda, but what does it entail, and to whom?

In the view of *making the markets work better* in a social market economy, there can be multiple perspectives and recipients of fairness.

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[33] G. MONTI, J. MULDER, *Scaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Objectives*, in *European Law Review*, 2017, Vol. 42, p. 635; S. HOLMES, *Climate Change, Sustainability and Competition Law*, cit., p. 354; A. GERBRANDY, *Solving a Sustainability Deficit in European Competition Law*, in *World Competition*, 2017, Vol. 40, p. 539; I. LIANOS, *Competition Law as a Form of Social Regulation*, in *The Antitrust Bulletin*, 2020, Vol. 65, p. 3; L. KHAN, S. VAHEESAN, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, in *Harvard Law & Policy Review*, 2017, Vol. 11, p. 235; E. DEUTSCHER, *Reshaping Digital Competition: The New Platform Regulations and the Future of Modern Antitrust*, in *The Antitrust Bulletin*, 2022, Vol. 67, p. 302; K. KEMP, *Concealed data practices and competition law: why privacy matters*, in *European Competition Journal*, 2020, Vol. 16, p. 628.

[34] S.M. COLINO, *The Antitrust F Word: Fairness Considerations in Competition Law*, in *CUHK Faculty of Law Research Paper* 9/2018.

[35] D. GERARD, *Fairness in EU Competition Policy: Significance and Implications*, in *Journal of European Competition Law and Practice*, 2018, Vol. 9, p. 212.

[36] EVP Vestager's speech at the European Competition Day 2022: "Fairness and Competition Policy", who noted that «protecting competition is about efficiency, but not only. Fundamentally, it is a question of fairness».

[37] N. DUNNE, *Fairness and the Challenge of Making Markets Work Better*, in *Modern Law Review*, 2021, Vol. 84, p. 232.

The creation of a level-playing field, making the process of competition "fair", is a prominent idea. This approach can be related to the ordoliberal origins of EU competition law and entails providing the same initial opportunities to firms in the marketplace and thus protecting the structure of the market [38]. However, fairness can also entail fairness *ex post*, meaning equality of outcomes (e.g., tackling inequality, fair wages for workers, etc.) [39]. From an even wider viewpoint, fairness could entail all «socially desirable objectives» that can fall under the competition policy regulatory scope [40]. Accordingly, it has been suggested that a fairness-driven competition would have as purpose to «equalize the structural position of the individual (or collective) agents in the various overlapping social spheres they are active, so that economic power is not easily converted to cultural or political power» [41]. The analysis of the use of the fairness rhetoric by the Commission in the last years seems to support the view that that the concept is used in multiple settings, positioning «competition law as a regulatory tool that goes beyond the technical task of remedying discrete market failures, instead laying claim to a range of targets that extend to the core of modern liberal democracy» [42].

Beyond the rhetoric and the potential political meaning of the fairness mantra recently emphasised by the Commission, there are examples of possible meanings of fairness in the current EU competition law practice. For example, the «fair share» requirement for the application of the exception of Article 101(3) TFEU seems to still be related to the maximization of consumer surplus, rather than to any other broader meaning [43].

3. Recent developments on Article 101 TFEU and collective labour agreements: digital platform workers' rights

The platform economy has notably increased the number of atypical

[38] *Ivi,* p. 236.

[39] *Ivi,* p. 237.

[40] *Ibidem.*

[41] I. LIANOS, *Competition Law as a Form of Social Regulation*, cit., p. 12.

[42] N. DUNNE, *Fairness and the Challenge of Making Markets Work Better*, cit., p. 244.

[43] *Infra*, para 3.

forms of employment, from the very well-known delivery riders or ride-hailing drivers to even domestic workers.

One of the challenges that the new digital economy has brought is precisely related to the correct qualification of the labour relation between these atypical workers and online platforms. These atypical workers may be considered to fall within the traditional notion of undertaking on which EU competition law is based [44] and, therefore, they may be considered as self-employed undertakings rather than employees of the platform. Intuitively, this could lead to undesirable results, such as for example the inapplicability of EU (and maybe even national) labour law protective rules in their regard. More importantly for the purposes of this paper, however, the relation between the platform and the workers would also be subject to the application of EU competition law, falling outside the relevant exemption. As a consequence of the digital revolution and of the development of the so-called gig economy [45], the category of self-employment has expanded beyond the traditional bourgeois or the innovative entrepreneur to also include individuals that may quite often be labouring in precarious conditions [46]. However, competition law and specifically Article 101 TFEU can be a barrier to the formation of collective labour agreements between the digital platforms and these atypical workers.

While from a labour law perspective, collective bargaining and collective labour agreements are essential to safeguard workers welfare and counterbalance the power asymmetry between employers and employees, from a competition law perspective they could be interpreted as an anti-competitive agreement between undertakings, i.e. the platform (the employers) and the employees [47]. On the one hand, the right to collective

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[44] A. JONES, B. SUFRIN, N. DUNNE, *Jones and Sufrin's EU Competition Law*, cit., pp. 141-165.

[45] M. STEINBAUM, *Antitrust, the Gig Economy, and Labor Market Power,* in *Law and Contemporary Problems*, 2019, Vol. 82, pp. 45-64; D. SCHIEK, A. GIDEON, *Outsmarting The Gig-Economy Through Collective Bargaining – EU Competition Law as a Barrier to Smart Cities?*, in *International Review of Law, Computers & Technology*, 2018, Vol. 32, p. 275; O. LOBEL, *The Gig Economy & the Future of Employment and Labor Law*, in *University of San Francisco Law Review*, 2017, Vol. 51, p. 51.

[46] V. DASKALOVA, *Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?*, in *German Law Journal*, 2018, Vol. 19, Iss. 3, pp. 465-469.

[47] G. MONTI, *Collective Labour Agreements and EU Competition Law: Five Reconfigurations*, in *European Competition Journal*, 2021, Vol. 17 Iss. 3, p. 714; V. DASKA-

bargaining for workers is a fundamental right and is *inter alia* protected by the Universal Declaration on Human Rights (Article 23(4)), the International Covenant on Social, Economic and Cultural Rights (Article 8), the European Convention of Human Rights (Article 11) and the International Labor Organization ("ILO") constitution. In the EU, this right is protected by Article 28 CFREU. On the other hand, the cartel prohibition of Article 101 TFEU is one of the main pillars of EU competition law, under which anticompetitive agreements between undertakings are prohibited and shall be declared void (Article 101(1) and Article 101(2) TFEU. Collective labour agreements may lead to a restriction of competition among workers and to higher consumer prices [48]. However, given the public policy objectives at hand, namely the fundamental right to collective labour agreements, the CJEU has developed an exemption.

Below, the exemption of the CJEU to collective labour agreements and the recent adaptation of this one by the Commission to cases involving digital platform workers, or gig workers, will be examined in more details. After that, other possible paths to exclude the application of the prohibition of Article 101 TFEU to collective labour agreements when these do not fulfil the requirements of the Albany route are considered.

3.1. The *Albany* route, digital platform workers and the new Commission SSE Guidelines

During the years, the CJEU has tried to clarify the complex relationship between competition law and policy and workers' rights. The case law following the *Albany* judgment [49] indicates that, when employees in one firm bargain collectively with their employer, employees are not considered undertakings and, as a result, Article 101 TFEU does not apply since the agreement at hand is not between undertakings [50]. In the same manner, the trade union that represents employees could not be consid-

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LOVA, *Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?*, cit., p. 465.

[48] G. MONTI, *Collective Labour Agreements and EU competition Law: Five Reconfigurations*, cit., pp. 730-734.

[49] Case C-67/96, *Albany*, cit.

[50] Court of Justice, case C-413/13, *FNV Kunsten Informatie en Media* [2014] ECLI: EU:C:2014:2411; case C-217/05, *Confederación Española* [2006] ECLI:EU:C:2006:784.

ered an association of undertakings. When the employees in one economic sector bargain collectively with the employers in that sector, collective labour agreements are generally exempted from the application of Article 101 TFEU following the *Albany* judgment. In *Albany*, it was indeed held that «agreements concluded in the context of collective negotiations between management and labour in pursuit of [their social policy] objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101(1)] of the Treaty» [51].

Following the *Albany* judgment, therefore, any agreement will fall outside the scope of Article 101(1) TFEU if two conditions are met: first, the agreement is conducted in the context of collective bargaining between employers and employees, or their representatives (the so-called "nature" criterion) and, second, such agreement is aimed directly at improving the working terms and conditions of employees (the so-called "purpose" criterion) [52]. However, self-employed workers did not seem to fall under the first criterion and, as mentioned, have traditionally been seen as undertakings under EU competition law [53]. Especially in the culture, arts or media sectors, there have been difficulties regarding self-employed workers and their qualification as "undertakings" rather than "workers" under EU law.

In *FNV Kunsten*, the CJEU held that «in so far as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings» [54]. According to the CJEU, the exemption was not extended to self-employed individuals because the Treaty did not contain provisions that encouraged self-employed service providers to bargain with the employers to which they provide services [55].

However, the Court also provided an exception to this rule to cope with the case of so-called 'false self-employed', that is to say, service providers which are actually in a situation comparable to that of employ-

[51] Case C-67/96, *Albany*, cit. para 60.

[52] Case C-67/96, *Albany*, cit. para 59.

[53] Case C-413/13, *FNV*, cit.

[54] *Ibidem*.

[55] *Ivi*, para 29.

ees [56]. However, the exception requires a case-by-case analysis. It has been quickly noted that this judgement does not offer clear criteria for when a worker classifies as false- self-employed and is open to misinterpretation [57]. In *Confederación Española* [58], the CJEU held that a service provider who «*does not independently determine his conduct on the market since he depends entirely on his principal, […] because the latter assumes the financial and commercial risks as regards the economic activity concerned' falls outside the scope of Article 101*» TFEU.

Overall, these judgments do not seem to provide effective guidance regarding atypical workers and, specifically, digital platform workers. The criteria used are based on a comparison with what a typical worker does, but in many cases that comparison is not possible (e.g. new types of work with no clear equivalents in terms of salaried labour, or in the case of the atypical worker working on demand and the service provided cannot be compared because no regular employee exists in the firm) [59].

It has also been pointed out that trade unions would be reluctant to make an agreement concerning the terms and conditions of atypical workers that could be considered self-employed workers given the risk of falling under the competition law prohibition of Article 101 TFEU and facing possible fines [60].

The COVID-19 pandemic evidenced the weaker position of many solo self-employed persons, which continued to go out to work while most of the actual employees could stay at home [61]. In the light of the continuous growth of digital platform workers, the calls for certainty and the concerns regarding their working conditions have amplified over the last few years. This led the Commission to publish on September 29th 2022 the

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[56] *Ivi*, para 31.

[57] G. MONTI, *Collective labour agreements and EU competition law: five reconfigurations*, cit., p. 714; V. DASKALOVA, *Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?*, cit., p. 465.

[58] Case C-217/05, *Confederación Española*, cit., para 44.

[59] V. DASKALOVA, *Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?*, cit., p. 489.

[60] *Ivi*, p. 490.

[61] C. DENIHAN, *Collective or Collusive Agreements? An Examination of the Position of Solo Self-Employed Persons under Article 101 TFEU*, in *World Competition*, 2023, Vol. 43, Iss. 3, pp. 317 and 318.

SSE Guidelines [62]. The SSE Guidelines build upon the aforementioned judgments of the Court of Justice and have, as a starting point, the same criteria, trying to clarify further when collective labour agreements between solo self-employed persons and one or several undertakings fall under Article 101 TFEU [63].

The SSE Guidelines consider several categories of workers, among which we find the category of «solo self-employed persons working through digital labour platforms». The SSE Guidelines acknowledge that many of these self-employed persons are in a situation comparable to that of workers. The SSE Guidelines note that such self-employed workers are often dependent on digital platforms, specially to reach customers. Usually, digital labour platforms would be able to unilaterally impose upon the self-employed workers the terms and conditions not only of the relationship between them [64], but also those that shall be applied to the customers. Moreover, the SSE Guidelines refer to recent case law and national legislative developments regarding the classification and status of platform self-employed persons [65].

The SSE Guidelines replicate the definition of platform work found in the proposed Directive on *improving working conditions* in *platform work* [66]. Emphasis is placed on the role of the online platform in organising the work performed by individuals at the request of the recipient of the service provided by the platform. The definition does not cover online platforms that merely provide the means by which the service providers can reach the end user [67]. For example, the definition of digital labour platforms covers providers of a service, such as a ride-hailing platform, for which the organisation of work performed by the drivers is essential. On the other hand, a digital platform that merely gathers and displays the

[62] See above note 10.

[63] According to para 1(2)(a) of the SSE Guidelines «a solo self-employed person' means a person who does not have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned».

[64] *Ivi*, para 28.

[65] *Ivi*, para 29.

[66] Commission Proposal of 9 December 2021 for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, COM(2021) 762 final.

[67] See paras 28-31 of the SSE Guidelines.

details of plumbers available in a specific area, just allowing customers to contact plumbers, does not fall under the definition of digital labour platform, since it does not organise the work of the plumbers. According to the SSE Guidelines, only collective agreements between digital labour platforms and solo self-employed persons relating to working conditions fall outside the scope of Article 101 TFEU [68].

Finally, it is also necessary to note that the SSE Guidelines also include a section on enforcement priorities, which, rather than offering interpretative guidance, sets out situations in which the Commission has committed to not intervene (although they are not considered exempted from the scope of Article 101 TFEU and other enforcers, such as national judges, may decide to tackle them). Under these enforcement priorities, the Guidelines express the view that that the Commission will not enforce EU competition rules against collective agreements made by solo self-employed persons who are in a weak bargaining position, such as when solo self-employed people face an imbalance in bargaining power due to negotiations with economically stronger companies [69].

As it can be observed, the CJEU took the social policy objectives of the EU into account in its ruling in *Albany*, and provided for an exemption to the application of Article 101 TFEU on the basis of those social policy objectives. In the same manner, now the Commission recognises, in the new Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons the exception to Article 101 TFEU on the same basis.

The SSE Guidelines make reference also to several other Treaties provisions in order to support this conclusion. For example, Article 3(3) TEU is mentioned, insofar it provides that «the Union shall promote a highly competitive social market economy, aiming at full employment and social progress». According to Article 9 TFEU, moreover, «[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health». The SSE Guidelines also mention Article 152 TFEU concerning collective bargaining, as this provision establishes that the EU

[68] *Ibidem.*

[69] *Ivi*, paras 32-35.

commits to «facilitate dialogue between the social partners, respecting their autonomy». Lastly, Article 28 CFREU further recognises the right of collective bargaining and action [70].

In conclusion, in the pursuit of EU social policy objectives, it seems that the Court of Justice and the Commission, at least to some extent, share the view that EU policies should support each other. In the situations described in this paragraph, competition is excluded because, on balance, another EU objective shall take priority.

3.2. Other possible paths to exempt the application of Article 101 TFEU to collective agreements of digital platform workers

Widening the scope of the concept of employee to certain categories of atypical worker seems to be the more straightforward way of addressing the issue of atypical workers and the (non)application of Article 101 TFEU. Even if, as mentioned, the Commission seems to prefer this solution, it shall be noted that other paths exist under which the relation between "employers" and solo self-employed individuals could still be exempted from the application of Article 101(1) TFEU, even if the latter would not be considered employees of the former.

On the one hand, it could be considered whether the so-called *Wouters doctrine* could apply to the situation and let important policy considerations take precedence over EU competition law. In the *Wouters* judgment [71], the Court of Justice found that the ban by the Dutch Bar Association disallowing partnerships between lawyers from the Dutch bar and accountants could be justified on the basis of the effective provision of legal services. The Court of Justice found that domestic policy considerations relating to the provision of legal services in a Member State can potentially justify a restriction of competition.

In the case of collective labour agreements, following the *Wouters* approach would allow the Commission, the Member States' National Competition Authorities ("NCAs") or courts to assess the agreement beyond the distinction between employee and self-employed [72]. In addition, the

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[70] Cf. para 4 of the SSE Guidelines.

[71] Case C-309/99, *Wouters*, cit.

[72] G. MONTI, *Collective Labour Agreements and EU Competition Law: Five Recon-*

application of the *Wouters* doctrine would allow for national specificities to be considered, if necessary, rather than to the need of applying the same approach to collective labour agreements to all Member States [73]. In this way, for instance, it would be possible to allow an agreement involving vulnerable atypical workers in one Member State, and not doing so in another Member State because those atypical workers are in fact not vulnerable in the latter Member State, for example due to more protective national labour laws [74].

However, the possible application and scope of the *Wouters* doctrine has been highly debated [75]. While some authors have considered that it would be enough if the public interest objective is on national policy considerations, others have argued that government involvement is necessary and therefore it can only be applied when the Member State has delegated regulatory tasks to private parties [76]. Most recently, the Court of Justice has launched the discussion regarding the *Wouters* doctrine again. In the *European Superleague* case [77], the Court of Justice refers to the *Wouters* exception and mentions that «that case-law applies in particular in cases involving agreements or decisions taking the form of rules adopted by an association such as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives and, more broadly, to regulate the exercise of a professional activity if the association» [78]. This could be understood as a limitation to the

figurations, cit., pp. 729 and 730; C. DENIHAN, *Collective or Collusive Agreements? An Examination of the Position of Solo Self-Employed Persons under Article 101 TFEU*, cit., p. 347.

[73] G. MONTI, *Collective Labour Agreements and EU Competition Law: Five Reconfigurations*, cit., p. 730.

[74] *Ibidem*.

[75] See for example C. JANSSEN, E. KOOSTERHUIS, *The Wouters case law, special for a reason?*, in *European Competition Law Review*, 2016, Vol. 37, Iss. 8, p. 335; J. NOWAG, *Wouters, When the Condemned Live Longer: A Comment on OTOC and CNG*, in *European Competition Law Review*, 2014, Vol. 36, p. 39; G. MONTI, *Collective Labour Agreements and EU Competition Law: Five Reconfigurations*, cit., p. 730.

[76] G. MONTI, *Collective Labour Agreements and EU Competition Law: Five Reconfigurations*, cit., p. 730; C. DENIHAN, *Collective or Collusive Agreements? An Examination of the Position of Solo Self-Employed Persons under Article 101 TFEU*, cit., p. 348.

[77] Court of Justice, case C-333/21, *European Super League Company* [2023] ECLI:EU:C:2023:1011.

[78] Case C-333/21, *European Super League*, cit., para 183.

broad understanding of the exception [79]. In addition, the Court explains that the *Wouters* exception cannot be applied to conduct that is, by its very nature, harmful to the proper functioning of competition, hence excluding its application to restrictions by object [80].

Finally, a collective agreement could be exempted from Article 101(1) TFEU following the exemption on Article 101(3) TFEU. However, difficulties would be found specially when fulfilling the first two conditions of the exemption: the improvement in the production or distribution of goods or technical and economic progress and the «fair share» requirement [81]. The current interpretation of these requirements of Article 101(3) TFEU by the Commission, following a consumer welfare approach with emphasis on economic efficiency, make this route unlikely, especially considering that the Commission has already put forward the approach they would follow when measuring non-economic considerations concerning sustainability agreements [82].

4. Recent developments on Article 101 TFEU and sustainability objectives: sustainability agreements

The sustainability challenge is one of the main challenges that our world is currently facing. As such, sustainability has been at the forefront (also) of the discussions within the competition law community for some time [83]. All the efforts are needed to fight against the climate emergency

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[79] B. VAN ROMPUY, *EU Court of Justice Delineates the Scope of the Wouters Exception*, in *Kluwer Competition Law Blog*, 2024, available at: www.competitionlawblog.kluwercompetitionlaw.com/.

[80] Case C-333/21*, European Super League*, cit., para 186.

[81] C. DENIHAN, *Collective or Collusive Agreements? An Examination of the Position of Solo Self-Employed Persons under Article 101 TFEU,* cit., pp. 344-346.

[82] *Infra*, para 3.

[83] Among many others, R. CLAASSEN, A. GERBRANDY, *Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach*, in *Utrecht Law Review*, 2016, Vol. 16; J. NOWAG, *Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview*, in *Lund Law Competition*, 2019, Vol. 3; C. VOLPIN, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, in *CPI Antitrust Chronicle*, 2020; G. MONTI, *Four Options for a Greener Competition Law*, in *Journal of European Competition Law & Practice*, 2020, Vol. 11, p. 124; S. HOLMES, D.

and achieve the UN SDGs [84]. The efforts of the private sector are also necessary. Private actors may wish to contribute to sustainability objectives and, for example, reach a so-called "sustainability agreement" that increase, compared to the mandatory ones, the environmental standards applied by the parties of the agreement. The involvement of more than one undertaking is not only a positive element for sustainability (as there are more subjects applying stricter environmental standards) but it may also be a necessity, as the undertakings may wish to avoid the so-called 'first mover disadvantage' that can arise in these cases, essentially because all environmental standards have a cost.

Reference to the costs of "sustainability agreements" also explain why, while there may be types of cooperation based on private self-regulation pursuing sustainability objectives that do not affect (let alone) restrict competition and certainly do not fall under the prohibition of anti-competitive agreements of Article 101 TFEU, in many other cases sustainability agreements are likely to be capable of having (at least) anti-competitive effects. For instance, the sustainable measures agreed upon by the undertakings involved in the sustainability agreement might result in a general price increase of the products available to consumers or end up limiting their options. For example, if supermarkets and farmers make an agreement to improve the animal welfare conditions of the chicken that these farmers provide to supermarkets. As noted for example by the Dutch NCA (the Autoriteit Consument & Markt), such an agreement might result in a price increase of poultry meat that these supermarkets sell [85]. The debate focuses on the extent to which those anticompetitive effects can be allowed when the agreement brings, at the same time, sustainability benefits.

Sustainability is certainly one of the main objectives of EU law [86]. First, codifying the case law of the Court of Justice [87], Article 11 TFEU

MIDDELSCHULTE, M. SNOEP (eds.), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, 2021.

[84] The United Nations SDGs are available at www.sdgs.un.org.

[85] See the Autoriteit Consument & Markt Decision of 26 January 2015 in case No 13.0195.66 – *Chicken of Tomorrow* and the related Autoriteit Consument & Markt press release of 26 January 2015.

[86] On this issue see A. GERBRANDY, *Changing Competition Law in a Changing European Union*, cit.

[87] Court of Justice, case C-487/06 P, *British Aggregates v Commission* [2008] ECLI:

establishes that «environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development». The so-called principle of integration has also been "enhanced" to the rank of a fundamental right, to the extent that Article 37 CFREU provides that environmental protection and the quality of the environment are to be integrated into the EU policies, and guaranteed in accordance with the principle of sustainable development.

Then, Article 3(3) TEU emphasises that the Union shall work for the sustainable development of Europe, while Article 3(5) TEU says that «it shall contribute to [...] the sustainable development of the earth» and to «free and fair trade». When it comes to implementation, Article 7 TFEU says that «the Union shall ensure consistency between its policies and activities, taking all of its objectives into account», while Article 9 TFEU provides that «in defining and implementing its policies and activities, the Union shall take into account […] the protection of human health».

The potential of EU competition law to contribute to (or at least not hinder) the efforts to pursue sustainability objectives may be limited when following a consumer welfare/economic efficiency approach [88]. The Commission's 2004 Guidelines on Article 101(3) TFEU and the previous Horizontal Guidelines focused on «*objective economic efficiencies*» in restrictive manner. However, in the last decade, we have seen increasing concerns about integrating sustainability objectives and considerations within our competition law analysis. On 17 July 2023, the Commission adopted the new Revised Horizontal Guidelines, which contain a chapter on sustainability agreements which will be analysed below. After that, other possible paths to pursue sustainability objectives within Article 101 TFEU will be discussed.

EU:C:2008:757, para 73; case C-513/99, *Concordia Bus v Helsingin Kaupunki* [2002] ECLI:EU:C:2002:495, para 57; Case C-62/88 *Greece v Council* [1990] ECLI:EU:C:1990:153, para 20; Opinion of AG Jacobs, case C-379/98, *PreussenElektra v Schleswag* [2001] ECLI:EU:C:2000:585, para 231; Opinion of AG Mengozzi, case C-487/06 P, *British Aggregates v Commission* [2008] ECLI:EU:C:2008:419, para 102. See also J. NOWAG, *Environmental Integration in Competition and Free-Movement Laws*, Oxford University Press, Oxford, 2016, p. 15 ff.

[88] A. GERBRANDY, *Solving a Sustainability-Deficit in European Competition Law*, cit., pp. 547-548; S. HOLMES, *Climate Change, Sustainability and Competition Law*, cit., p. 371; D. WOUTERS, *Sustainability Agreements under Article 101 (1) TFEU*, in *Journal of European Competition Law & Practice*, 2021, Vol. 12, Iss. 3, p. 265.

4.1. Article 101(3) TFEU, sustainability agreements and the Revised Horizontal Guidelines

The exception contained in Article 101(3) TFEU has been discussed as the most plausible option to allow sustainability agreements under EU competition law. Article 101(3) TFEU states that agreements, decisions or concerted practices that may be declared anticompetitive according to Article 101(1) TFEU might nonetheless be exempted if they: 1. contribute to improving the production or distribution of goods or to promoting technical or economic progress (i.e. efficiency gains); 2. allow consumers a fair share of the resulting benefit; 3. their conditions are indispensable to the attainment of these objectives; 4. sufficient competition remains on the market.

When considering sustainability agreements, doubts arise in particular on whether and how "non-economic" benefits can be taken into account to calculate efficiency gains, and what is considered a "fair share" to consumers (i.e., benefits that are directed to most society at large, or affecting a different group than the consumers suffering the consumer-welfare loss, or benefits that will occur in a much longer term, etc.). The discussion below focuses on these first two conditions.

After the silence by the European Commission regarding sustainability agreements in the previous Horizontal Guidelines of 2011, and following numerous calls for certainty and change, the Commission has included Chapter 9 on sustainability agreements on the new Revised Horizontal Guidelines [89]. Sustainability agreements are defined broadly in the Revised Horizontal Guidelines and consist of those agreements whose objective supports environmental, social or economic development, such as those addressing climate change and environmental concerns but also those pursuing inter alia labour and human rights, ensuring living income, facilitating the shift to nutritious and healthy food [90]. Thus, sustainability agreements are not restricted to those pursuing environmental objectives, but the definition is broad and may include any aspect regarding sustainable development, including, for example, the improvement of data privacy conditions [91].

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[89] Revised Horizontal Guidelines, cit.

[90] *Ivi*, para 517.

[91] Collective labour agreements, which involve workers' rights, also fall within the

The Revised Horizontal Guidelines provide for a so-called 'soft safe harbour' for sustainability standardisation agreements that are not likely to produce appreciable negative effects on competition (e.g., harmonizing behaviour through a set of standard practices replacing non-sustainable products with sustainable ones, or harmonising packaging materials or sizes). The procedure for developing the standard must be transparent; the standard must not impose obligations on other undertakings not participating in the agreement; although binding requirements can be imposed in the participating undertakings, they must have the freedom to apply higher sustainability standards; the parties must not exchange commercially sensitive information; effective and non-discriminatory access to the outcome of the standard-setting process must be ensured, such as allowing other undertakings to adopt the standard later on; finally, the sustainability standard must either not lead to a significant price increase or significant reduction in quality, or the combined market share of the participating undertakings must not be higher than 20% of the relevant market [92].

In the case of sustainability agreements that are not standardisation agreements, there is a need for a detailed assessment under Article 101(3) TFEU when it comes to the measurement of efficiency gains and a fair share to consumers, unless it is obvious. For this assessment, the Commission distinguishes between agreements involving «individual use value benefits», «individual non-use value benefits» and «collective benefits». «Individual use value benefit» are those typically deriving from the consumption or the use of the products by the consumer, for example as improved product quality or price decrease. For example, when producers agree on a more efficient method of production that results in a faster production but, at the same time, entails less water use. These are the same type of benefits that may result from other agreements that are not sustainability agreements and which, in our case, also happen to bring positive externalities related to sustainability. Since their benefits concerning price, quality, or other similar profiles are bigger than the possi-

definition of sustainability agreement. However, as it has been explained in the previous paragraph, those agreements are generally exempted from the application of Article 101 TFEU following the *Albany* exception for collective bargaining (case C-67/96, *Albany*, cit.).

[92] Revised Horizontal Guidelines, cit., para 549.

ble anticompetitive damage to consumers, they are considered to bring efficiency gains.

Since this paper mainly aims at discussing how sustainability benefits are to be integrated in Article 101(3) TFEU, focus needs to be placed in those agreements that, according to the Commission, bring «individual non-use value benefits» and «collective benefits». «Individual non-use value benefits» are considered indirect benefits which result from the consumers' appreciation of the impact of their sustainable consumption on others, and they are to be measured by the so-called willingness-to-pay method [93]. Only if the parties to the agreement can demonstrate that consumers are "willing to pay" for the sustainable improvement that the agreement brings will the agreement fall under the efficiency gains requirement of Article 101(3) TFEU [94]. For example, would consumers be willing to pay for the price increase on chicken meat that an agreement concerning animal welfare of chickens has caused [95]?

A direct evaluation method asking consumers which value they ascribe to a product (in this case, the willingness-to-pay method) is referred to by the Commission. However, this approach has been object of criticism. On top of the different inherent difficulties of the method itself, such as the possibility that the results may be influenced by the chosen structure of the survey or wording of questions, we come across the struggle of economically quantifying all aspects of a sustainability goal or benefit (e.g., how do we value intergenerational equity?) [96]. In addition, if consumers were willing to pay for more environmentally

[93] These are referred to in the Revised Horizontal Guidelines, cit., para 576, according to which «[f]or example, consumers may opt for a particular washing liquid not because it cleans better but because it contaminates less the water. Similarly, consumers may be ready to pay a higher price for furniture made from wood that is grown and harvested sustainably not because of the better quality of the furniture but because consumers want to stop de-forestation and loss of natural habitats. In the same vein, drivers may opt for using more expensive fuel not because it is of higher quality and better for their vehicles, but because it pollutes less».

[94] According to the Commission, parties to the agreement should not be able to impose their own preferences to consumers. *Ivi*, para 580.

[95] Case No 13.0195.66 – *Chicken of Tomorrow*, cit.

[96] OECD, *Sustainability and Competition*, 2020, Note by Germany, pp. 16-17, available at www.oecd.org; K. WHITE, D. J. HARDISTY, R. HABIB, *The Elusive Green Consumer*, in *Harvard Business Review*, 2019; C. VOLPIN, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, cit., pp. 3-4.

friendly products, then the market failure will not be there, neither the first mover disadvantage, resulting in no need to exempt sustainability agreements. Thus, using the willingness-to-pay method in this context is questionable.

This aspect escapes the scope of the consumer welfare paradigm and of the more economic approach to competition rules. In addition, other market failures, such as consumer biases, are relevant when measuring sustainability benefits through a direct evaluation method. The actual willingness-to-pay frequently differs from the stated willingness-to-pay (bounded rationality of consumers). Potential biases or lack of knowledge may arise both when considering future benefits against immediate costs, but also when assessing the preferences of consumers for a balancing of effects [97]. Hyperbolic discounting (giving less importance to events that may happen on the future), lack of information, diffusion of responsibility thinking that one's sacrifice will not make a difference, perceiving something higher to the usual price as a loss are all important behavioural biases that may affect consumer's willingness to pay [98]. These biases, noted by behavioural economics, might be mitigated only up to a certain extent [99].

In addition, it should also be noted that consumer sustainability preferences may be in conflict with societal sustainability preferences [100]. Consumers' preferences may differ when acting as consumers in the market as opposed to when acting as citizens in society and the political sphere. A consumer is not an isolated role, but that consumer belongs to a broader social context, being also a citizen, a worker [101]. Thus, one should wonder, especially when it comes to the realisation of sustainability as a public interest and obligation derived from the TFEU, whether this societal value and preference should be considered by competition law beyond

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[97] R. INDERST, S. THOMAS, *Integrating Benefits from Sustainability into the Competitive Assessment- How Can We Measure Them?*, in *Journal of European Competition Law & Practice*, 2021, Vol. 12, Iss. 9, pp. 705-709.

[98] C. VOLPIN, *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, cit., pp. 3 and 4.

[99] R. INDERST, S. THOMAS, *Integrating Benefits from Sustainability into the Competitive Assessment- How Can We Measure Them?*, cit., p. 708; also, see the Revised Horizontal Guidelines, cit., para 579.

[100] I. LIANOS, *Polycentric Competition Law*, cit., p. 161.

[101] *Ivi*, p. 172.

just a consumer preference. The multiple overlapping contexts or roles of an individual in society could be taken into account and, as a result, considered when addressing the effects of a behaviour in the competition law assessment, rather than only focusing on the interests of the narrow group of consumers [102].

Finally, when it comes to the "fair share" requirement, the Commission considers an exception concerning «collective benefits», which affects a larger group of society irrespectively of consumer's individual appreciation. In this case, the sustainability impact from individual consumption accrues to a larger group. The sustainability agreement can be used to internalise the negative externalities of individual unsustainable consumption and bring about sustainability benefits to a larger group of the society (think of environmental damage agreements, such as those concerning emissions, or phasing out polluting technology) [103].

While the balancing of benefits with negative effects resulting from agreements is normally conducted within the relevant market, the Commission states that, where two markets are related, efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same [104]. Only regarding agreements involving «collective benefits», benefits for others than merely the users can be taken into account, since, in those cases, it is the demand for the products in question the one creating the problem that affects society, and it can be fair not to fully compensate users for the harm that the agreement causes [105]. However, when the consumers do not benefit from the agreement, these benefits will fall under the category of «individual non-use value»

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[102] Some authors have used the term *citizen welfare* to refer to the described approach: F. CENGID, *The Conflict between Market Competition and Worker Solidarity: Moving from Consumer to a Citizen Welfare Standard in Competition Law*, in *Legal Studies*, 2020, Vol. 41, Iss. 1, p. 1; K. CSERES, *EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding*, in C.M. COLOMBO, M. ELIANTONIO, K. WRIGHT (eds.) *The Evolving Governance of EU Competition Law in a Time of Disruptions: a Constitutional Perspective*, Hart, Oxford, 2022.

[103] Revised Horizontal Guidelines, cit., paras 582 and 583.

[104] *Ivi*, para 583.

[105] According to the revised Horizontal Guidelines, para 584: «[…] collective benefits to the consumers in the relevant market that occur outside that market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm that they suffer».

and can only be considered to the extent that consumers are willing to pay for them [106].

For example, following the Commission's Horizontal Guidelines, an agreement that reduces the use of fertilisers and water in the products used for dying clothing in the factories located in the EU would likely bring collective benefits, since there is likely a substantial overlap of consumers (the consumers of these clothing in the EU) and the beneficiaries of the environmental benefits (individual living in the EU). However, when considering an agreement concerning sustainable cotton that reduces chemicals and water use in a third country where said cotton is cultivated, the benefits would not be considered collective benefits because there is no overlap between the clothing consumers in the EU and the people living in the area of that third country where the cotton is cultivated. Therefore, the Commission sticks to the traditional consumer welfare restrictive interpretation of the "fair share" requirement, since it requires a substantial overlap between the group of affected consumers and those that benefit from the agreement for any "collective benefits" to be taken into account.

In conclusion, while the Commission recognizes the importance of pursuing sustainability objectives in the EU, it does not grant an exemption to sustainability agreements, or even to environmental agreements, but just clarifies when these would fall under the requirements of the general exemption of Article 101(3) TFEU, following a consumer welfare approach that, in short, it does not directly include in its analysis non-economic objectives.

4.2. Other possible paths to exempt sustainability agreements from Article 101 TFEU

The possibility of applying an inherent limitation of Article 101 TFEU applicable when competition law clashes with sustainability objectives has also been mentioned by scholars [107]. The *Albany* [108] exception followed in the case of collective labour agreements, as well as the *Wouters*

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[106] *Ivi*, para 585.

[107] S. HOLMES, *Climate Change, Sustainability and Competition Law*, cit., p. 371; D. WOUTERS, *Sustainability Agreements under Article 101 (1) TFEU,* cit., p. 265.

[108] Case C-67/96, *Albany*, cit.

doctrine [109], have been mentioned as possible paths to consider sustainability objectives under Article 101 TFEU.

As seen in the previous paragraph, in the *Albany* judgment [110], the Court of Justice held that Article 101 TFEU does not apply to collective labour agreements, when some conditions are met, on the basis of the indispensability of collective agreements when pursuing Treaty's social policy objectives. In the *Wouters* ruling [111], the Court of Justice excluded the application of Article 101 TFEU to the self-regulation measures taken by the Dutch Bar association that restricted partnerships between lawyers and accountants.

That exception was made on the basis of pursuing legitimate objectives of domestic public policy. The *Wouters* doctrine was referred to in several other cases by the Court of Justice, regarding other professional bodies [112]. Still, the Court of Justice made clear in these cases that a balancing exercise is necessary between the pursing of legitimate objectives and Article 101 TFEU, since it found that the restrictions to competition concerned went beyond what was necessary to pursue the legitimate objectives referred to [113].

It can be argued that the social policy objectives can be applied to sustainability objectives *mutatis mutandis*. Given the similar status of these objectives in the Treaties, some authors defend the existence of the possibility that the Court of Justice can limit the application of Article 101 TFEU to sustainability agreements on the basis of pursuing relevant Treaty's objectives (see Article 3(3) TEU, Article 3(5) TEU, Article 7 TFEU, Article 9 TFEU, Article 11 TFEU). Given the growing importance and urgency of sustainability matters, it could be more likely that these could be seen as matters that should not be caught by Article

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[109] Case C-309/99, *Wouters*, cit.

[110] Case C-67/96, *Albany*, cit.

[111] Case C-309/99, *Wouters*, cit.

[112] Court of Justice, case C-519/04 P, *Meca-Medina*, [2006] ECLI:EU:C:2006:492; Court of Justice, case C-136/12, *Consiglio Nazionale dei Geologi (CNG)* [2013] ECLI:EU:C:2013:489; Court of Justice, case C-184/13, *API- Anónima Petrol iItaliana SpA* [2014] ECLI:EU:C:2014:2147; case C-1/12, *Ordem dos Técnicos Oficiais de Contas*, cit.

[113] M. UFFER, *Chapter 9 Competition Law: Sustainability Through Competition and Participation*, in B. PETERS, E. LOHSE *Sustainability through Participation? Perspectives from National, European and International Law*, Brill, Leiden, 2023, p. 260.

101(1) TFEU [114]. Nevertheless, since the *European Superleague* judgement of December 2023 [115], it could be possible that the Court of Justice does not follow such a broad understanding of the Wouters exception [116].

As we have seen in the previous paragraph, this is not the path recommended by the Commission. Still, the Court of Justice's case law can justify the exemption of a sustainability agreement from the application of Article 101 TFEU without an assessment under 101(3) TFEU on the basis of this previous case law [117]. On the downside, it should also be noted that the transparent balancing of competing objectives and considerations under Article 101(3) TFEU provides more legitimacy to the prioritisation of sustainability objectives [118]. A less narrow interpretation of that provision than the one suggested by the Commission can allow that prioritisation.

5. Conclusion

When looking at the recent trends regarding non-economic objectives and considerations within Article 101 TFEU, this paper focused on two recent developments brought forward by the Commission given the need to adapt to the digital and sustainability challenges.

Since the end of the nineties, the Commission had followed the so called more economic approach to EU competition law, generally leaving aside non-economic objectives within its antitrust analysis. However, in the last few years, Commissioner Vestager has put an emphasis on the role of fairness within competition law.

The first development object of study was related to one of the challenges brought by digital markets. The existence and continuous growth of digital platform workers, or gig workers, resulted in the discussion of

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[114] S. HOLMES, *Climate Change, Sustainability and Competition Law*, cit., p. 371.

[115] Case C-333/21, *European Super League*, cit.

[116] *Supra* para 3.2.

[117] *Ibidem*; D. WOUTERS, *Sustainability Agreements under Article 101 (1) TFEU*, cit., p. 21.

[118] M. UFFER, *Chapter 9 Competition Law: Sustainability Through Competition and Participation*, cit., p. 260.

whether these atypical workers could fall under the exemption from Article 101 TFEU when entering into collective bargaining agreements. This exemption was developed by the case law of the Court of Justice following the *Albany* case[119], and it exempts the application of Article 101 TFEU to certain collective bargaining agreements on the basis of the social policy objectives of the EU.

The Commission, in the new SSE Guidelines, and referring to the relevant social policy objectives of the TFEU, follows the case law developed by the Court of Justice and adapts it to the new reality that digital platform workers bring. Following the same reasoning, the SSE Guidelines extend the exemption to collective labour agreements between digital labour platforms and solo self-employed workers.

The second development concerned the possible exemption of sustainability agreements following the exemption provision of Article 101(3) TFEU after falling under the prohibition of Article 101(1) TFEU. Many authors had expressed the need to consider sustainability objectives in competition law by considering sustainability benefits under Article 101(3) TFEU. The Commission, in the new Horizontal Guidelines, despite recognising the importance of sustainable development and finally providing legal certainty to the completion of sustainability agreements between competitors, sticks to a consumer welfare analysis of Article 101(3) TFEU based on economic efficiency and, in short, not considering non-economic objectives within it beyond their economic efficiencies.

Therefore, there seems to be still a contrast between the existent case law referring to public policy objectives of EU law versus the Commission's interpretation of Article 101(3) TFEU and its consumer-welfare focused analysis. The TFEU provides for the consistency between its policies and activities, taking all of its objectives into account (Article 9 TFEU), which seems to be considered regarding social policy objectives but does not meet the same mark when considering other EU policy objectives concerning sustainable development.

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[119] Case C-67/96, *Albany*, cit.

Applying Article 102 TFEU to Multisided Online Platforms: Discrimination, Leveraging and Undefined Abuses of Dominance

Daniel Mandrescu [*]

1. Introduction

The application of EU competition law to online platforms has proven time and time again to pose significant challenges to the European Commission (the "Commission"), the Member States' National Competition Authorities ("NCAs") and courts. The growing success of prominent platforms triggered a push towards adjusting and complementing the current framework of EU competition law to deal with these actors. This push for more effective and timely enforcement is seen particularly in the context of abuses of dominance under Article 102 TFEU, which has been the primary legal framework for dealing with the anti-competitive behavior of these actors so far [1]. Despite the growing number of cases, the chal-

[*] Assistant professor of EU Competition Law and Innovation at the University of Leiden, The Netherlands.

[1] Over the past fifteen years, the leading cases against Google (e.g. case AT.40670 – *Google - Adtech and Data-related practices*; Commission Decisions of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*; 18 July 2018 in case AT.40099 – *Google Android*; 27 June 2017 in case AT.39740 – *Google Search (Shopping)*, Apple (e.g. case

lenges associated with this process have not necessarily become smaller or fewer. Nevertheless, there is an increasing understanding of the need to adjust current practice to the realities of online platforms to capture the pro-and anti-competitive potential behind their business practices. This realization can be witnessed in how new and more complex theories of harm have been identified in recently decided and ongoing cases [2]. Furthermore, these evolving insights have been accumulated, translated, and eventually bundled in what now will become the leading competition law-oriented regulatory tool for online platforms, namely the Digital Markets Act (the "DMA") [3].

Nevertheless, the growing experience of current practice remains case-oriented, and general insights into the competitive concerns raised by multisided online platforms have not yet reached a consensus. This is also, to a great extent, reflected by the scope of the DMA. Although this new regulatory framework is intended to address the business practices of multisided platforms that may interfere with the process of healthy competition, it does so in a pinpointed manner. The scope of application is limited to a list of specific types of platform service providers, and the obligations included in it entail narrowly formulated prohibitions. Furthermore, its enforcement is, in principle, solely left in the hands of the Commission, whereby NCAs and national courts appear to be expected to play only a supporting role [4]. Admittedly, this approach is perhaps also why implementing the DMA was possible to begin with, as more sweeping and open-ended regulatory frameworks would have been met with

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AT.40452 – *Apple – Mobile payments*; case AT.40437 – *Apple - App Store Practices (music streaming)*, Amazon (e.g. Commission Decisions of 20 December 2020 in case AT.40462 – *Amazon Marketplace* and in case AT.40703 – *Amazon Buy Box*; 4 May 2017 in case AT.40153 – *E-book MFNs and related matters (Amazon)*), Microsoft (e.g. AT.40721– *Microsoft Teams*; Commission decisions of 16 December 2009 in case AT. 39530 – *Microsoft (Tying)*), and Facebook (e.g. case AT.40684 – *Facebook Marketplace*) were all done under the scope of Article 102 TFEU and /or the national equivalent of this provision.

[2] The recent investigation into Facebook's potential tying practices is a good example of this. See case AT.40684 – *Facebook Marketplace*, cit., and the related Commission press release No IP/22/7728 of 19 December 2022.

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

[4] Articles 37-39 of the DMA.

more opposition from practice and would be less likely to achieve the goal of timely intervention. These choices can be further justified by the fact that the DMA is not intended to replace EU competition law enforcement but rather to complement it [5]. In practice, however, this means that the (parallel) application of (EU) competition law to multisided online platforms will have to continue, especially at the national level, where the power to apply the DMA is only partial.

Against this background, this chapter aims to provide guidance on the application of EU competition law to multisided online platforms, specifically focusing on Article 102 TFEU. To do so, the chapter will be structured as follows. First, the characteristics of multisided platforms will be discussed to provide insight into the economic rationale behind their business practices, which may appear contentious when viewed through the lens of previous practice concerning non-platform entities. Such insights will be an inseparable part of the legal and economic context that must be accounted for when dealing with platforms under EU competition law to avoid erroneous findings stemming from applying insights from non-platform contexts [6]. Second, paragraphs 3 and 4 will be devoted to the characteristics of platforms that are likely to cross paths with Article 102 TFEU (or the national equivalent thereof) throughout their lifecycle. These paragraphs will provide an overview of the potentially anti-competitive practices that are most likely to manifest in platform settings and offer various options to tackle these under Article 102 TFEU. Finally, paragraph 5 will be devoted to presenting additional ways that Article 102 TEU can be used to tackle unprecedented business practices implemented by multisided online platforms. This paragraph, which will be followed by a final conclusion, focuses on the non-exhaustive character of Article 102 TFEU that enables the identification of new types of abuse as well as the possibility (and perhaps even obligation) to look at compliance with parallel regulatory frameworks to establish an abuse.

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[5] Recital 10 of the DMA.

[6] J. WRIGHT, *One-Sided Logic in Two-Sided Markets*, *AEI-Brookings Joint Center Working Paper*, 10/2003, available at www.papers.ssrn.com.

2. The economic context of platforms

In the context of competition law policy, online platforms are commonly discussed in relation to their multisided market character, which places them in a different commercial reality compared to non-platform undertakings [7]. For platforms to be considered multisided, these must (i) facilitate an interaction between two or more separate customer groups, (ii) exhibit indirect network effects, (iii) and the platform is necessary for internalizing the externalities created [8]. These elements constitute the foundation of platform entities and thus directly impact their commercial and, therefore, also the legal reality that requires accounting for in the process of application [9]. Broadly speaking, the different commercial reality stems from the fact that platforms create value by successfully facilitating a (matchmaking) service between two or more separate customer groups [10]. Consequently, the success of platforms depends on their ability to bring the right customer groups 'on board' and coordinate the interaction between such groups in a profitable manner [11].

In the early days of every platform, this coordination task translates into a chicken-and-egg problem they need to solve. The first customer group to get on board has little or nothing to gain from their participation in the absence of involvement of additional customer groups on the other

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[7] B. MARTENS, *An Economic Policy Perspective on Online Platforms*, *Institute for Prospective Technological Studies Digital Economy working paper*, 5/2016, p. 12, available at www.ec.europa.eu.

[8] *Ivi*, pp. 10-18; Commission Staff working document of 25 May 2016 on Online Platforms – Accompanying the Communication on Online Platforms and the Digital Single Market, SWD (2016) 172 final, pp. 1-9; OECD, *Two-Sided Markets*, 2009, p. 3, available at www.oecd.org.

[9] This is to a great extent the main theme discussed in expert reports concerning the application of competition policy to online platforms see e.g., Commission, Expert report by J. CRÉMER, Y.A. DE MONTJOYE, H. SCHWEITZER, *Competition Policy for the Digital Era*, Publications Office of the European Union, Luxembourg, 2019; OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018, available at www.oecd.org; Report of the Digital Competition Expert Panel, *Unlocking Digital Competition*, 2019, available at www.assets.publishing.service.gov.uk.

[10] J.C. ROCHET, J. TIROLE, *Two-Sided Markets: A Progress* Report, in *The RAND Journal of Economics*, 2006, Vol. 37, Iss. 3, p. 645.

[11] B. CAILLAUD, B. JULLIEN, *Chicken & Egg: Competition among Intermediation Service Providers,* in *The RAND Journal of Economics*, 2003, Vol. 34, Iss. 2, p. 309.

side(s) of the platform and vice versa [12]. In practice, this problem has been successfully overcome through various launch strategies [13]. Nevertheless, the interdependence between the different customer groups of platforms remains central to their survival throughout their entire lifecycle. Therefore, when competing with other (platform) undertakings, platforms compete to attract the customers they wish to get on board in optimal proportions, depending on their business model [14]. Doing so in practice means meeting different types and degrees of demand for the platform service(s), which requires making different value propositions for such customer groups to join the platform [15]. Such different offers entail the adoption of skewed pricing structures where (at least) one customer group (the subsidizing group) pays more to participate on the platform than another group (the subsidized group) [16]. This means that the price structure of platforms is non-neutral [17]. In other words, the demand for platform services depends not only on the overall level of platform fees but also on how these fees are allocated across the different customer groups [18].

The economic literature on pricing in two and multisided markets has identified multiple variables influencing how platforms set their total price structure and level [19]. Such variables can be divided into on-plat-

[12] *Ibidem*. Perhaps the only exception to this problem are peer-to-peer platforms such as eBay and Airbnb as the customers of these platforms can in most cases participate on both sides of the interaction (or platform). Sellers on eBay are often also buyers and users on Airbnb can choose to either offer their residence for a short-term stay or rent one from other users.

[13] E.g., some platforms started off as non-platform entities. Facebook, for example, was not open to ads during its early days when it was intended to be a university-oriented communication platform. TripAdvisor started off as a review site for consumer's experience of hotels, restaurants, and attractions and transformed at a later stage into a hotel room booking platform.

[14] E.g., a ride-hailing platform would try to keep a specific balance between consumers and drivers per available territory. Such a balance may differ, for example, when compared to a hotel room booking platform or an online marketplace.

[15] M. RYSMAN, *The Economics of Two-sided Markets*, in *Journal of Economic Perspectives*, 2009, Vol. 23, Iss. 3, p. 125, pp. 129-131.

[16] B. CAILLAUD, B. JULLIEN, *Chicken & Egg: Competition among Intermediation Service Providers*, cit.

[17] B. MARTENS, *An Economic Policy Perspective on Online Platforms*, cit., pp. 11-14.

[18] See OECD, *Two-sided markets*, cit., pp. 29-30.

[19] F. ZINGAL, F. BECKER, *Drivers of Optimal Prices in Two-sided Markets: The State of the Art,* in *Journal für Betriebswirtschaft*, 2013, Vol. 63, Iss. 12, p. 87.

form and off-platform variables. On-platform variables concern variables that originate from the platforms' business model. These include the nature and intensity of network effects, the homing patterns of customers, and the price sensitivity of customers. These variables indicate the relative value the respective customer groups derive from the platform and their willingness to pay. Off-platform variables concern variables originating from the market conditions and competitive pressure experienced by platforms in each case. These include the number of competitors the platforms face concerning each customer group and their homing patterns. These variables indicate the degree of (direct) competitive pressure experienced by platforms.

When getting various customer groups on board, their participation, called homing patterns [20], can differ. Homing patterns, which can be divided into single-homing and multi-homing, are considered one of the main indicators of market power. Single-homing occurs when a platform customer group uses a single platform to fulfill its specific demand for a service. This would occur, for example, if consumers only used Booking.com to reserve hotel rooms online. Multi-homing occurs when platform customers use multiple platforms to fulfill their demand for the same service provided by the platform. This would occur when consumers choose to search and reserve hotel rooms via multiple platforms outside of Booking.com. Since platforms inherently bring together two or more customer groups, homing patterns on a platform can result in (i) multisided single-homing [21], (ii) multisided multi-homing [22], and (iii) single-homing on one side and multi-homing on another side of the platform [23], also referred to as a bottleneck scenario. From a market power perspective, the platform undertaking would commonly have the incentive to ensure that at least one of its customer groups is single-homing, as this provides the platform with monopoly power with respect to the other platform customer groups that are interested in interacting with such sin-

[20] A. TIWANA, *Platform Ecosystems: Aligning Architecture, Governance, and Strategy*, Morgan Kaufmann Publishers, San Francisco, 2014, p. 36.

[21] This occurs, for example, in the case of the Apple App Store which must be used by consumers and app developers to buy and sell iOS apps.

[22] This occurs, for example, in the case of hotel room booking platforms where consumers and hotel owners use multiple platforms for the same purpose.

[23] This occurs, for example, in the case of payment cards: consumers usually have one credit card while merchants tend to accept multiple cards.

gle-homing groups. Where single-homing is achieved on all sides of the platform, such market power would be even greater as it would apply, in principle, to all groups simultaneously [24]. By contrast, in a multisided multi-homing scenario, the market power of the platform with respect to its customer groups and competitors is constrained by the ability and willingness of such customer groups to use alternative solutions.

Once members of two or more separate customer groups join the platform, the network effects at play enable the platform's growth to viability (also referred to as critical mass) and, in the long run, even help secure a monopoly position [25]. Network effects can be divided into direct and indirect network effects. In the case of platforms (positive), direct network effects are present when the value of the platform for one of its customer groups increases with the presence of more members of the same customer group. Indirect network effects, by contrast, are present when the value of the platform service for a customer group increases with the presence of members of a different customer group. Both types of network effects will vary in intensity and range between negative (decreasing value) and positive (increasing value) depending on the business model of the respective platform. Such a setting will also influence how the platform pricing scheme will be set [26]. To harness and utilize the benefits of such effects, each platform must engage in constant refinement of its service(s), pricing structure, and governance rules that tackle undesired practices on the platform [27]. The importance of network effects ex-

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[24] This happens in the Apple App Store which imposes the single-homing of both consumers and app developers as part of the terms and conditions of the iOS ecosystem.

[25] D.S. EVANS, R. SCHMALENSEE, *The Antitrust Analysis of Multi-Sided Platform Businesses*, in R. BLAIR, D. SOKOL (eds.), *Oxford Handbook on International Antitrust Economics*, Oxford University Press, Oxford, 2014, pp. 404-448; D.S. EVANS, R. SCHMALENSEE, *Failure to Launch: Critical Mass in Platform Businesses*, in *Review of Network Economics*, 2010, Vol. 9, Iss. 4; G.G. PARKER, M.W. VAN ALSTYNE, S.P. CHUDARY, *Platform Revolution*, W.W. Norton & Company, New York, 2016, pp. 123-127.

[26] J.J. GABSZEWICZ, D. LAUSSEL, N. SONNAC, *Does Advertisement Lower the Price of Newspapers to Consumers? A Theoretical Appraisal,* in *Economic Letters*, 2005, Vol. 87, p. 127.

[27] See A. HAGIU, *Pricing and Commitment by Two-Sided Platforms*, in *The RAND Journal of Economics*, 2006, Vol. 37, Iss. 3, p. 720; K.J. BOUDREAU, A. HAGIU, *Platform Rules: Multi-Sided Platforms As Regulators*, in A. GAWER (ed.), *Platforms, Markets and Innovation,* Edward Elgar, Cheltenham, 2009.

tends to the entire platform lifecycle as one of the main determinants of market power and growth.

Against this background, it can be said that the abovementioned will constitute an inseparable part of the legal and economic context that must be considered to evaluate whether a particular platform business practice entails *competition on the merits*[28]. Doing so will allow one to adequately assess the risk of (anti-competitive) market power leveraging as well as the existence of potentially abusive (exclusionary or exploitative) discrimination while allowing practices that are legitimately in line with platform logic despite their initially concerning appearance.

3. Platform expansions and abusive market power leveraging

Implementing market power leveraging strategies is an (almost) inevitable aspect of a platform lifecycle. This is because most, if not all, platforms will, at some point in time, need to expand. Once a platform reaches critical mass, this signifies that it is considered viable and can proceed with maximizing the value creation and monetization of the service it facilitates[29]. Increasing the value of the platform service(s) entails mainly reducing the costs incurred by the platform customer groups, including information, search, and transaction costs[30]. Reducing such costs helps increase the volume of customers and, thereby, the likelihood of revenue-creating actions by these customers, such as purchases, clicks on ads, membership subscriptions, and more. This, in turn, may also raise the willingness of some customers to pay more for their use of the platform. It is not hard to imagine that sellers would be willing to pay a higher transaction fee for an online marketplace that attracts more consumers by offering a superior purchasing experience that increases sales.

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[28] Competition on the merits refers to competition on parameters such as price, choice, quality, or innovation and not means only available due to significant market power. See further discussion in OECD, *Competition on the merits*, 2006, available at www.oecd.org.

[29] See e.g. A. HAGIU, *Multi-sided platforms: From micro-foundations to design and expansion strategies*, Harvard Business School Strategy Unit Working Paper 09-115/2009, available at www.papers.ssrn.com.

[30] *Ibidem*.

As part of the expansion process, platforms may also move on to increase their territorial reach. Such a step entails *de facto* a market power leveraging exercise where the platform extends from one geographical (sub) market to another. This can be seen, for example, in the case of platforms that offer services provided locally, such as ride-hailing or sharing (e.g., Uber) or food ordering and delivery (e.g., Grubhub, Uber Eats) [31]. Depending on how the relevant market is defined in such cases, territorial expansions may warrant caution as they may involve bellow price (i.e., predatory) or other exclusionary strategies by dominant platforms. Such strategies can involve, for example, initial reductions for new customers from a specific geographic location, price parity clauses (narrow or wide), exclusivity clauses, or rebates for business customers.

Although such practices may be pretty standard in certain sectors of the economy, such as hotel room booking, ride-hailing, food order and delivery, and even retail, when dominant actors implement these, their impact on competition will be significant. This is because such leveraging actions prevent other competing platforms from being able to get the right customer groups 'on board'. Accordingly, when such practices are identified, assessing their anti-competitive potential requires first looking at how these may interfere with the ability of other (competing) platforms to compete for the same customer groups. Secondly, it is essential to assess the homing patterns of the customer group(s) to whom such business practices apply and to what extent such practices can (forcefully) curb the homing patterns of the respective platform customer groups. Thirdly, an assessment needs to be made as to what extent the network effects at play on the platform will amplify such shifts in homing patterns and thereby fuel the process of market power leveraging and growth. Finally, it must be assessed whether the identified business practices constitute competition on the merits or, instead, an abusive practice.

In practice, this analysis will go as follows. For example, Uber Eats operates in a market where both consumers and restaurant owners multihome. Imposing an exclusivity clause or introducing a loyalty rebate system for restaurant owners will certainly have the potential to get restau-

[31] See the example of OpenTable in D.S. EVANS, R. SCHMALENSEE, *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press, Boston, 2016, chapter 1; S.P. CHOUDRAY, *Platform Scale: How an Emerging Business Model Helps Start-Ups Build Large Empires with Minimum Investment*, Platform Thinking Labs Publishing, 2015, pp. 260-309.

rant owners to single-homing. If that were to occur, the indirect network effects at play would likely amplify such effects to some degree. The more restaurants the platform displays, the more interesting it becomes to consumers and vice versa. Nevertheless, as the nature of the food delivery service is locally focused, the magnitude of these effects will be limited. Accordingly, such practices could indeed have a foreclosure effect; however, its manifestation in practice would require an (almost) nationwide strategy to be effective. In the absence of such a strategy, it is unlikely for practices to come under the scope of Article 102 TFEU. If such a widespread strategy is in place, the next step would be to assess whether it can be (effectively) countered by competing platforms. At this last stage, when the concerned practices appear to fall within the ambit of established abuse categories under Article 102 TFEU, these can be applied as in the past while accounting for the multisided nature of the respective platform [32].

In addition to the above-mentioned territorial expansions, platforms can also expand the scope of their services. Such a mode of expansion will occur with all kinds of platforms once the commercial potential of their core service(s) is utilized to their fullest (profitable) extent [33]. Expanding the selection of services allows platforms to increase their revenue-generating options significantly and to engage or fend off a so-called envelopment attack from potential competitors in related markets [34]. By adding more services to their existing portfolio, platforms can harness more of the growth potential that such business structures have, allowing them to extend their presence and capitalize on their activity across additional markets. When expanding, platforms essentially go back to the launching phase but can skip the chicken-and-egg problem as the new service(s) will be targeting (at least part of) their already existing customer base. For example, every time Booking.com added another service, it already had one of the needed customer groups on board, namely end consumers.

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[32] E.g., see D. MANDRESCU, *Abusive Pricing Practices by Online Platforms: A Framework Review of Art. 102 TFEU for Future Cases*, in *Journal of Antitrust Enforcement*, 2021, Vol. 10, Iss. 3, p. 469.

[33] See e.g. A.S. STAYKOVA, J. DAMSGAARD, *Platform Expansion Design as Strategic Choice: The Case of WeChat and Kakaotalk*, Research Papers, 78/2016, available at www.aisel.aisnet.org.

[34] T. EISENMANN, G. PARKER, M. VAN ALSTYNE, *Platform Envelopment,* in *Strategic management Journal*, 2011, Vol. 32, Iss. 12, p. 1270.

The moment of expansion represents the point in time when platforms will attempt to leverage their market power from the market(s) of their already established service(s) to the market(s) of the newly added platform service(s). Generally speaking, the prospect of successful leveraging depends on the relationship between the already established platform service and the newly offered one(s) and the degree of customer overlap between them. The relationship between the existing and the newly added platform services can be one of (i) complements (e.g., Amazon Marketplace and Amazon Pay), (ii) weak substitutes (Facebook and WhatsApp), or (iii) non-related (Windows OS and LinkedIn). The degree of customer overlap commonly depends on such relationships where complements often show the most significant potential. For example, in the case of eBay, the addition of PayPal was successful as PayPal was useful for eBay's already existing customer groups, namely consumers and traders. In the case of weak substitutes and non-related services, the correlation between the nature of the relationship and the degree of customer overlap can vary. For example, in the case of Facebook and WhatsApp, which were considered weak substitutes, there was a very significant degree of overlap. Similarly, in the case of LinkedIn, which was to be added to Windows OS, a non-related product, the degree of overlap was significant and also the reason why Microsoft was not allowed to combine them in one offer[35]. Accordingly, during the evaluation of the anticompetitive potential of a strategy, it is crucial that the degree of customer overlap is addressed with diligence and explored extensively.

In light of the above, it can be said that the moment of expansion is also the moment in time when legal scrutiny under Article 102 TFEU and/or its national counterpart can be triggered. That is not to say that expansions are inherently harmful but rather that market power leveraging is inherent to the survival of platforms in the long run and will inevitably take place at some point in the lifecycle of every multisided platform. The main concern, then, from a competition law perspective, should be how this is done and whether that complies with the notion of competition on the merits.

When expanding their scope of services, platforms can choose to do so by either providing more services through an existing platform or by

[35] Commission Decision of 6 December 2016 in case M.8124 – *Microsoft / LinkedIn*, commitments section.

launching (or acquiring) another platform. This is something that can be seen in the case of almost all of the leading platforms today. For example, Booking.com started by offering hotel room bookings and recently attempted to extend into flight booking services by acquiring eTraveli, which the Commission prohibited due to the market power leveraging concerns of this concentration [36]. Similarly, Uber started as a ride-hailing platform and is now being offered with Uber Eats, which is a food delivery platform. Although platform companies can also choose to expand with non-platform standalone products or services, such expansions are strategically less attractive as these will often not allow the respective platform to benefit from the (indirect) network effect at play. This can be seen, for example, in the case of Amazon, which offers a great deal of (physical) products like Alexa, Kindle E-readers, or home security devices on top of its marketplace service. While these products indeed represent new sources of revenue, they do not, as such, enhance the demand for Amazon Marketplace for consumers or sellers. By contrast, the addition of Amazon Pay relies on the existing success of the marketplace service while enhancing its value. Over time, the positive feedback loop between the two fosters further growth for both. In the context of competition law, it is precisely this feedback loop that represents the anticompetitive potential behind such expansions and, thus, market power leveraging exercises.

When assessing such practices, the main steps of assessment are similar to those of territorial expansions. Accordingly, the initial focus should be on the impact that such strategies may have on the homing patterns of the platform customers and how network effects at play will contribute to the (further) growth of the platform services involved. Once the leveraging potential of the strategy is identified, what remains to be assessed is whether the adopted practices entail competition on the merits. The abusive character of the expansion strategy can take various forms. Tying (or bundling) can be, for example, a very efficient strategy for market power leveraging [37]. This would occur, for example, when participation in the established platform service requires the (passive or active) participation

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[36] See Commission Decision of 25 September 2023 in case M.10615 – *Booking Holdings / Etraveli Group*.

[37] D. MANDRESCU, *Tying and Bundling by Online Platforms - Distinguishing between Lawful Expansion Strategies and Anti-competitive Practices*, in *Computer Law and Security Review*, 2021, Vol. 40, p. 1.

of platform customers in the newly added platform service [38]. This was the case, for example, with eBay, which required the use of PayPal to complete transactions. More recent examples concern the ongoing investigation against Microsoft and the tying of Teams to its Microsoft 365 and Office 365 packages to the detriment of competitors such as Zoom or Slack [39].

Other possibilities, such as sub-cost (predatory) strategies, are also suitable for achieving a similar outcome by providing the newly launched platform service at a loss and cross-subsidized from the profits obtained in the market in which the platform is dominant. Where the concerned platform services are offered across separate platforms, the analysis of abuse entails applying the existing practice to them while accounting for the multisided nature of such platforms, which entails the costs involved in offering a platform service extend beyond the costs of service a single customer group [40]. Where, however, the expansion occurs on a single platform, predatory strategies require great diligence when it comes to the market definition as the market definition determines to a great extent which costs can be taken into account and how these are to be allocated for the analysis [41]. Alternatively, leveraging strategies may take the form of discriminatory or self-preferencing practices when it comes to interoperability, access to data, and access to the market. These options can be seen in recent cases and investigations concerning platform undertakings.

Apple offers limited interoperability between the Apps Store and third-party payment processing services for (paid) iOS apps. Amazon restricts access to the data generated on its Marketplace to third parties, including the sellers using it, and until recently was accused of utilizing it to gain insights (and foothold) in other markets in competition with its customers (i.e., marketplace sellers). Such practices can be said to consist of unfair trading conditions having both exclusionary and exploitative aspects.

In cases where the respective practices do not resemble any of the al-

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[38] *Ivi*, pp. 17-18.

[39] See case AT.40721 – *Microsoft Teams*, cit., and the related Commission press release No P/23/3991 of 27 July 2023.

[40] See D. MANDRESCU, *Abusive Pricing Practices by Online Platforms: A Framework Review of Art. 102 TFEU for Future Cases*, cit.

[41] *Ivi*, pp. 482-489.

ready established forms of abuse, the fallback option is reliance on the broad category of abusive leveraging. This option used in *Google Shopping* offers the possibility to look at a collection of practices that on their own may not suffice to reach the finding of abuse; however, as an overall strategy or collection of actions, it may nevertheless be considered abusive [42].

Similar circumstances have been identified in the recent investigation by the Commission in the case of Facebook Marketplace. According to the Commission, Facebook may be leveraging its position in the market for social media services to that of marketplace services. This appears to have been done by placing the Facebook Marketplace tile/icon prominently on the main interface page of the Facebook social media page while at the same time hampering the visibility of ads that are placed on Facebook [43]. On their own, each of the actions is unlikely to be capable of constituting a standalone abuse; however, together, that may well be the case [44].

In light of the above, it can be said that the prospect of market power leveraging in the context of multisided online platforms is an inevitable one that will occur as part of their legitimate and illegitimate expansion strategies. Bringing such practices under competition law scrutiny and, more specifically, under the scope of Article 102 TFEU will require, however, identifying their anticompetitive potential in light of the multisided character of platforms and applying the existing frameworks of abuses in a manner that accounts for such character.

4. Platform pricing, governance, and abusive discrimination

The implementation of discrimination or, better yet, differentiation in governance rules and pricing is yet another inherent aspect in the existence of platforms that may trigger, rightfully or wrongfully, competition law scrutiny. As mentioned above, platforms must be able to make dif-

[42] General Court, case T-612/17, *Google* [2021] ECLI:EU:T:2021:763.

[43] Commission press release No IP/22/7728, cit.

[44] D. MANDRESCU, *On-platform Tying or Another Case of Leveraging- A Discussion on Facebook Marketplace*, in *Kluwer Competition Law Blog*, 2023, available at www.competitionlawblog.kluwercompetitionlaw.com/.

ferent value propositions (which include prices) for their different customer groups. Such different propositions are then intended to match the various degrees of demand that the respective customer groups have for the platform service and the benefit they can derive from it. Without this approach, there is simply no feasible way for platforms to overcome the chicken-and-egg when launching nor to sustain a stable (and ideally growing) customer base once this problem is overcome. Nevertheless, this inevitable truth may, at times, cross paths with competition law scrutiny when claims of abusive discrimination or exploitation arise. This is currently seen in the case of the Apple App Store investigation, which was triggered by a complaint from Spotify claiming that the 30% commission levied by Apple was discriminatory[45]. The rhetoric used by Spotify and repeated by media, however, does not correspond with the concept of abusive discrimination under Article 102 TFEU, especially when placed in the context of multisided platforms. This is likely also why actual investigations by the Commission and the Dutch NCA were eventually based on a different theory of harm, namely the imposition of unfair trading conditions.

Price discrimination in the context of competition policy concerns two main scenarios, namely competitor discrimination and customer discrimination. The practice itself entails a situation where the dominant undertaking is offering identical goods or services to different customers at different prices for reasons unrelated to costs[46]. In practice, the main focus of enforcement is addressing competitor discrimination as it is considered the more harmful of the two and more likely to be part of a dominant undertakings' practice. Such type of discrimination requires that the concerned undertaking is active on two vertically related markets. In such circumstances, the concerned undertaking would have the incentive to discriminate against its customers in favor of its own downstream or upstream entity, thereby creating an exclusionary as well as exploitative threat. In the context of platforms, this would entail that the platform undertaking directly competes with (some) of its (business) customer groups. This can be seen, for example, in the case

[45] See case AT.40437 – *Apple – App Store Practices – music streaming*, cit., and case AT.40652 – *Apple – App Store Practices – e-books/audiobooks* cit., and the related Commission press release No IP/20/1073 of 16 June 2020.

[46] See e.g. OECD, *Price Discrimination*, 2016, Background note from the Secretariat, pp. 6-7, available at www.oecd.org.

of Apple, which provides both the App Store and Apple Music and TV in competition with Spotify and Netflix, which rely on the App Store to reach iOS users. Similarly, this can also be seen on Amazon Marketplace, where Amazon is also operating as a retailer in competition with third-party sellers. The extent to which such scenarios could arise across all platforms depends predominately on the launch strategy of the respective platform as well as the interest and ability to operate a vertically related non-platform business in tandem with the already established platform [47].

When the concerned platform is not active in a vertically related market, the prospect of discrimination and its impact will involve the competitive relationship between its business customers/trading parties. The competitive concerns associated with such practice are, to a great extent, the same as in the case of competitor discrimination; however, in this latter situation, there are fewer incentives for the dominant undertaking to pursue such a strategy. In the absence of exceptional circumstances, the dominant undertaking would not benefit from having one or more of its trading parties struggling to compete in a market where it is not itself active [48]. In the context of platforms, however, the logic of having different prices for the different customers (groups) is, if done in good faith, in line with the inherent need to use skewed pricing structures and thus should not be erroneously labeled as abusive under Article 102 TFEU. At the same time, this inherent reliance on skewed pricing structures must not be used to hide prohibited anticompetitive practices.

According to economic literature, for either type of discrimination to take place, the concerned (platform) undertaking needs to have (significant) market power [49], be able to sort its customers based on their valuation of the service offered by it, and be able to prevent arbitrage through

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[47] A. HAGIU, J. WRIGHT, *Marketplace or Reseller?*, in *Management Science*, 2015, Vol. 61, Iss. 1, p. 184.

[48] When confronted with such a scenario, the Court of Justice also cast doubt on the rationale of such a practice from the perspective of the dominant undertaking. See Court of Justice, case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* [2018] ECLI:EU:C:2018:270, para 35.

[49] D. GERADIN, N. PETIT, *Price Discrimination under EC Competition Law: The Need for a Case-by-case Approach,* GCLC Working Paper, 7/2005, available at www.papers.ssrn.com, p. 4; OECD, *Price Discrimination*, cit., p. 9. The precise degree of market power needed for this purpose is however unsettled, see e.g. M. E. LEVINE, *Price Discrimination Without Market Power,* in *Yale Journal on Regulation*, 2002, Vol. 19, Iss. 1, p. 2.

re-trades between its customers [50]. When translating these criteria to the reality of online platforms, it is clear current market leaders have this ability. Amazon Marketplace, for example, charges sellers a transaction fee based on the types of goods they sell [51]. Similarly, the Google and Apple app stores charge app developers transaction fees based on the business model behind their respective app(s) [52]. Comparable examples can be found throughout all corners of the economy where platforms are active [53], whereby the degree of market power needed to implement such practices may not even require dominance. This alone, however, is not an indication of potential abuses of dominance, as the concept of (price) discrimination under Article 102 TFEU requires meeting more narrowly defined criteria.

Finding an infringement of Article 102(c) TFEU, which covers discriminatory pricing, requires showing the existence of (i) an equivalent transaction offered by the dominant undertaking to two or more trading parties; (ii) subject to dissimilar conditions; (iii) that creates a competitive disadvantage to some of these trading parties [54]. In the context of platforms, the most important criterion for filtering out unfounded claims of abusive discrimination is perhaps the third one. Fulfilling this criterion requires that the platform customers subject to different prices are competitors, which means that these should, at the very least, be in the same relevant market [55]. In practice, however, this is often not the case when looking at the pricing schemes of leading online platforms. The differentiation made commonly works along and not across the lines of competi-

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[50] N. GUNNAR, H. JENKINS, J. KAVANAGH, *Economics for Competition Lawyers*, Oxford University Press, Oxford, 2016, p. 181.

[51] See Amazon's transaction fee structure online, available at www.sell.amazon.com/pricing.

[52] See Apple's information for developers based on the business model they intend to implement in their app, available at www.developer.apple.com; see Google's pricing guidelines for app, available at www.support.google.com.

[53] See e.g. Booking.com's differentiated pricing information for property owners, available at www.partner.booking.com.

[54] Of course, like with any abuse, the option of objective justification also remains to be considered as well, see Court of Justice, case C-95/04 P, *British Airways v Commission* [2007] ECLI:EU:C:2007:166, para 86.

[55] Court of Justice, case C-52/07, *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* [2008] ECLI:EU:C:2008:703, para 46.

tion. For example, sellers on Amazon Marketplace that sell different kinds of retail goods are not considered competitors from the perspective of competition law policy, so any price differentiation will not fall under Article 102(c) TFEU. If the pricing scheme does not work along the lines of competition, the next steps would be to assess whether the offered service(s) constitute equivalent transactions and whether the price difference is sufficient to create a competitive disadvantage.

For platform services to be considered equivalent, these have to be commercially comparable and ideally utilized similarly by the respective customers. The utilization of platform service can generally be divided into (i) sales channel [56], (ii) advertisement channel [57], and (iii) data gathering channel [58]. Once both (sub) criteria are fulfilled, the next step requires establishing whether a competitive disadvantage has been or could be caused. For this purpose, the impact of the price difference on competition needs to be assessed in the output market for which the platform service was used [59]. Accordingly, when the platform is used as a sales channel, the competitive disadvantage among the sellers should concern the competitive relationship between them on the platform. When the plat-

[56] Such use is associated with the category of platforms coined by other authors as 'transaction platforms', where the various customer groups of the platform could conduct monetary transactions via the platform. See L. FILISTRUCCHI, D. GERADIN, E. VAN DAMME, P. AFFELDT, *Market Definition in Two-Sided Markets: Theory and Practice*, in *Journal of Competition Law and Economics*, 2014, Vol. 10, Iss. 2, p. 293 and BUNDESKARTELLAMT, *Market Power of Platforms and Networks*, Working Paper B6-113/15, 2016, pp. 18-30.

[57] *Ibidem*. Such use is associated with platforms coined by other authors as 'non-transaction platforms', audience providing platforms. In the context of the Google Shopping the Commission also made the distinction between sales channels platforms and advertisement channel platforms based on whether the concerned platform enables its customer groups to conduct a financial transaction, see case AT.39740 – *Google Search (Shopping*), cit., paras 191-250. It is worth noting, however, that coining platforms with a specific label for its 'type' has limited value in practice as platform business models are often a result of mixed strategies that do not follow such strict division lines. Any categorization made in their case should be done with respect the specific platform functionalities involved in each case. For more on this see D. MANDRESCU, *Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s),* in *World Competition*, 2018, Vol. 41, Iss. 3, p. 453.

[58] See e.g. UK Data and Marketing Association, *DMA advice: Using third party data under the GDPR*, 2018, available at www.dma.org.uk.

[59] Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, cit., para 24.

form (service) is used as an advertisement channel or a source of data gathering, the competitive disadvantage should be assessed for the market(s) where these are customers active outside of the platform. These markets would be those for the advertised product or service or the market(s) of the product or service for which the data was gathered or acquired. For a competitive disadvantage to materialize, the ratio between the (higher) price charged by the dominant undertaking from the disadvantaged customer group(s) and the total operating costs of such customer group in the output market must be sufficient to impact its interests compared with its competitors [60]. Therefore, a significant degree of price discrimination may, at times, not be considered abusive if the impact on the total operating costs of the platform customers in the affected output market is negligible [61]. Nevertheless, as there is no *de minimis* threshold under Article 102 TFEU, even relatively minimal effects in such situations could lead to findings of abuse once any of such effects are identified [62].

In the specific case of platforms that operate in vertically related markets in competition with their trading parties, discriminatory pricing may, at times, manifest in a margin squeeze. For such an abuse to be established, there needs to be evidence that the platform fees are too high for as efficient competitors, which rely on the platform, to compete in a vertically related market viably. This is, to some extent, one of the core issues of Spotify's complaint against Apple and the implicit favoring of its Apple Music service. Successfully applying this framework will, however, be quite tricky as it would require showing that the respective platform is a quasi-essential facility, which most platforms will not likely be

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[60] *Ibidem*, para 30. This position follows to a great extent the position of AG Whal who noted that in order to establish that a competitive disadvantage was caused by discriminatory pricing requires looking into how much the input sold by the dominant undertaking costs in relation to the total costs of the disadvantaged party. See Opinion of AG Wahl, case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, ECLI:EU:C:2017:1020, paras 105-110.

[61] For example a 5% difference in transaction fees charged by platforms that facilitate monetary transactions may have a greater impact on competition on the platform than a 5% price difference on pay-per-click ads on competition outside the platform.

[62] Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*, cit., para 29; Court of Justice, case C-23/14, *Post Danmark* [2015] ECLI:EU:C:2015:651, paras 70-73; case C-85/76, *Hoffmann-La Roche* [1979] ECLI:EU:C:1979:36, para 123.

since (viable) alternative channels for advertisement, sales, and data gathering will commonly exist.

Finally, where the skewed pricing scheme of a platform does not fulfill the criteria of abusive, discriminatory pricing yet appears problematic, an alternative approach would be to address it under the concept of excessive pricing or unfair trading conditions. Such alternative approaches should, however, only be considered in situations where the (dominant) platform manages to extract from specific (sub) group(s) of platform customers fees, which go beyond what platform pricing 'logic' would dictate. Such logic dictates that those who benefit the most and are easier to get on board will pay the lion's share of the platform fees. This is the reason why, in the case of most platforms, it is the commercial customers that are subject to the platform fees and not end consumers [63]. When a customer group is required to cover more than its own cost (plus profit) for the platform service, it is important that such an obligation is aligned with its interests. For example, on Booking.com, it is reasonable that hotels cover the costs of serving consumers with room booking services since hotel owners want to have access to many consumers. By contrast, in the case of the Apple App Store, where only a select group of app developers cover most of the App Store operating costs, the extraction of fees is not entirely aligned with their interests. After all, why should certain app developers be interested in subsidizing other developers? When such circumstances arise, it can be argued that the price charged no longer relates to the economic value of the service and thus likely entails a situation where the dominant (platform) undertaking can make use of an opportunity that is open to it due to its dominance that would otherwise not be possible in a competitive market. Under such circumstances, it should be possible to argue that members of a particular customer group are charged excessive prices even without going through the traditional steps of the United Brands test. After all, the very purpose of the test is to show a mismatch between the price charged and the value provided.

Should the fee misalignment not suffice for a finding of excessive pricing, an alternative route in such cases is to tackle the mechanism that regulates or enables it as an implementation of unfair trading conditions.

[63] Of course, even though consumers are not presented with participation or usage fees these can and are often passed on in full or partly by the commercial customers of the platforms they use.

In the case of the App Store, for example, this was done concerning the obligation for app developers to use IAP and the prohibition to inform consumers of alternative payment routes outside their respective apps. This mechanism has become the focus of investigations at the EU and national levels, even though the main concerns of app developers concern the level of Apple's commission. Tackling the mechanism allows for a relatively more straightforward approach as the legal framework for such abuses is not as demanding and formalistic, similar in a way to the practice of finding abuses under the general term of abusive leveraging [64]. Nevertheless, that is not to say that finding such abuse is entirely form-free as some core aspects would have to be assessed, such as (i) whether the mechanism serves a legitimate (ideally pro-competitive) aim, (ii) for which it is necessary and (iii) proportionate to the (alleged) harm inflicted upon those which are subject to it [65].

In addition to pricing schemes, differentiation and/or discrimination in the case of platforms can (and does) occur when the governance structure for the platform is developed. The term governance in this context refers to the set of rules established by the platform to determine which actors are allowed to participate on the platform and regulate the actions of such parties when using the platform [66]. The governance adopted by the platform is intended to optimize the value creation of the platform while preventing undesired practices from taking place [67]. Accordingly, governance rules cover matters such as openness, control, quality assurance, curation, and exclusion possibilities or other penalties [68]. Determining the exact criteria of the governance rules in each case depends on the kind of value the platform seeks to create and monetize and will, therefore, vary across platforms [69]. It is ex-

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[64] For a broader discussion of the case see F. BOSTOEN, D. MANDRESCU, *Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores,* in *European Competition Journal*, 2020, Vol. 16, Iss. 2-3, p. 431.

[65] R. O'DONOGHUE, J. PADILLA, *The law and Economics of Article 102 TFEU*, 3rd ed., Hart Publishing, Oxford, 2020, p. 1043.

[66] *Ibidem.*

[67] K.J. BOUDREAU, A. HAGIU, *Platform Rules: Multi-Sided Platforms As Regulators*, cit.; D.S. EVANS, *Governing Bad Behavior By Users of Multi-Sided Platforms*, in *Berkeley Technology Law Journal*, 2012, Vol. 27, Iss. 2, p. 1201.

[68] See A. TIWANA, *Platform Ecosystems: Aligning Architecture, Governance, and Strategy*, cit., pp. 117-151.

[69] For various possibilities see e.g. D.S. EVANS, *Governing Bad Behavior By Users of*

pected, however, that not all platform customer groups will have the same rights or obligations and that certain parties will be denied access to the platform.

The main concerns identified so far with respect to platform governance rules concern the restriction of access to data generated on the platform, restriction of access to functionalities and/or the platform as a whole, and the obligation to use multiple platform functionalities as a condition for access. These concerns can be seen to a great extent in the case of Amazon Marketplace. Getting into the buy box on the Amazon Marketplace and becoming a prime member required making use of Amazon logistics, a practice that is currently under investigation in multiple jurisdictions. Data generated on the Marketplace was accessible to Amazon but not to the individual sellers who generated such data, a practice which Amazon eventually decided to abandon after the launch of an official investigation by the Commission [70]. Similar circumstances can be seen in the case of the Apple App Store, where specific categories of apps must use IAP to offer in-app purchases. Sales and financial data generated through the App Store are visible to Apple but not to developers, and some (types of) apps are systematically refused or have been removed from the App Store.

In the context of Article 102 TFEU, there are several ways to deal with such governance rules. Outright denial of access to the platform can solely be tackled under the strict criteria of the essential facility doctrine laid down in the *Bronner* case [71]. As almost no platform can be considered indispensable in the sense of this doctrine, such refusals will not be covered by Article 102 TFEU. Restrictions of access through unfavorable or unreasonable terms can be dealt with under the scope of unfair trading conditions, as recently clarified in *Slovak Telekom* and *Lithuanian Railways* [72].

Multi-Sided Platforms, cit.; A. HEIN, M. SCHREIECK, M. WIESCHE, H. KRACMAR, *Multiple-Case Analysis on Governance Mechanisms of Multi-Sided Platforms*, in V. NISSEN, D. STELZER, S. STRAßBURGER, D. FISCHER (eds.), *Proceedings of the Multikonferenz Wirtschaftsinformatik*, Technische Universität Ilmenau, Ilmenau, 2016, p. 1613, available at www.db-thueringen.de/.

[70] See case AT.40462 – *Amazon Marketplace*, cit., and case AT.40703 – *Amazon Buy Box*, cit.

[71] Court of Justice, case C-7/97, *Oscar Bronner v. Mediaprint* [1998] ECLI:EU:C:1998:569.

[72] Court of Justice, case C-42/21 P, *Lietuvos geležinkeliai AB v Commission* [2023]

Consequently, restricted interoperability or restricted access to data generated on the respective platform can be addressed under the scope of Article 102 TFEU without having to apply the *Bronner* case law [73]. Finally, conditionality between platform services can be treated as abusive tying practices, provided separate markets can be defined for such services. When the definition of separate relevant markets is not entirely feasible, the alternative approach would be to fall back on the framework of unfair trading conditions. This has recently been done by the Commission and the Dutch NCA (the Autoriteit Consument & Markt) in the case of the Apple App Store and the obligation to utilize IAP be developers of paid apps [74].

In light of the above, it can be said that the framework of the unfair trading conditions under Article 102 TFEU could serve as an essential tool for addressing (allegedly) prohibited practices of discrimination and/or differentiation. Although the reliance on this framework may bring about a degree of legal uncertainty since it does not consist of rigid legal tests as other types of abuses do, this looseness is, in the case of platforms, a noteworthy advantage for the parties involved. This approach allows the Commission and NCAs (and courts) to deal with unprecedented practices that are harmful and contrary to the objectives of Article 102 TFEU but do not fit within other existing frameworks, thereby decreasing the likelihood of false negatives. At the same time, for platforms, the less stringent test behind this abuse allows more room to account for platform 'logic' considerations, thereby decreasing the likelihood of false positives. Whether such potential is utilized well in practice will remain to be seen; however, from a practical perspective, it constitutes one of the best frameworks for dealing with the complexities of online platforms in the absence of a formal *rule of reason* framework.

ECLI:EU:C:2023:12; Case C-165/19 P, *Slovak Telekom v Commission* [2021] ECLI:EU:C:2021:239.

[73] D. MANDRESCU, *Why You (Often) Don't Need the Essential Facility Doctrine in the Digital Economy? – Interpreting* Lithuanian Railways *and* Slovak Telekom, in *CoRe Blog*, 2020, available at www.lexxion.eu/en/.

[74] See case AT.40437 – *Apple – App Store Practices – music streaming*, cit., and case AT.40652 – *Apple – App Store Practices – e-books/audiobooks* cit., and Autoriteit Consument & Markt Decision of 24 August 2021 in case ACM/19/035630 – *Apple* and the related Autoriteit Consument & Markt press release of 24 December 2021.

5. Undefined abuses and new regulatory frameworks

The sections mentioned above show how the inherent intricacies of multisided online platforms can cross paths with several existing types of abuses of dominance under Article 102 TFEU. Despite the wide range of potential approaches depicted, there may be situations where the business practices of dominant platforms could and even should be approached differently. Such situations concern cases that would require stretching the existing frameworks beyond their perceived and accepted boundaries, as well as situations that showcase a type of behavior that is suitable for qualifying as a new standalone form of abuse. In such cases, an alternative and preferable approach would be to turn to the unexhaustive nature of Article 102 TFEU, and consult other dedicated regulatory frameworks that apply in tandem.

5.1. The unexhaustive character of Article 102 TFEU

The unexhaustive character of Article 102 TFEU has been confirmed time and time again in the case law of EU courts [75], which extended the scope of application of this provision over time and continues to justify its expansion in the future. This is not to say that any behavior can be fit under the umbrella of Article 102 TFEU as long as it concerns dominant undertakings. That would make the application of this provision unpredictable, undermining its legitimacy. Any scope extensions, while possible, should be limited only to practices that go against the fundamental logic of this provision when it comes to addressing exclusionary and exploitative practices, as well as practices that go against the main objectives of the EU internal market.

Defining new abuses for potentially exclusionary practices, therefore, requires identifying actions that can produce a (realistic) foreclosure effect while consisting of measures that do not entail *competition on the merits* within the legal and economic context of the respective case. The most recent case in this regard is that of *Lithuanian Railways*, where re-

[75] E.g., Court of Justice, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECLI:EU:C:2011:83, para 26.

moving a trail rail section to prevent (downstream) competition was considered a standalone form of abuse under Article 102 TFEU [76]. A similar approach can be taken in the case of multisided online platforms, where the respective practices can be framed as an action to distort competition. Of course, given the vast scope for interpretation in such cases, such options must be preserved for practices that are clearly harmful to competition despite being unpreceded, which is quite a high threshold to meet. The reason for this high threshold is that identifying a new type of abuse under Article 102 TFEU also means introducing a new corresponding legal test to address similar behavior in the future. If the case that introduces such a framework is unclear, its framework cannot be that either, nor can it be used in future cases, which again will undermine the legitimacy of applying Article 102 TFEU in future cases.

In the case of exploitative practices, the core logic behind coining new types of exploitative abuses should be that the practices entail a situation where the dominant platform undertaking makes use of an opportunity open to it due to its dominance that would otherwise not be possible in a competitive market. Such circumstances could occur, for example, where the dominant platform continuously modifies its business model in a manner that results in the extraction of higher rents from its customers, which bear no correlation to the (potential) increase in value it offers such customers. In practice, this can be seen where changes in the algorithms involved in the platform's monetization undergo significant and, at times, disruptive changes for its users [77]. This could be for example, the sudden termination of freemium services (i.e., ad financed) to force all customers to switch to a paid model (e.g., pay-as-you-go based or subscription-based), which could also be considered exploitative where the lock-in effects of a dominant platform are powerful due to network effects and/or customization [78]. This could happen, for example, if all of Meta's (Facebook) leading platforms (Facebook, Instagram, WhatsApp)

[76] Case C-42/21 P, *Lietuvos geležinkeliai AB v Commission*, cit., para 91.

[77] See e.g., a discussion of the changes made in YouTube's algorithm and its impact on creators. A. NEVES, *YouTubes Algorithm in 2023: What changes Moving Forward?,* in *rockcontent Blog*, 1 June 2023, available at www.rockcontent.com/.

[78] Alternatively, the introduction of an expensive paid version to keep customers from steering away from the free version can also take place. Arguably this can be seen in the case of Meta which introduced subscription models for Facebook and Instagram. More information and news are available at www.about.fb.com.

moved to a paid model on short notice, which would essentially force consumers to comply.

Similar to the case of exclusionary practices, and perhaps even more so, the use of the open-ended nature of Article 102 TFEU to identify new types of exploitative abuses should be done cautiously. Exploitative abuses of dominance are, at times, controversial, even when it comes to well-established examples. Enlarging the scope of abuses in this respect can be expected to be met with apprehension. It thus should be reserved for cases where clear evidence of anti-competitive intent and/or strategy can be found. The need for a clear-cut case and evidence to make use of the open-ended nature of Article 102 TFEU is even more significant when such use is done at the Member State level rather than at the EU level, as it decreases the likelihood of uniform application of this provision. In such circumstances, it is preferable from a legal formalistic perspective that Member States (NCAs, courts, legislators) use the available room provided by Article 3 of Council Regulation (EC) 1/2003 to implement stricter norms for dealing with unilateral behavior. Although divergence in enforcement should ideally be avoided, particularly when dealing with undertakings active in multiple MS (or the entire EU), this form of divergence creates fewer legal problems and can be justified more easily in light of diverging national market conditions.

5.2. Abuses through infringements of alternative regulatory frameworks

The interplay between EU competition law and various regulatory frameworks has been explored multiple times. In the case of online platforms, this option, generally limited to situations covered by sector-specific regulation, will only grow in importance as the regulatory horizon covering their business practices and technology continues to evolve quickly. Overall, this interplay means that the regulatory framework that is relevant in each case forms part of the legal and economic context in which the concerned (dominant) undertaking operates. Consequently, when the potentially abusive behavior of a dominant actor is analyzed, the content and impact of such frameworks need to be accounted for in the scope of the analysis. After all, many regulatory frameworks determine the market conditions in various sectors and thus also (indirectly)

determine to a large extent what needs to be understood as competition on the merits in such circumstances [79].

In the case of platforms, the legal and economic context of these actors is constantly becoming broader and more complex. For example, the recently implemented DMA, DSA, and P2B Regulation entail frameworks that dictate numerous obligations that must be followed by specific kinds of platforms when dealing with their trading partners and end consumers. Where these regulations cover prohibited practices that also undermine the prospect of healthy competition, such as in the case of the DMA, violations of such obligations could also be considered evidence of anti-competitive behavior under EU competition law. In this sense, such regulatory obligations dictate, to a large extent, the meaning of the notion of competition on the merits of dominant (platform) undertakings. This, in turn, also determines which legal test for abuse needs to be applied and whether a new type of abuse can be identified, as was the case in *Lithuanian Railways*. Similarly, in the case of platforms, various access restrictions are covered by the DMA, thereby removing the need to rely on the *Bronner* case law to establish an abuse.

A comparable situation can also be found with regard to various prohibitions on imposing joined offers that would otherwise require going through an analysis of tying or bundling under Article 102 TFEU [80]. Consequently, where the dominant platform is covered by the DMA and infringes its obligations under this framework, such behavior can be used to establish a *prima facie* infringement of Article 102 TFEU. As the threshold of gatekeeper platform is intended to work as a lower threshold for market power than the concept of dominance under Article 102 TFEU, it can be argued that the obligation within the scope of the DMA should fall within the ambit of the special responsibility of dominant undertakings [81]. Nevertheless, this synergy between the two does not mean that an infringement of the DMA would result in an automatic infringement of Article 102 TFEU. The effects-based approach under Article 102 TFEU will

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[79] N. DUNNE, *The Role of Regulation in EU Competition Law Assessment*, in *World Competition*, 2021, Vol. 44, Iss. 3, p. 287.

[80] D. MANDRESCU, *Tying and Bundling by Online Platforms - Distinguishing between Lawful Expansion Strategies and Anti-competitive Practices*, cit.

[81] Court of Justice, case 322/81, *Nederlandsche Banden Industrie Michelin v Commission* [1983] ECLI:EU:C:1983:313, para 57.

still require a clear delineation of the anti-competitive effects resulting from the breach of the DMA and also allow for efficiencies arguments that are not available within the DMA framework. If both kinds of infringements are established, these should be managed in a manner that accounts for the principle of *ne bis in idem* as required by the case law of CJEU [82]. Where the abuse of dominance is pursued based on national competition law, more far-reaching conclusions can be drawn from DMA infringement as a stricter approach to unilateral behavior is allowed under Council Regulation (EC) 1/2003. Nevertheless, this should not go so far as to undermine the uniformity that the DMA is attempting to achieve. Consequently, at the remedy stage of abuses of dominance, both under national or EU competition law, it is imperative that the imposed remedies can co-exist with the obligations already imposed by the DMA on the undertaking concerned.

In the case of the DSA and the P2B Regulation, which are less focused on objectives that contribute to the state of competition, potential violations will have less bearing on the notion of competition on the merits. Nevertheless, where non-compliance provides the concerned undertaking with a clear competitive advantage, such behavior can constitute evidence of anti-competitive practice, which other types of evidence can ideally supplement. The mere violation of such frameworks alone will not suffice, however, to find an abuse of dominance. This has been recently seen in the case of Facebook, where an infringement of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "GDPR" [83]) can be considered for the finding of abuse but does not, on its own, suffice for such a finding [84].

Consequently, a *prima facie* finding of abuse in such cases would not be justified. In essence, the more distant the objectives of the respective regulatory framework are to those of competition law, the more elaborate

[82] Court of Justice, case C-117/20, *bpost v Autorité belge de la concurrence* [2022] ECLI:EU:C:2022:202.

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

[84] Court of Justice, case C-252/21, *Meta Platforms inc., v Bundeskartellamt* [2023] ECLI:EU:C:2023:537, paras 36-63.

the effects analysis would have to be. As such scenarios would require that more than the mere infringement of the regulatory framework is observed, clashes with the *ne bis in idem* principle are less likely to occur. In the case of the P2B Regulation, which does not have a penalty clause, such an event should, in principle, not occur at all. Nevertheless, at the remedy stage, as in the case of the DMA, it is essential that the remedies imposed for the competition law infringement can co-exist with the existing obligations of the concerned undertaking under the regulatory frameworks that were used for the purpose of analysis.

6. Conclusion

The discussion in this chapter has shown that establishing abuses of dominance in the context of online multisided platforms is a complicated matter. The effective enforcement of such practices starts by accounting for the specific legal and economic context involving these entities. While this requirement applies to all cases where EU competition is applied, in the case of platforms, it requires being open to different modes of monetization, different strategic concerns and requirements, and a good understanding of the technology employed by these actors.

The specific characteristics of multisided platforms and their expected life cycle will almost inevitably cross paths with competition policy and, in the case of the most successful platforms, specifically, with Article 102 TFEU. Such expected clashes will occur on multiple occasions, where the platform governance and pricing schemes, as well as expansion strategies, are the most likely ones. The implementation of skewed pricing schemes and governance rules by platforms inherently requires some degrees of differentiation and exclusion (or restricted access) to optimize and preserve the prospect of growth viably. Accordingly, in practice, it will be imperative to correctly make the distinction between practices that are in line with the economic and commercial logic behind platform structures and those that deviate from this logic and consist of anti-competitive strategies and intent. Similarly, the prospect of expansions, which are inherent to the lifecycle of all platforms, will inevitably trigger competition law scrutiny as the successful deployment of (service) expansions entails various forms of market power leveraging. The crux in such instances is not to prevent or deter such expansions but rather to en-

sure that these are achieved through means that coincide with competition on the merits.

The current framework of Article 102 TFEU and the variety of tests it offers for identifying abuses of dominance provide multiple avenues for dealing with the risk associated with these platform-oriented concerns. Nevertheless, even the wide array of abuse types will, at some point, run the risk of being overstretc.hed by entirely unforeseen practices that cannot be caught by such legal tests. In such instances, the open-ended character of Article 102 TFEU and the effects-based approach can offer additional benefits, albeit subject to restricted circumstances and cautious application. The identification of new types of abuses under Article 102 TFEU, while possible, requires diligence and should preferably be done at the EU level as it involves establishing a new EU-wide practice, which should ideally be done uniformly. The constantly intensifying effects-based approach under Article 102 TFEU, which makes the finding of abuses overall more labor intensive, offers at the same time the ability to include compliance with external regulatory frameworks in the context of the analysis. With the growing scope of such frameworks in the case of platforms, this possibility enables taking on board more sources of evidence pertaining to the anti-competitive effects of a given practice or strategy. At the same time, it is imperative that such cross-framework use does not lead to (automatic) parallel sanctioning and is done in a manner that accounts for the *ne bis in idem* principle.

Dawn of the Robots: First Cases of Algorithmic Collusion

Jan Blockx [*]

1. Introduction

All antitrust regimes around the world prohibit collusive agreements. The key provision under EU law is Article 101(1) TFEU which prohibits «all agreements between undertakings, decisions by associations of undertakings and concerted practices […] which have as their object or effect the prevention, restriction or distortion of competition within the internal market».

This prohibition does not only cover agreements in the form of binding written contracts, but also oral covenants and so-called gentlemen's agreements, as well as simple "concertation", i.e. forms of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation for the risks of competition [1]. Concertation can in particular result from the exchange of information between undertakings [2], as this may influence their behaviour.

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[*] Assistant professor of European economic law at the University of Antwerp, Belgium.

[1] Court of Justice, case 40/73, *Suiker Unie* [1975] ECLI:EU:C:1975:174, para 26.

[2] Court of Justice, case C-238/05, *Asnef-Equifax* [2006] ECLI:EU:C:2006:734, para 51.

Agreements and exchanges between undertakings are only prohibited by Article 101(1) TFEU if they restrict competition. Particularly problematic are so-called restrictions of competition by object (or hardcore restrictions). The most important category of hardcore restrictions is constituted by cartels, i.e. agreements and concertation between competitors in relation to the key parameters of competition, such as sales prices, production volumes and target markets and customers. However, also some agreements and concertation between undertakings that are not each other's competitors can be problematic: in particular, collusion between suppliers and distributors about the sales price of the latter (so-called resale price maintenance [3]), as well as absolute territorial protection granted to distributors [4] are considered to be hardcore restrictions of EU competition as well.

The prohibition of Article 101(1) TFEU is tempered by the exception contained in Article 101(3) TFEU. A *prima facie* anticompetitive agreement or concertation is not prohibited if it complies with four cumulative conditions: (*i*) it contributes to improving the production or distribution of goods or to promoting technical or economic progress, (*ii*) it allows consumers a fair share of the resulting benefit, (*iii*) it does not contain restrictions which are not indispensable to the attainment of these objectives and (*iv*) it does not give the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. The burden of proof to establish that these four conditions are fulfilled is on the parties to the anticompetitive agreement or concertation [5]. In addition, the European Commission (the "Commission") considers that it is unlikely that hardcore restrictions fulfil these conditions [6].

The prohibition of Article 101 TFEU was already contained in almost identical wording in the Treaty of Rome of 1957 and also other prohibitions of anticompetitive collusion (e.g. in national law) date back many

[3] Court of Justice, case 161/84, *Pronuptia* [1986] ECLI:EU:C:1986:41, para 25.

[4] Court of Justice, case 56/64, *Consten and Grundig* [1966] ECLI:EU:C:1966:41.

[5] Article 2 of Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[6] Para 46 of Commission Guidelines of 27 April 2004 on the application of Article 81(3) of the Treaty.

decades ago. They therefore date from a time when undertakings where entirely dependent for their operation on the agency of human officers and employees.

However, in the meantime, a technological revolution has taken place, whereby digital technologies have increasingly replaced human agents in various activities in the economy. This raises the question of how the prohibition of Article 101 TFEU has to be applied in this new context, where commercial decision making is no longer entirely left to humans, but may (also) be influenced by or even handed over to computers which operate according to coded algorithms.

2. The use of algorithms in commercial decision making

An algorithm is a set of instructions or operations which transform one or more inputs into one or more outputs [7]. Algorithms can be written in software code and then allow a computer to transform the inputs into outputs. With increasing processing capacity and speed, coded algorithms have become increasingly complex, and have become able to process vast amounts of information in very small spaces of time.

These capabilities of coded algorithms have made them attractive for businesses, as they can be much more efficient than humans at numerous tasks. In addition, algorithms do not need sleep or holidays, and are not (or at least much less) affected by irrational motives. Businesses have therefore increasingly adopted algorithms to support or even to replace human decision making. For example, algorithms are used by businesses to monitor behaviour by customers and competitors, to personalise product offerings for customers, and to propose or actually set prices for products and services.

These applications of algorithms have multiple procompetitive effects, which can be framed in microeconomic terms. The speed of algorithms allows supply and demand to be matched more quickly, thereby avoiding wasteful time-lags. Product and price personalisation allows supply and demand to be matched more closely, thereby avoiding wasteful dead-

[7] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age*, 2017, available at www.oecd.org; OECD, *Algorithmic Competition*, Background note from the Secretariat, 2023, available at www.oecd.org.

weight losses. And monitoring algorithms increase market transparency, thereby reducing market failures.

Nevertheless, some of the inherent qualities of algorithms also create a potential for collusion and can therefore be problematic under Article 101 TFEU and equivalent prohibitions of anticompetitive agreements or concerted practices. For example, price monitoring algorithms can be used to facilitate the verification of compliance with a price fixing cartel. Price adjustment algorithms can even be set up to immediately respond to price reductions by competitors, thereby strengthening the deterrent effect of punishment mechanisms. And so on.

The anticompetitive risks of algorithms have caused a rich academic discussion over the last decade [8] as well as policy papers by Member States' National Competition Authorities ("NCAs") [9] and other policy makers [10]. In parallel, the first cases in which algorithms were involved in collusive activities have been investigated by competition authorities and litigated before the courts.

Before discussing these cases, it is useful to point out that, while they all concern price collusion, the concerns for algorithmic collusion also cover non-price practices. Although there is far less theoretical discussion on this, examples of collusion through non-pricing algorithms can easily be envisaged. By way of example, consider two competitors, A and B, who agree that A will only actively market product X to a certain group of customers, while B will only actively market product Y to these customers. This agreement could be implemented by adjusting the recommendation algorithms of each of the competitors to ensure that the pro-

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[8] Some of the first papers by competition law scholars include A. EZRACHI, M.E. STUCKE, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, Oxford Legal Studies Research Paper, No 18/2015, 2015, available at www.ssrn.com and S.K. MEHRA, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, in *University of Minnesota Law Review*, 2016, Vol. 100, Iss. 4, p. 1323.

[9] See, for example, AUTORITÉ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Algorithms and Competition,* 2019, available at www.bundeskartellamt.de. As for the competition authorities of third countries, see for example the UK Competition & Markets Authority, *Pricing Algorithms: Economic Working Paper on the Use of Algorithms to Facilitate Collusion and Personalised Pricing*, 2018, available at www.assets.publishing.service.gov.uk.

[10] See OECD, *Algorithms and Collusion*, cit., and OECD, *Algorithmic Competition*, cit., as well as, for example, the German Monopolkommission, *22nd Biennal Report*, 2018, available at www.monopolkommission.de.

hibited product is not recommended to the relevant customer group.

The first cases of algorithmic collusion will be described below in three categories according to the role the algorithm plays in the collusion, as this role affects the legal analysis of the conduct in question. A first category comprises algorithms that are used by undertakings to facilitate or strengthen an anticompetitive agreement that was concluded independently from the algorithm. A second category covers instances where the common use of one single algorithm by multiple undertakings provides opportunities for collusion (driven by humans or not). Finally, in the third category, different algorithms autonomously arrive at a collusive outcome, without any human intervention.

3. Algorithms as tools for collusion

As indicated earlier, algorithms present certain qualities that make them very useful tools for humans to implement and enforce collusive agreements and practices that were concluded independently of the algorithm itself. At the simplest level, monitoring algorithms can be used to verify whether the behaviour of other parties to the collusive agreement complies with the agreement. In e-commerce markets, such monitoring algorithms are very common [11] and they can therefore easily be used for collusive purposes as well.

In a next step, algorithms can combine the monitoring of consumers and competitors with automatic adjustment of conduct (e.g. prices) in response to the observed behaviour. Competitors with whom a collusive outcome is agreed often have an incentive to cheat on the cartel (e.g. to gain market share by undercutting the higher prices committed to by other cartelists). Automatic price adjustments may allow for instant trigger strategies to immediately punish such deviations from the collusive outcome. Because the time lag of punishment can be eliminated in this way,

[11] Already in a 2017 inquiry by the Commission, one third of retailers stated that they used software to track prices online (see Commission Staff working document of 10 May 2017 Accompanying the document Report from the Commission to the Council and the European Parliament – Final report on the E-commerce Sector Inquiry, SWD (2017) 154 final, para 149). The share of retailers using such software has certainly increased further in the intervening period.

the algorithm will be much more effective at undermining the incentives for each of the participants to cheat [12].

Automatic price adjustments algorithms were the subject of the US Department of Justice's *Topkins* case, one of the earliest antitrust decisions on algorithmic collusion, which inspired some of the first articles on this topic [13]. This was a case that resulted in a plea agreement for David Topkins, an executive of a company selling posters, prints and wall art, including on Amazon Marketplace. According to the plea agreement, Topkins entered into an agreement to fix prices with other sellers of such products on Amazon Marketplace. He then wrote computer code to instruct his firm's software to set prices in line with the agreement, which was in this way implemented between September 2013 and January 2014. Pursuant to the plea agreement, Topkins ultimately paid a fine of USD 20,000.

The announcement of the *Topkins* case in 2015 led to several other cases in the same sector. The best documented of these occurred on the other side of the Atlantic, where GBE, a UK producer and seller of licensed sport and entertainment merchandise applied for leniency for price fixing of posters on Amazon Marketplace as well [14]. GBE revealed that one of its customers, Trod, which resold its products on Amazon Marketplace, had started complaining about GBE's increased activities on Amazon since 2010, including about "aggressive pricing". To assuage Trod, GBE concluded an agreement with it pursuant to which they would stop undercutting each other's prices for posters, at least for those products for which no third parties offered lower prices on Amazon.

GBE and Trod initially tried to implement this agreement manually but, given the number of distinct products that each of them sold, this proved too difficult. They therefore started implementing the agreement through repricing software. Noteworthy is that the software tools they used for repricing worked in a different manner. GBE's software was configured in such a manner that it would match the price of Trod, unless another party offered a lower price. Trod's software was instead config-

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[12] OECD, *Algorithms and Collusion*, cit.

[13] US District Court, Northern District of California – San Francisco Division, case No CR 15-00201 WHO, *U.S. v Topkins* [2015], Plea agreement.

[14] UK CMA Decision of 12 August 2016 in case 50223 – *Online Sales of Poster and Frames*.

ured to undercut any price in the market, but ignored prices set by GBE.

After GBE applied for leniency with the UK Competition & Markets Authority (the "CMA"), the latter opened an investigation. The CMA concluded its investigation by imposing a fine of £163,371 on Trod[15]. Trod also paid a USD 50,000 fine in the United States for this conspiracy[16] and its chief executive was sentenced to a six months prison sentence (most of which he served in Spain while waiting for his extradition to the United States)[17].

Algorithms cannot only be used as tools to support collusion between competitors (also known as horizontal collusion) but can also be a tool for anticompetitive agreements between companies that are active at different levels of the supply chain (vertical collusion). Examples of this are provided by the four consumer electronics cases decided by the Commission on 24 July 2018[18]. In these cases, the suppliers of consumer electronics (Asus, Denon & Marantz, Philips and Pioneer) engaged in resale price maintenance, i.e. they agreed with some of the online retailers to fix the (minimum) prices at which their own products could be sold.

The discussions on these resale prices were conducted by sales executives of each of the suppliers and the online retailers, but in the implementation of the agreement recourse was had to software applications. In particular, the suppliers used some of their internal price monitoring tools to verify whether the retailers stuck to the minimum prices agreed. They also used (external) price comparison websites to verify deviations from the agreed price levels. The Commission in addition noted that the use of price monitoring and adjustment software by the retailers strengthened the effects of the agreements, since they caused price adjustments by one retailer to have automatic repercussions across the market. Fines were only imposed on the suppliers of the consumer electronics (not on the retailers or software providers), for a total of EUR 111 million.

The legal analysis of this type of algorithmic collusion is straightfor-

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[15] *Ibidem*.

[16] US District Court, Northern District of California – San Francisco Division, case No CR 15-0419 WHO, *U.S. v Trod Limited* [2016], Plea agreement.

[17] See US District Court, Northern District of California – San Francisco Division, case No 15-419, *US v. Aston et al.* [2019] and the related Department of Justice press release No 19-46 of 28 January 2019, available at www.justice.gov.

[18] Commission Decisions of 24 July 2018 in cases AT.40465 – *Asus*; AT.40469, *Denon & Marantz*; AT.40181, *Philips*; and AT.40182, *Pioneer*.

ward. If two undertakings agree to fix prices, they breach Article 101(1) TFEU (and equivalent provisions), regardless of whether the tools they use to implement the agreement are human or digital. As Acting Chair of the US Federal Trade Commission Maureen Ohlhausen already said in a speech in 2017, «[i]f it isn't ok for a guy named Bob to do it, then it probably isn't ok for an algorithm to do it either» [19].

The use of algorithms to implement the collusion may nevertheless have an impact on the available evidence of collusion. To be sure: in the cases discussed in this category, the parties still reach a collusive outcome at the outset, and there is likely to be evidence of this that can be used in enforcement. However, the use of monitoring and adjustment algorithms may reduce the need for exchanges of information and other forms of communication between the undertakings that accompanies many analogue cartels (and other antitrust infringements) during their lifetime. In that sense, the use of algorithms to implement collusion can reduce the amount of evidence available to antitrust enforcers or to private parties damaged by the cartel who would be willing to bring a civil claim before a national court.

4. Algorithmic hub-and-spoke collusion

The last example mentioned in the previous paragraph, about resale price maintenance in consumer electronics, could also be viewed as an example of so-called hub-and-spoke collusion. The suppliers in these cases (Asus, Denon & Marantz, Philips and Pioneer) acted as hubs to facilitate adherence by each of the retailers to a specific pricing level. In this case, the Commission decided only to sanction the suppliers for this infringement, but it is not uncommon that such cases are (also) viewed as horizontal cases, since the retailers that adhere to the resale price maintenance benefit from the price fixing in a similar way as if they participated in a horizontal cartel [20].

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[19] M.K. OHLHAUSEN, *Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing*, 23 May 2017, available at www.ftc.gov.

[20] See, for instance, Court of Appeal in England and Wales, case EWCA Civ 1318, *Argos, Littlewoods and JJB v OFT* [2006], para 106.

This paragraph focuses on instances where the hub-and-spoke collusion is not simply orchestrated by a single firm, but rather by a single algorithm. Indeed, in the customer electronics cases, the suppliers used various algorithmic tools to facilitate the resale price maintenance to support the collusive outcome agreed by the human officers and employees.

A small step further would be to replace these different algorithmic tools by one single algorithm. In that case, the algorithm is still a tool to implement human collusion, but, as we will see, the opportunities for collusive outcomes are significantly increased by the use of a single as opposed to multiple algorithms.

How software can function as a hub to enforce an anticompetitive agreement is already apparent from the *Eturas* decision of the Lithuanian NCA (the Konkurencijos taryba) in 2012 [21]. In this case, the Lithuanian Competition Council found that 30 travel agents and Eturas, the provider of an online tour search and booking system, had infringed Article 101 TFEU by fixing the maximum discount that could be offered through that system to 3%. This maximum discount percentage was proposed by Eturas and subsequently implemented through a technical restriction in the system, which was difficult for the travels agents to circumvent. This algorithmic restriction in the joint system therefore fixed the discount percentage and, hence, also (part of) the final price at which the travel agents could offer their services. Both the travel agents and Eturas itself were fined a combined amount of approx. EUR 1.5 million [22]. In response to a preliminary reference by a subsequent appeal court, the Court of Justice confirmed that the sending by Eturas of the proposed discount restriction and the subsequent implementation through technical restrictions constituted an infringement of Article 101 TFEU [23].

Another clear example of algorithmic hub-and-spoke collusion is the Spanish *Proptech* case, where a handful of real estate brokerage firms started using the same multiple listing system ("MLS"), basically a common database of listings. Participants in the MLS could add a property for sale or rent to the database or could look for a potential purchaser or tenant for properties added to the database by other brokers. So far so good. However, the rules for participation in the database provided that a

[21] Konkurencijos taryba Decision of 7 June 2012 in case No 2S-9 – *Eturas*.

[22] *Ibidem*.

[23] Court of Justice, case C-74/14, *Eturas* [2016] ECLI:EU:C:2016:42.

minimum commission of 4% needed to be charged on sales listed in the database, whereas for leases a minimum commission of one month of rent applied. The rules also provided that the commission needed to be split evenly between the broker listing the property and the broker finding the customer.

The Spanish NCA (the Comisión Nacional de los Mercados y la Competencia, CNMC) found that the agreement to charge minimum commissions and to evenly split that commission constituted an infringement of Article 101 TFEU[24]. It found that both the real estate brokers involved in the MLS, as well as the software companies that developed it were parties to this illegal agreement. The CNMC noted that the software for the MLS was designed in such a way that only properties that complied with the minimum commission could actually be listed on the database. Although this was not a very sophisticated algorithm, the CNMC nevertheless considered that it was a tool used to ensure compliance with the agreement, and that the software developers were well aware of this situation. Fines totalling EUR 1.25 million were imposed[25].

A final case that can be mentioned here is the *Webtaxi* decision of the Luxembourg NCA (the Autorité de la Concurrence)[26]. This case concerned a taxi dispatch service to which several independent taxi operators subscribed. The dispatch service allocated taxis to customers based on proximity and calculated the price for the ride based on an algorithm that took into account the distance, the time and a number of other factors (taxi prices being in practice unregulated in Luxembourg). The Luxembourg NCA considered that this system constituted a restriction of competition by object, but that it was justified under the Luxembourg national equivalent of Article 101(3) TFEU[27]. One factor that the Luxembourg NCA took into account in this respect was that on-

[24] Comisión Nacional de los Mercados y la Competencia Decision of 25 November 2021 in case No S/0003/20 – *Proptech*.

[25] *Ibidem*.

[26] Autorité de la Concurrence Decision of 7 June 2018 in case No 2018-FO-01 – *Webtaxi*.

[27] Note that the Autorité de la Concurrence considered that there was no effect on trade between the member states due to the fact that most taxi trips are not cross-border and due to the existence of national licensing rules (case No 2018-FO-01 – *Webtaxi*, cit.).

ly 26% of taxis in Luxembourg belonged to companies that subscribed to the Webtaxi service and that there was therefore sufficient competition remaining on the market.

In the previous cases, the algorithm was obviously used to fix prices: the anticompetitive agreement was explicitly incorporated in the software code. Things start becoming more complex if the algorithm is not ostensibly designed to fix prices of the users, but there may be suspicions that this is nevertheless its true purpose or at least its effect. These suspicions may in particular relate to the way the algorithm collects information from its users and subsequently shares this information with other users or uses that information to recommend or propose conduct by other users.

Information exchanges through third parties are a long-running antitrust concern. The exchange of commercially sensitive information can result in collusion between undertakings, regardless of whether that information is exchanged directly between them or whether it is exchanged through a third party. The fact that the third party is a piece of software rather than a person of flesh and blood does not raise legal issues per se. However, to the extent that the algorithms also process the information they receive, it may nevertheless become more difficult to discern whether the exchange has anticompetitive effects.

The collusive potential of the exchange of information through an algorithmic tool can already be observed in the *Car Insurance* case that the UK Office of Fair Trading (the "OFT") concluded in 2011[28]. This case concerned pricing information that was legitimately provided by car insurance companies to brokers through an insurance quote engine, but that was subsequently recycled in another software application which was offered as a market analysis tool to the insurance companies themselves. The recycling of the information allowed the car insurance providers to observe the quotes offered by their competitors, not only historical but even current quotes (so future prices). In addition, since the market analysis tool allowed the insurer to analyse quotes for a large variety of risk profiles (so-called batch analysis), the insurers were able to reverse engineer their rivals' rating models. The OFT's investigation was ultimately concluded as a result of commitments offered by the car insurance pro-

[28] Office of Fair Trading Decision of December 2011 in case OFT1395 – *Private Motor Insurers*.

viders and the software providers to only include data in the market analysis tool that was at least six months old and that was anonymised and aggregated[29]. While information exchanges through common databases have raised competition concerns in the past[30], this seems to be one of the first cases where the functionalities provided by the database (in particular the batch analysis) heightened the antitrust concerns.

Two class action cases that were recently filed in the United States also fall in this category. The first is a series of cases brought against several real estate agents and software provider RealPage. The plaintiffs point out that many of the real estate agents in question started using the RealPage software and that the latter collects real-time price and supply data to recommend rental prices, which are in turn followed by the agents in the vast majority of cases. The complaints allege that this practice has resulted in lower occupancy rates and higher prices for the properties in question. Through a discovery process, the plaintiffs want to obtain a better insight into the functioning of the software and the data that is being collected to determine whether any unlawful exchanges of information took place through the software. The plaintiffs allege that this coordination through the software was accompanied by direct phone calls between competing agents to collect pricing information[31].

Another class action case was introduced against several hotel chains on the Las Vegas Strip and software provider RainMaker. The latter offers price comparison and price recommendation tools which collect transaction-level data from hotels. The complaint alleges that the use of these tools by the hotel chains resulted in lower occupancy rates and higher prices. According to the plaintiffs, the information exchange through the software was again accompanied by direct contacts between executives

[29] *Ibidem.*

[30] See, for example, the information exchange that a number of US airlines engages in through the ATPCO database in the 1990s discussed in OECD, *Algorithms and Collusion*, cit. The database in question collated information about tickets for travel agents, but was also accessible by the airlines themselves. The airlines used the database to announce future price increase in advance and, in that way, facilitate coordinated price increases between them. The US Department of Justice investigated the case and concluded a settlement with the airlines under which they would refrain from announcing pricing increases in advance.

[31] US District Court, Southern District of California, case 3:22-cv-01611-WQH-MDD, *Bason et al* v. *RealPage et al* [2022]; US District Court, Western District of Washington – Seattle, case 2:22-cv-01552-RSL *Navarro et al* v *RealPage et al* [2022].

of the hotel during in-person user conferences organised by RainMaker [32].

While these two cases are still pending, the allegations made in them do show the collusive potential of a common use of the same software by several competitors. The plaintiffs in these cases also allege that human-to-human collusion took place in addition to the alleged collusion through the algorithms, but the key concern seems to be the common use of the same digital pricing tool.

Another case in which an allegation of hub-and-spoke collusion was formulated is the *Parneo*-case, which resulted in a judgment of the Paris Court of Appeal in 2022 [33]. This case concerned an algorithm named Partneo that was marketed as a tool for car manufacturers to set prices for spare parts. Mr. Z developed this algorithm and his company Syrus sold it to Accenture in 2010. In 2016, Mr. Z and Syrus brought a damages claim against Accenture alleging that the latter was using the algorithm to facilitate collusion between different car manufacturers, including Renault and PSA. According to the claimants, this anticompetitive conduct damaged Mr. Z's reputation and thereby his other professional activities since the sale.

Mr. Z and Syrus alleged in particular that Accenture did not ensure proper separation of the data provided by each of the car manufacturers for the adjustment of the algorithm. As a result, car manufacturers knew by what method other car manufacturers adjusted their prices for spare parts, what parameters they used for this and what price levels they practised. According to the claimants, this resulted in coordinated price increases.

After the Paris Commercial Court, also the Paris Court of Appeal rejected the claims made by Mr. Z and Syrus on several grounds. First of all, the Court of Appeal pointed out that car manufacturers are not competitors of one another when it comes to the sale of spare parts, as the latter are distinct for each car model. Secondly, the Court considered that the claimants had not shown that car manufacturers had used the same parameters to set up the Partneo algorithm nor that the parallel use of that algorithm resulted in parallel price increases. Finally, the Court rejected the allegation that any allegedly anticompetitive use of the algorithm could have caused any damages to Mr. Z since the difficulties he allegedly suffered post-dated the introduction of his damages claim.

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[32] US District Court, District of Nevada, case 2:23-cv-00140-MMD-DJA, *Gibson et al* v. *MGM Resorts International et al* [2023].

[33] Paris Court of Appeal, case RG No 20/14980, *Z and Syrus* [2022].

While the circumstances of this case are very particular, the allegations made by Mr. Z and Syrus again demonstrate the potential that the common use of software tools may have to result in collusion (even though this was not established in this case).

As is apparent from the cases discussed above, hub-and-spoke collusion through algorithms is the area where most enforcement and litigation in relation to algorithmic collusion has taken place. There are obvious evidentiary reasons for this. The simple fact that multiple businesses are using the same software raises suspicions that this might result in collusive outcomes. In the cases where an infringement has been found, the software itself also provided the evidence of the collusive agreement since it explicitly contained the pricing level that was the object of the cartel.

However, in instances where the software is not so obviously anticompetitive (or enforcers have difficulty interpreting it), the use of a joint algorithm may raise legal and evidentiary issues which relate to the boundaries of prohibited information exchanges. In particular, the question is whether the increased transparency provided by the algorithm allows each of its users to compete more effectively or instead facilitates an anticompetitive collusion. The answer to this question will often require enforcers and courts to interpret the software code in light of economic theory.

5. Autonomous algorithms

Algorithms have become increasingly complex and some have been designed to not only adapt their output to different inputs, but even to adapt themselves to changing inputs. This gives these algorithms an ability to "learn" and to appear intelligent in a manner that is similar to humans: they are therefore a form of artificial intelligence ("AI"). AI is a term that encompasses a variety of digital tools that provide computers with a semblance of intelligence akin to humans. Some of these tools are grouped under the notion of "machine learning", which itself comprises a number of different techniques.

One of the machine learning techniques that appears to be most suitable to allow algorithms to learn in changing market circumstances is reinforcement learning. This technique entails that the algorithm is program-

med to pursue a specific reward (e.g. profit maximization) and to find the best strategy to reach that reward by engaging in a (large) number of trials-and-errors (e.g. setting prices at different levels). Such an algorithm can come up with the best (e.g. profit-maximizing) strategy in a static environment, but it can also adjust strategies to take into account changing market circumstances.

Reinforcement learning techniques have been used to teach algorithms to play games (e.g. chess, Go, poker) and to adapt their strategies in response to the way the opponent plays. Oligopolistic markets have been compared to game environments, so it is natural to conceive of the possibility that such algorithms would also be able to perform well in such markets. Since economic theory teaches that collusion is a profit-maximizing strategy for companies in certain oligopolistic markets, this implies that a reinforcement learning algorithm may develop this strategy as well.

As far as the author and indeed also the OECD [34] is aware, there are currently no instances where the use of such self-learning autonomous algorithms has led to enforcement action by NCAs or in the courts. However, the theoretical possibility that algorithms could themselves achieve collusive outcomes has been the subject of experimental verification in the economic literature. A 2015 paper by Bruno Salcedo already indicated that pricing algorithms in a duopoly could reach an equilibrium price at a monopolistic level [35]. However, this paper assumed that each algorithm (at least from time-to-time) became aware of the pricing strategy followed by the other algorithm.

In a 2020 article published in the American Economic Review, Emilio Calvano et al. demonstrated that a supra-competitive price could also be achieved by pricing algorithms that do not benefit from such transparency [36]. In their model, the authors let reinforcement learning algorithms play iterative games in which they set prices in a duopolistic market (so in which one other algorithm was present). The algorithms were designed to act in a profit-maximizing manner but also to experiment, i.e. to occa-

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[34] OECD, *Algorithmic Competition*, cit.

[35] B. SALCEDO, *Pricing Algorithms and Tacit Collusion*, 2015, available at www.brunosalcedo.com.

[36] E. CALVANO, G. CALZOLARI, V. DENICOLÒ, S. PASTORELLO, *Artificial Intelligence, Algorithmic Pricing, and Collusion*, in *The American Economic Review*, 2020, Vol. 110, Iss. 10, p. 3267.

sionally set prices in an explorative manner to discover more rewarding pricing strategies. Although it took a long time (on average close to one million iterations), the two algorithms in the duopoly converged on an identical price over time. However, this equilibrium was not the Nash equilibrium of perfect competition, but instead very close to the profit-maximizing price set by a monopoly. The way prices were set by the algorithms suggested that they used a punishment strategy to respond to price cuts by the other algorithm and that the supra-competitive price was therefore a result of tacit collusion. The experiment was extended to markets with 3 and 4 algorithms and resulted there in prices that were somewhat lower but still significantly above the competitive price.

The practical relevance of the conclusions of the Calvano paper have, however, been questioned [37]. As already indicated, the learning process described in that experiment is extremely slow and would therefore not be suitable for application in practice. More fundamentally, it has been argued that the algorithms used in the experiment were designed to converge on a certain price after a number of iterations and that the level of that price could be the consequence of independent pricing strategies applied by the algorithms, without the need for any collusion.

Apart from this experimental evidence, there is an empirical study conducted of petrol station pricing in Germany that suggests that the use of pricing algorithms led to price increases there [38]. This study was based on the observation that AI-tools for price setting are becoming increasingly available for petrol station owners. Using public information on petrol station prices, the researchers tried to deduce the adoption of such tools (which is not publicly known) from certain structural breaks in pricing behaviour such as the number of price changes at a petrol station, the average size of price changes, and the response time of a station's price update given a rival's price change. Coupling this information of the adoption of AI-tools with the public information on prices suggested, according to the study, that petrol stations that adopt such pricing software benefited from a 9% increase in margins. The data also indicated that in

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[37] A.V. DEN BOER, J.M. MEYLAHN, M.P. SCHINKEL, *Artificial Collusion: Examining Supracompetitive Pricing by Q-learning Algorithms*, Tinbergen Institute Discussion Paper, No TI 2022-067/VII, 2022, available at www.econstor.eu.

[38] A. ASSAD, R. CLARK, D. ERSHOV, L. XU, *Algorithmic pricing and competition: Empirical evidence from the German retail gasoline market*, CESifo Working Paper, No 8521, 2020, available at www.econstor.eu.

duopoly markets margins did not change when only one of the two stations adopted the AI-powered price setting tool but they increase by 28% when both stations adopted that tool. The researchers could of course not identify the precise causes of the increased margins, but the study nevertheless suggests that the adoption of pricing algorithms can increase prices, in particular in concentrated markets.

Collusion by autonomous algorithms raises a host of legal and practical issues. To start with, if algorithms manage to achieve a collusive outcome without communicating between them, the conduct would not qualify as explicit, but merely as tacit collusion. The latter is not prohibited by the antitrust rules, as epitomized by the statement of the Court of Justice in *Suiker Unie* that EU antitrust law «does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors» [39].

This is not a legal problem that can be easily fixed. It is indeed entirely normal and, one could say, the very essence of competition, that businesses take into account the (actual and expected) conduct of their competitors. If some of this conduct would nevertheless be viewed as problematic since it might lead to supra-competitive prices or other anticompetitive outcomes, where should antitrust authorities draw the line between permissible and unlawful behaviour? This difficulty makes most scholars argue that there is no alternative to not prohibiting tacit collusion [40].

A second related issue is what remedies companies could implement or antitrust authorities could impose to avoid the collusive outcome. It would be nonsensical to require companies to ignore the prices of competitors. Such conduct would impede much of the competitive process and could result both in consumers paying too much for their products or services (since the suppliers would not realize when the market price went down) and in companies going out of business (since they would not realize that they priced themselves out of the market) [41].

Instead of trying to prohibit autonomous collusion by algorithms un-

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[39] Case 40/73, *SuikerUnie*, cit.

[40] See R. POSNER, *Antitrust Law*, 2nd ed., University of Chicago Press, Chicago, 2001, in particular its chapter 3 *Price fixing and the oligopoly problem*, pp. 51-100 and N. PETIT, *The Oligopoly Problem in EU Competition Law*, in I. LIANNOS, D. GERADIN (eds.) *Research Handbook in European Competition Law*, Edward Elgar, Cheltenham, 2013, p. 259.

[41] See again R. POSNER, *Antitrust Law*, cit., and N. PETIT, *The Oligopoly Problem*, cit., p. 259.

der the antitrust rules, it may therefore be preferrable to look for alternative solutions to reduce the risk that this may happen.

A first avenue to do so, is to more rigorously enforce the antitrust rules to stop instances of signaling. Antitrust authorities, including the Commission and NCAs, have indeed recognized that firms may facilitate collusion by signaling to each other the future (pricing) conduct which they are considering adopting: this information allows the recipient to adapt its own conduct in turn and even to signal this as well. In order to distinguish between legitimate situations where firms communicate their future (pricing) intentions from those where such communications are aimed at collusion, the authorities have used as a benchmark the business rationale of the communication.

For example, in the leading US case on signaling, *Valassis*, one of the companies in question during an investor's call disclosed its intentions to retreat from certain markets but also to furiously compete in other markets. The main competitor of the company, which also attended the call, informed the US Department of Justice of this, as it considered that it was no longer able to make autonomous business decisions because of the information that had been revealed. The Department of Justice indeed considered that this information «would not ordinarily have been disclosed» and concluded a settlement with Valassis [42].

In the *Dutch Telecom* case, one of the leading telecom operators in the Netherlands announced at an industry conference and in an industry journal its intention to increase mobile telephony prices and to no longer fight for market share. Since this information was not addressed at consumers and seemed to be formulated in a non-committal manner (the date of the price increase was not announced), it appeared to be rather an invitation to competing telecom operators to do the same. The Dutch NCA (the Autoriteit Consument & Markt) indeed concluded that the announcements did «not provide valuable information to consumers or information about future trends in demand that is of general use». It ultimately obtained commitments from the telecom operators not to make such price announcements again [43].

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[42] US Federal Trade Commission Decision of 14 March 2006 in case No C-4160 – *In re Valassis Communications, Inc.*, consent order.

[43] Autoriteit Consument & Markt Decision of 7 January 2014 in case 13.0612.53 – *T-Mobile, Vodafone, KPN*.

In the *Container Shipping* case, the Commission similarly took issue with rate increase announcements by container lines which took place long in advance, but would not always be actually implemented by the shipping companies [44]. Also this case was concluded with commitments.

While all these cases were concluded through commitments rather than infringement decisions, they provide an indication of the problematic effects of the communication of commercially sensitive information for collusion. In the context of autonomous algorithms, these principles could be relied on to verify that algorithms are not communicating information that has little value for customers and is merely useful for competing algorithms to align their conduct. Authorities and courts could stop such signaling if it unnecessarily increases transparency between the algorithms.

Furthermore, precisely the use of commitments can be an important second alternative avenue to deal with algorithmic collusion in circumstances where it is difficult to prohibit such conduct. In order to avoid a costly and lengthy investigation by the authority and subsequent litigation before the courts, both authorities and companies may prefer to proceed in a more collaborative manner by agreeing on business practices that should be avoided because they have the greatest likelihood of anti-competitive collusion.

European competition law specifically provides for the use of the commitment procedure in Article 9 of Council Regulation (EC) 1/2003 [45]. Under this procedure, if the undertaking or undertakings being investigated agree with the Commission on commitments that meet the Commission's competition concerns, the Commission can make these commitments binding and decide that there are no grounds for other action (so without finding an infringement or imposing a fine). If an undertaking is in this way bound by the commitments, its failure to comply with them does, however, expose it to penalties at a later stage. Other antitrust regimes have similar systems in place.

The commitments system has been particularly useful to tackle practices which may be harmful to competition but which are outside of the

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[44] Commission Decision of 7 July 2016 in case AT.39850 – *Container Shipping*.

[45] On commitment decisions see L. CALZOLARI, *Judicial Application of Commitment Decisions: from* Gasorba *to the Digital Market Act*, in this *Book*, p. 193.

hard core of antitrust infringements. The above-mentioned cases on price signaling illustrate this. Commitments have also been used by the Commission to deal with 'novel' conduct, i.e. conduct on which no decisional practice existed, e.g. because it arose in novel market circumstances. The Commission indeed agrees that commitments are particularly useful since they provide for more flexible solutions to antitrust concerns, in particular in fast-moving technology markets[46]. A good example of this is the 2009 commitments decision relating to Rambus in which the latter agreed to cap royalties for the use of certain standard essential patents[47]. This decision was adopted at a time when the antitrust framework for standard essential patents was still developing and the use of the commitments decision allowed the Commission to intervene in harmful practices without imposing a fine.

The increasing use of artificial intelligence by businesses poses similar challenges and the commitments procedure also provides the Commission with the much needed flexibility to deal with this. Investigations into possible instances of autonomous algorithmic collusion could not only be concluded with commitments not to signal prices (as discussed before), but also with commitments relating to other business conduct, e.g. as regards what factors to take into account to set prices.

Finally, if restrictions on price signaling do not curb collusion by autonomous algorithms and the companies concerned are not willing to enter into commitments to prevent collusion, regulatory intervention may be required. The risks posed by artificial intelligence have already triggered the Commission to propose an Artificial Intelligence Act which is currently being finalized in the trilogue between the Commission, the Council and the European Parliament[48]. However, in the risk-based approach followed by the proposed regulation, the use of autonomous algorithms in ordinary commercial contexts is not perceived as particularly high-risk. Therefore, companies which set prices based on autonomous

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[46] See Commission, *To Commit or not to Commit? Deciding between Prohibition and Commitments*, in *Competition policy brief*, 2014, Iss. 3, p. 2.

[47] Commission Decision of 9 December 2009 in case AT. 38.636 – *Rambus*.

[48] Commission Proposal of 21 April 2021 for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.

algorithms would not be subject to very strict requirements (except possibly the requirement to simply inform customers that an AI system has been used) [49].

However, if the use of autonomous algorithms leads to collusive effects, more stringent rules could be proposed. While the need of such rules and their precise content requires much more extensive research, such stricter regulation could take inspiration from certain cases of algorithmic collusion mentioned above, for instance, in requiring companies to avoid the publication of data which has no relevance to customers (as in the price signaling cases discussed before) or which is unduly specific (as in the UK *Car Insurance* case).

6. Conclusion

Coded algorithms increasingly play a role in commercial decision making. This has many advantages for the businesses using these algorithms as well as for their customers and for the economy as a whole. However, as humans are increasingly replaced by algorithms, the potential for anticompetitive collusion by algorithms also increases.

This paper has described the first cases in which competition authorities and courts have investigated possible instances of algorithmic collusion. Forms of algorithmic collusion can be divided in three categories.

First of all, algorithmic tools can be used to implement an anticompetitive agreement that was concluded by human officers and employees of the companies in question. From a legal perspective, such cases are not very different than purely human forms of collusion, although the evidence of the collusion may be more limited.

Second, the use of the same algorithmic tool by a number of companies can allow for collusion between them. If the collusive purpose is explicitly incorporated in the algorithm, this raises few legal questions, and it may even make it easier to establish that anticompetitive objective. However, if the algorithmic tool is not explicitly collusive, but merely facilitates an information exchange between the users, more difficult ques-

[49] In case the customer interacts with the system: see Article 52 of COM(2021) 206 final, cit.

tions about the content and the likely effects of that information exchange may need to be answered.

Third, there is at least a theoretical potential for autonomous algorithms to learn that collusion is the best commercial strategy for an undertaking in an oligopolistic market environment and to therefore pursue that strategy. There is also some experimental and empirical evidence that self-learning algorithms could be adopting collusive strategies in those circumstances. From a legal and evidentiary perspective, such collusive strategies may be difficult to prohibit under Article 101 TFEU and equivalent provisions. Competition authorities and courts may therefore have to consider alternative solutions to prevent collusion by autonomous algorithms, including greater scrutiny of price signalling and the increased use of commitments. If all else fails, regulatory intervention may be required.

Gatekeepers and Their Special Responsibility under the Digital Markets Act

Claudio Lombardi [*]

1. Introduction

The EU Digital Markets Act (the "DMA") is a peculiar piece of legislation that aims to achieve several goals, both stated and implied. Its stated objective is to contribute to the proper functioning of the internal market by laying down harmonized rules to ensure fair and contestable markets in the digital sector throughout the EU where gatekeepers are present [1]. This is intended to benefit both business users and end-users. Additionally, the DMA seeks to eliminate any existing or potential fragmentation due to diverging national laws in the EU [2]. This, in turn, should also help to remove obstacles to the freedom to provide and receive services [3]. Moreover, the DMA is intended to complement competition law

[*] Lecturer in Competition Law, University of Aberdeen, Scotland (UK).

[1] Article 1 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[2] Recital 7 of the DMA.

[3] Recital 8 of the DMA.

enforcement, and should therefore not conflict with Articles 101 and 102 TFEU [4].

According to others, the DMA aims at facilitating the entry of innovative small and medium-sized enterprises ("SMEs") in digital markets by preventing and fighting back exploitative and exclusionary conducts of gatekeepers [5], ensuring a level playing field in intra-platform competition [6]. While Articles 101 and 102 TFEU and national competition rules aim to protect undistorted competition in the market, the DMA includes two complementary stated objectives. It aims to ensure that markets with gatekeepers remain fair and contestable, regardless of the actual or potential impact of gatekeepers' behaviour on competition [7]. The DMA notes that although Articles 101 and 102 TFEU apply to gatekeepers, they only address certain instances of market power and anti-competitive behaviour [8]. Moreover, antitrust enforcement takes place *ex post* and requires complex and lengthy investigations [9]. Furthermore, the DMA observes that existing EU law does not effectively address the challenges posed by gatekeepers, which sometimes might not even be dominant in competition-law terms [10]. To solve all these issues, the DMA has introduced a process of designation of gatekeepers paired with several obligations and prohibitions. This allows the European Commission (the "Commission") to concentrate on a few selected undertakings and monitor their conduct when providing core platform services ("CPSs"). This involves imposing obligations and prohibitions on gatekeepers to ensure that the CPS remains fair and contestable.

Contestability is defined as the «ability of undertakings to overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services» [11]. According to the DMA, certain

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[4] Recital 10 of the DMA.

[5] F. BOSTOEN, *Understanding the Digital Markets Act*, in *The Antitrust Bulletin*, 2023, Vol. 68, Iss. 2, pp. 263-306.

[6] N. MORENO BELLOSO, N. PETIT, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, in *European Law Review*, 2023, Vol. 48, Iss. 4, p. 391.

[7] Recital 11 of the DMA.

[8] Recital 5 of the DMA.

[9] *Ibidem*.

[10] *Ibidem*.

[11] Recital 32 of the DMA.

characteristics of digital platforms, such as network effects and economies of scale and scope, limit the contestability of their CPSs [12]. The concept of unfairness is instead defined as «an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage» [13]. However, it is unclear what the extent of the imbalance between the rights and obligations of business users has to be to generate an unfair outcome under the DMA. Generally, contractual conditions tend to be in favour of the stronger contractual party. However, it is unclear if the imbalance has to make the contract unconscionable to be considered unfair under the DMA, or if unequal conditions are enough. Nevertheless, this imbalance must result in a «disproportionate advantage» for the gatekeeper. Since there is no clear benchmark for determining this disproportionate advantage, the enforcement of DMA provisions will need to offer more guidance. From a different perspective, contestable markets would enhance inter-platform competition, whilst fair market practices relate to intra-platform competition [14].

This chapter will proceed as follows: paragraph 2 covers the process and requirements for the designation of gatekeepers; paragraph 3 explores the obligations imposed upon gatekeepers by Articles 5-7 of the DMA and their enforcement; paragraph 4 analyses the justifications against designation decisions and the application of the obligations; paragraph 5 considers the balance that the different specific characteristics of the DMA, speed, flexibility and legal certainty; lastly, a conclusion follows.

2. Designation of gatekeepers

Differently from competition law rules, the DMA applies only to undertakings that are previously designated as gatekeepers. This makes possible to target and follow specific undertakings even in the absence of a specific distortion of competition.

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[12] Recitals 13 and 15 of the DMA.

[13] Recital 33 of the DMA.

[14] Recital 32 of the DMA. See also F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 266; N. MORENO BELLOSO, N. PETIT, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, cit., p. 402.

In traditional competition law enforcement, the finding of dominance is a key factor for proving an infringement of Article 102 TFEU. As such, no undertaking can be considered automatically dominant, as the Commission has the burden of defining the relevant market and providing evidence of the dominant position of such undertaking within this market. In the best-case scenario, the Commission can rely on rebuttable presumptions of dominance based on the market share held by the undertaking under investigation [15]. Since the finding of dominance is generally limited and constrained by the analysis of the specific case, the process of *ex ante* designation of dominant gatekeepers was alien to EU competition law [16]. However, digital platforms have introduced new challenges to determining market dominance due to the difficulties in establishing workable market definition criteria and dominance tests [17].

Traditional antitrust rules assess the relevant market and market power based on the perspective of product substitutability [18]. Goods or services that are reasonably interchangeable and demonstrate cross-elasticity of demand are considered to be competing with each other. Antitrust authorities, including the Commission and the Member States' National Competition Authorities ("NCAs"), mainly focus on horizontal competition, even when analysing vertical agreements or mergers, by assessing their impact on substitutable goods or services [19]. The concept of relevant market thus serves as a tool to select and delineate the interactions and issues that competition law should target in that case.

However, as digital ecosystems, multi-product platforms, and intercon-

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[15] See, General Court, case T-30/89, *Hilti AG v Commission* [1991] ECLI:EU:T:1991:70, para 92; Court of Justice, case T-65/98, *Van den Bergh Foods Ltd v Commission* [2003] ECLI:EU:T:2003:281, para 154; Court of Justice, case C-62/86, *Akzo v Commission* [1991] ECLI:EU:C:1991:286, para 60.

[16] Although other jurisdictions made this choice in the past, for example some of the post-soviet countries, including Kazakhstan and Russia, see OECD, *Eurasian Economic Union*, Peer Reviews of Competition Law and Policy, 2021, available at www.web-archive.oecd.org, OECD, *Competition Law and Policy in Kazakhstan*, A Peer Review, 2016, available at www.oecd.org.

[17] V.H. ROBERTSON, *Antitrust Market Definition for Digital Ecosystems*, in *Concurrences*, 2021, Iss. 2.

[18] Para 7 of the Commission Notice of 9 December 1997 on the definition of relevant market for the purposes of Community competition law.

[19] Commission Notice of 30 June 2022 Guidelines on vertical restraints.

nected economic activities have become more prevalent, the traditional notion of the relevant market has encountered limitations in reflecting this new reality. One notable limitation is the failure to adequately account for related markets, particularly situations where a dominant firm leverages its market power from one relevant market into another[20]. Scholars have highlighted the concept of "systems competition"[21] which involves closely related product families creating barriers for potential entrants who must either develop their own competing product family or collaborate with existing complementors. In response, a dominant player might even make its core product incompatible with rivals' offerings, effectively hindering the establishment of substitute ecosystems built on more advanced technology.

Besides, certain digital platforms pose new challenges to regulators due to their unique characteristics such as extreme scale and scope economies and network effects. Although there was a debate on whether standard antitrust regulations were effective in addressing these issues, the DMA aims at providing a solution to slow antitrust procedures that arose due to the challenge in establishing an abuse of dominance in digital markets[22]. The DMA bypasses the lengthy and evidence-heavy requirements of the market definition and competition assessment stages and instead relies on quantitative and qualitative criteria to trigger rebuttable presumptions. The next paragraph will consider these criteria in more detail.

2.1. The concepts of gatekeeper and core platform service

As mentioned before, the DMA enforcement is premised upon the designation of "gatekeepers". In other words, the provisions of the DMA

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[20] M.G. JACOBIDES, I. LIANOS, *Ecosystems and Competition Law in Theory and Practice*, in *Industrial and Corporate Change*, 2021, Vol. 30, Iss. 5, pp. 1199-1229. See also F. MUNARI, *Competition on Digital Markets: An Introduction*, in this *Book*, p. 7.

[21] M.L. KATZ, C. SHAPIRO, *Systems Competition and Network Effects*, in *Journal of economic perspectives*, 1994, Vol. 8, Iss. 2, pp. 93-115.

[22] Commission, Expert report by J. CRÉMER, Y.A. DE MONTJOYE, H. SCHWEITZER, *Competition Policy for the Digital Era*, Publications Office of the European Union, Luxembourg, 2019.

can be applied only to the undertakings that have been designated as «gatekeepers» according to Article 3 of the DMA.

The designation process introduces new concepts and definitions that are not commonly used in competition law. The DMA indeed applies only to gatekeepers providing a CPS. According to the DMA, a gatekeeper is «an undertaking providing [CPSs], designated pursuant to Article 3» [23]. Article 2(2) of the DMA does not provide a general definition of this concept but rather outlines it by way of a list of services [24]. The identification of CPSs mostly relied on three key criteria: (*i*) highly concentrated multi-sided platform services, with the power to dictate commercial terms and conditions; (*ii*) large digital platforms acting as gateways; (*iii*) unfair behaviours against economically dependent business users and customers [25].

The DMA observes that CPSs have several key characteristics that allow digital platforms to exploit their position. In particular, these characteristics are extreme scale economies, very low marginal costs to add business users or end users, very strong network effects, the ability to connect businesses users to end users, and a significant economic or technological dependence of such users from this core service, which causes lock-in effects and prevents multi-homing [26]. Vertical integration and data-driven advantages are other critical characteristics of such services [27]. Additionally, the Commission relied on numerous sources of data including existing enforcement experience, expert studies, complaints

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[23] Article 2(1) of the DMA.

[24] According to Article 2(2) of the DMA, these services include: «(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i)».

[25] Cf. para 37 of the Commission Staff working document of 15 December 2020 Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), SWD (2020) 363 final (hereinafter, the Impact Assessment).

[26] Recital 25 of the DMA. See also F. MUNARI, *Competition on Digital Markets: An Introduction*, cit., p. 7.

[27] Recital 2 of the DMA.

from business users and customers, ongoing regulatory interventions, and broad stakeholder consultation [28], to prove and select CPSs where unfair practices are more prominent [29].

Several of the services mentioned in Article 2(2) of the DMA require a reference to other EU laws for their definition: reference is made, in particular, to «online intermediation services» [30], «online search engine» [31], «video-sharing platform service» [32], «number-independent interpersonal communications service» [33], and «cloud computing service» [34]. Despite the fact that the DMA directly recalls Regulation (EU) 2019/1150 [35], the so-called Platform-to-Business Regulation (the "P2B Regulation") and establishes that the DMA itself should apply without prejudice to the application of this and other EU laws [36], some commentators have stated that the complex relationship between the two «will not only jeopardize the P2B Regulation *acquis* but also the effective enforcement of the DMA» [37]. Streaming services and B2B industrial platforms were initially also included in the list of CPSs. However, the Commission ob-

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[28] Footnote 133 of the Impact Assessment.

[29] Para 37 of the Impact Assessment.

[30] Article 2(2) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. This is relevant for Google Maps, Google Play, Google Shopping, Amazon Marketplace, App Store, Meta Marketplace.

[31] Article 2(5) of Regulation (EU) 2019/1150, cit. The only CPS designated in this category was Google Search. See *infra* note 85.

[32] Article 1(1)(aa) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[33] Article 2(7) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code. This is the relevant provision for CPS such as Whatsapp and Messenger.

[34] Article 4(19) of Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

[35] Regulation (EU) 2019/1150, cit.

[36] Recital 11 and Article 1(6) of the DMA.

[37] K. BANIA, *Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause*, in *European Competition Journal*, 2023, Vol. 19, Iss. 1, pp. 116-149.

served that video streaming services lack multi-sided characteristics and B2B platforms did not exhibit strong asymmetry in bargaining power [38].

With regard to video-sharing platform services, the Audiovisual Media Services Directive has established [39] that video-sharing platforms are responsible for organizing programs or videos using algorithms, but they should not have editorial responsibilities [40]. Therefore, it has been noted that streaming services like Netflix and Amazon's Prime Video are not subject to the DMA because they choose and curate the content they offer to viewers [41]. In contrast, Google's YouTube is a video-sharing platform that shares all the characteristics of such a service, and was indeed the only CPS designated in this category [42].

On the other hand, the DMA also introduces some original definitions of CPS. In particular, an online social networking service is defined as «a platform that enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations» [43] and Tiktok, Facebook, Instagram and Linkedin were designated in this category. An operating system is «a system software that controls the basic functions of the hardware or software and enables software applications to run on it» [44]. For example, in the first round of gatekeeper designations, Google Android, iOS, and Windows PC OS were designated as CPS in this category [45].

Web browser is defined instead as «a software application that enables end users to access and interact with web content hosted on servers that

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[38] Impact Assessment, para 37.

[39] Under Article 1(a) of Directive 2010/13/EU, cit.

[40] Editorial responsibility that Article 1(c) defines as «the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided».

[41] N. MORENO BELLOSO, N. PETIT, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, cit., p. 397.

[42] See *infra* note 85.

[43] Article 2(7) of the DMA.

[44] Article 2(10) of the DMA.

[45] See *infra* notes 85 and 90.

are connected to networks such as the Internet, including standalone web browsers as well as web browsers integrated or embedded in software or similar» [46]. The two web browsers designated in 2023 were Chrome and Safari [47].

While a virtual assistant is «a software that can process demands, tasks or questions, including those based on audio, visual, written input, gestures or motions, and that, based on those demands, tasks or questions, provides access to other services or controls connected physical devices» [48]. No virtual assistants were designated in the first round of designations.

2.2. A mix of quantitative and qualitative criteria that although focused on size make without market definition and market share

The designation of gatekeepers under the DMA rests upon three qualitative criteria which are further specified according to quantitative thresholds. In particular, an undertaking must meet three cumulative criteria: (*i*) it has a significant impact on the internal market; (*ii*) it provides a CPS which is an important gateway for business users to reach end users; and (*iii*) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future [49].

Each criterion is defined by a specific set of quantitative criteria. The next paragraphs analyse both the qualitative and quantitative concepts utilised in Article 3 of the DMA.

i. Significant impact on the internal market

When assessing the significant impact on the internal market criterion, the Commission has to use a combination of quantitative and qualitative criteria. These criteria include a very significant turnover and provision of a CPS in at least three Member States, as well as very significant market capitalization or fair market value, also in at least three Member

[46] Article 2(11) of the DMA.

[47] See *infra* notes 85 and 87.

[48] Article 2(12) of the DMA.

[49] Article 3(1) of the DMA.

States. The Commission may use delegated acts to develop an objective methodology for calculating the fair market value [50].

The turnover thresholds are relatively straightforward, and a gatekeeper will fulfil the criterion if it provides the same CPS in at least three Member States and meets at least one of the following criteria [51]: (*i*) it achieved an annual Union turnover equal to or greater than EUR 7.5 billion in each of the last three financial years, or (*ii*) its average market capitalization or equivalent fair market value amounted to at least EUR 75 billion in the last financial year.

According to the impact assessment, suitable quantitative thresholds can be constructed from indicators for size (such as turnover and presence in various Member States) and for economic dependency (such as the number of business users and end-users served on the platform) [52]. Measures of "persistence", such as the number of CPSs offered by the same group of undertakings and the number of years this group has held its position, can capture the weak inter-platform competition that results from entrenched gatekeepers' services [53]. This combination of quantitative and qualitative parameters aims at finding a restricted group of gatekeepers benefiting from an entrenched and persistent position in the market and high level of users' dependency [54].

The first quantitative indicator of size is based on the undertaking's turnover (EUR 7.5 billion in each of the last three financial years), or average market capitalization [55] to at least EUR 75 billion in the last financial year. The DMA focus on turnover has led some commentators to question whether this was a return to "big is bad" approach [56]. Bigness, however, was long being linked to a number of structural issues in digital markets [57].

The impact assessment evaluated three distinct methods to identify gatekeepers who attain a specific level of «size and internal market im-

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[50] Recital 17 of the DMA.

[51] Article 3(2)(a) of the DMA.

[52] Para 130 of the Impact Assessment.

[53] *Ivi*, para 135.

[54] *Ibidem*.

[55] Or equivalent fair market value.

[56] F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 272 ff.

[57] T. WU, *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports, New York, 2018, available at www.scholarship.law.columbia.edu.

pact» [58]. To determine size and internal market impact, the chosen criteria were the EEA's annual turnover of the group (> EUR X billion) or the average market capitalisation or the equivalent fair market value of the group (> EUR X billion) along with its presence in more than three EU countries.

The impact assessment stated that while other factors like the degree of multi-homing or the rate of innovative entry were suggested in the literature, they were not appropriate for establishing quantitative criteria that could objectively measure the impact of gatekeepers in the EU [59].

ii. It provides a core platform service which is an important gateway for business users to reach end users

According to the DMA, certain digital services are more susceptible to unfair practices and weak contestability than others [60]. This is particularly true for widely used services that directly connect business and end users, and possess features like significant network effects, lock-in effects, and a lack of vertical integration or multi-homing [61]. In particular, the DMA has identified certain digital services as having the potential to affect a vast number of end-users and businesses and posing a risk of unfair business practices, such as online search engines, video sharing platforms, cloud computing services, virtual assistants, and web browsers [62].

According to Article 3 of the DMA, the turnover thresholds are not sufficient to designate a gatekeeper, as the undertaking also needs to provide certain CPS. These CPSs are defined in Article 2(2) of the DMA, through a list of services rather than a general definition: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by

[58] Paras 141-142 of the Impact assessment.

[59] Para 147 of the Impact Assessment.

[60] Recital 13 of the DMA.

[61] *Ibidem*.

[62] Recital 14 of the DMA.

an undertaking that provides any of the CPSs listed in points (a) to (i).

This criterion mostly aims at finding out the dependency of stakeholders on a gatekeeper [63]. Article 3(2)(b) of the DMA has set a quantitative standard that requires a CPS to have a minimum of 45 million monthly active end users within the EU, along with at least 10,000 yearly active business users established in the EU. The criteria for identifying and calculating these users are specified in the Annex to the DMA and must be followed accordingly.

The number of active users and business users should serve as a proxy for the gatekeeper's "bottleneck power" [64]. A high number of business users and monthly active end users would indeed indicate the provider's importance as a gateway for a CPS. It has been observed that determining the number of "active" end users might be challenging however due to scarce information and issues of actual definition of an end user for certain services [65]. The DMA burdens the undertaking with providing information about the number of active users. The undertaking providing CPSs is responsible for submitting accurate data and explanations on the methodology used to count active end users and active business users [66]. In performing this calculation, the same category of CPSs should not be identified as distinct based on domain names or geographic attributes [67]. Distinct CPSs should be considered based on their purposes and usage by end users and business users [68].

Undertakings must distinguish between different CPSs based on two criteria. Firstly, CPSs that do not belong to the same category as defined in Article 2(2) of the DMA should be considered distinct, even if they are offered together. Secondly, CPSs used for different purposes by their end users or business users, or both, should also be considered distinct, even if they belong to the same category as defined in Article 2(2) of the DMA and are offered together [69].

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[63] Para 143 of the Impact Assessment.

[64] Para 143 of the Impact Assessment.

[65] F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 275.

[66] Section D, para 2, of the Annex to the DMA.

[67] *Ivi*, Section D, para 2(a).

[68] *Ivi*, Section D, para 2(c).

[69] *Ivi*, Section D, points 2(b) and (c)(ii).

It is possible to consider CPSs as distinct even if they fall into the same category. In such cases, a relevant criterion for identifying distinct CPSs within the same category would be the purpose for which the service is used by either end-users or business users, or both. Additionally, different services may be considered as a single CPS, if they serve the same purpose from both an end-user and a business-user perspective, except if they belong to different categories of CPSs listed in Article 2(2) of the DMA [70]. Recital 2 spells out the only clear exclusion to be found to the CPS which is reserved for services which act in a non-commercial manner.

The selected criteria for "dependency" relates to the number of users (> X million EU users) along with the number of business users (> X EU business users) across all CPSs [71]. This is a proxy for the bottleneck power of gatekeepers. A high number of business users who depend on a CPS to reach end-users and a high number of monthly active end-users indicate the provider's role as an important gateway.

iii. It enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future

The third characteristic of gatekeepers is that they enjoy or will foreseeably enjoy in the near future an entrenched and durable position [72]. This occurs «notably where the contestability of the position of the undertaking providing the CPS is limited. This is likely to be the case where that undertaking has provided a CPS in at least three Member States to a very high number of business users and end users over a period of at least 3 years» [73].

This element is apt to show the "persistence" of a gatekeeper [74], which would testify to the low or absence of contestability of the undertaking [75]. So that gatekeepers fulfil this requirement if they meet the thresholds in point (b) of Article 3(2) of the DMA and they «were met

[70] See *infra* note 87.

[71] Para 143 of the Impact Assessment.

[72] Recital 15 and Article 3 (1)(c) of the DMA.

[73] Recital 21 of the DMA.

[74] Para 143 of the Impact Assessment.

[75] Recital 21 of the DMA.

in each of the last three financial years»[76]. The gatekeeper's 'persistence' may cause indeed weak inter-platform competition, which, in turn, may cause gatekeeper's services to become entrenched[77]. For this reason, the DMA targets those practices that increase barriers to entry or expansion, and impose obligations on gatekeepers that tend to lower those barriers, especially when inter-platform competition is not effective in the short term, «meaning that intra- platform competition needs to be created or increased»[78].

Gatekeepers who hold a persistent position are believed to hinder innovation, especially when smaller companies that depend on gatekeepers are discouraged from innovating so as not to compete with them[79]. One way to gain monopoly power and increase barriers to entry is by preventing patents[80] or pre-emptive activities to gain monopoly power and increase barriers to entry, which ultimately slows down innovation in the long run[81]. Additionally, gatekeepers may acquire startups to further establish their market power[82]. Such market dominance can slow down innovation in the long run[83]. In this connection, the DMA aims at preventing gatekeepers from gaining an entrenched and durable position in their operations by imposing specific obligations, such as those preventing leveraging, facilitating switching and multi-homing[84].

The likelihood of an entrenched and durable position, or the foreseeability of achieving such a position in the future, is high where the contestability of the gatekeeper's position is limited. This is likely to be the case where that provider has provided a CPS in at least three Member States to a high number of business users and end-users during at least three years.

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[76] Article 3(2)(c) of the DMA.

[77] Para 135 of the Impact Assessment.

[78] Recital 32 of the DMA.

[79] Paras 1-10 of the Impact Assessment.

[80] I.e. para 281.

[81] *Ivi*, para 281.

[82] *Ibidem*.

[83] R.J. GILBERT, D.M. NEWBERY, *Preemptive Patenting and the Persistence of Monopoly*, in *The American Economic Review*, 1982, Vol. 72, Iss. 3, pp. 514-526.

[84] Recital 27 of the DMA. See also para 3.1 below.

2.3. First designation: expected or revealed flaws?

On 6th September 2023, the Commission designated its first six gatekeepers according to the DMA, namely Alphabet [85], Amazon [86], Apple [87], ByteDance [88], Meta [89] and Microsoft [90], each with respect to specific CPSs [91]. On the other hand, whilst Gmail, Outlook.com and Samsung Internet Browser would qualify as CPSs according to Article 3 of the DMA, the relevant undertakings [92] provided substantial evidence to rebut the presumption that these services qualify as gateways for the respective CPSs. As a result, the Commission concluded that these services should not be designated as CPSs.

Moreover, the Commission has launched four market investigations to evaluate Microsoft's and Apple's submissions regarding, respectively, Bing, Edge and Microsoft Advertising, and Apple iMessage. In particular, the undertakings have argued that these services do not meet the criteria for gateways.

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[85] Cf. Commission Decision of 5 September 2023 in cases DMA.100011 – *Alphabet – OIS Verticals*; DMA.100002 – *Alphabet – OIS App Stores*; DMA. 100004 – *Alphabet – Online search engines*; DMA.100005 – *Alphabet – Video sharing*; DMA.100006 – *Alphabet – Number-independent interpersonal communications services*; DMA.100009 – *Alphabet – Operating systems*; DMA.100008 –- *Alphabet – Web browsers*; and DMA.100010 – *Alphabet – Online advertising services*.

[86] Cf. Commission Decision of 5 September 2023 in cases DMA.100018 – *Amazon - online intermediation services – marketplaces*; DMA.100016 – *Amazon - online advertising services*.

[87] Cf. Commission Decision of 5 September 2023 in cases DMA.100013 – *Apple – online intermediation services – app stores*; DMA.100025 – *Apple - operating systems*; and DMA.100027 – *Apple – web browsers*.

[88] Cf. Commission Decision of 5 September 2023 in case DMA.100040 – *ByteDance - Online social networking services*.

[89] Cf. Commission Decision of 5 September 2023 in cases DMA.100020 – *Meta - online social networking services*; DMA.100024 – *Meta - number-independent interpersonal communications services*; DMA.100035 – *Meta - online advertising services*; DMA.100044 – *Meta - online intermediation services – marketplace*.

[90] Cf. Commission Decision of 5 September 2023 in cases DMA.100017 – *Microsoft - online social networking services*; DMA.100023 – *Microsoft - number-independent interpersonal communications services*; DMA.100026 – *Microsoft - operating systems*.

[91] On this point, see the infographic provided by the Commission, available at https://digital-markets-act.ec.europa.eu/gatekeepers_en.

[92] Alphabet, Microsoft and Samsung.

Furthermore, the Commission has opened another investigation to determine whether Apple's iPadOS should be designated as a gatekeeper despite not meeting the thresholds. This investigation should be completed within a maximum of twelve months [93].

This first designation has showed, if anything, that the rebuttable presumptions are more flexible than expected. It is however still to see how the Commission will use the although limited discretionary power it has according to Article 3(8) and Article 17 of the DMA to determine the status of gatekeeper of undertakings that meet the criteria set out in Article 3(1) without fulfilling all the quantitative requirements in Article 3(2) of the DMA. The way in which the Commission will motivate the decision may confirm or disprove concerns raised by some scholars about the unclear and imprecise definition of the characteristics and requirements for such designations [94].

3. Gatekeepers' obligations and prohibitions

The DMA is intended to fill a gap in the battle against unfair practices and super-dominance in digital markets. Thus, it was designed to work in conjunction with the enforcement of Articles 101 and 102 TFEU and Regulation (EC) 139/2004 [95]. Moreover, the provisions set out in Articles 5-7 of the DMA have a scope limited to the achievement of more contestable, fair, and sometimes transparent markets. Since the lack of contestability is generally due to the existence of very high barriers to entry and exit [96], the DMA establishes obligations aimed at lowering these barriers in the CPSs and in adjacent markets. Similarly, the Commission's impact assessment selected CPSs based on previous studies finding a high incidence of unfair practices, thus the impositions of fair conducts in the CPSs and in the adjacent markets where the gatekeepers leverage

[93] Article 17(1) of the DMA.

[94] N. Moreno Belloso, N. Petit, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, cit., p. 396.

[95] Cf. Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[96] Recital 3 of the DMA.

their gateway position [97]. The unfair behaviour is indeed made possible by the special position of the gatekeepers, which can «unilaterally set unbalanced conditions for the use of their [CPSs]» [98]. At the same time the DMA aims to impose obligations and prohibitions that are «sufficiently predictable» [99].

The DMA includes a number of prohibitions and obligations for gatekeepers, contained in Articles 5, 6 and 7 of the DMA. The provisions in Article 5 of the DMA are "self-executing", whilst those based on Articles 6-7 of the DMA are «susceptible of being further specified». The former provisions are mostly based on previous case law which has provided evidence of the anticompetitiveness of such conducts [100]. Scholars have attempted to classify the many rules included in these provisions on the basis of the different business models they regulate [101], on the type of market power [102], possible theories of harm [103], as positive and negative [104], or by reference to their purpose [105].

Here, we will simply follow the structure dictated by the DMA and divide the provisions into obligations and prohibitions, without further categorising them, for example, on the basis of their effects on intra or inter-platform competition. These categorisations, indeed, although useful, are generally targeting a subset of obligations and can rarely be comprehensive.

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[97] Recital 31 of the DMA.

[98] Recital 33 of the DMA.

[99] Recital 79 of the DMA.

[100] P. AKMAN, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, in *European Law Review*, 2022, Vol. 47, Iss. 1, p. 85.

[101] P. AKMAN, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, cit.

[102] P. IBÁÑEZ COLOMO, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, in *Journal of European Competition Law & Practice*, 2021, Vol. 12, Iss. 7, p. 561.

[103] A. DE STREEL, B. LIEBHABERG, A. FLETCHER, R. FEASEY, J. KRÄMER, G. MONTI, *The European Proposal for a Digital Markets Act: A First Assessment*, Centre on Regulation in Europe, Bruxelles, 2021, available at www.cerre.eu; G. MONTI, *The Digital Markets Act-institutional Design and Suggestions for Improvement*, TILEC Discussion Paper, 4/ 2021, p. 3 ff.

[104] F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 280 ff.

[105] N. MORENO BELLOSO, N. PETIT, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, cit., p. 401 ff.

However, a word of warning is necessary. Some prohibitions can also be viewed as obligations, and vice versa. For instance, Article 5(4) of the DMA requires gatekeepers to allow business users to communicate and promote their offers. However, it is not clear whether the gatekeepers have an active role in enabling this communication. If they do not, then the obligation could be rephrased as a prohibition against preventing business users from communicating or promoting their offers. In contrast, Article 5(3) of the DMA prohibits gatekeepers from stopping business users from offering their products or services to end-users through third-party online intermediaries or their own direct online sales channels at different prices or conditions than those offered through the gatekeeper's intermediation services. This prohibition could also be expressed as an obligation to allow users to offer their services under better conditions [106].

However, there is an essential difference between the two types of provisions. Article 5(4) of the DMA assumes that the gatekeeper has the power to permit or prevent communication on its platform. Therefore, the decision should lean towards allowing it (obligation). On the other hand, Article 5(3) of the DMA presupposes that there is a competitor who is theoretically allowed to promote and offer better conditions outside of the gatekeeper's intermediation service. Still, the gatekeeper potentially has the power to prevent this from happening (thus the imposition of a prohibition). Hence, the starting positions of the general powers and rights of the parties dictate whether the provision is formulated as a prohibition or an obligation.

3.1. Prohibitions

Article 5 of the DMA includes self-executing prohibitions which are triggered only if the gatekeeper fails to obtain valid users' consent. The obligations specifically are:

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[106] Another example could be Article 5(8) of the DMA, according to which «[t]he gatekeeper shall not require business users or end users to subscribe to, or register with, any further core platform services listed in the designation decision pursuant to Article 3(9) [of the DMA] or which meet the thresholds in Article 3(2), point (b) [of the DMA], as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services listed pursuant to that Article», which could be phrased as an obligation to give access free from the imposition to adopt other services.

«(a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of CPSs of the gatekeeper;

(b) combine personal data from the relevant [CPS] with personal data from any further [CPS] or from any other services provided by the gatekeeper or with personal data from third-party services;

(c) cross-use personal data from the relevant [CPS] in other services provided separately by the gatekeeper, including other [CPSs], and vice versa; and

(d) sign in end users to other services of the gatekeeper in order to combine personal data» [107].

The DMA still relies on the assumption that informed and valid consent given by the user [108] authorises the platform to do all that is above. This, in other words, may practically transform these prohibitions into a *de facto* reiteration of the obligation to obtain informed consent.

Moreover, gatekeepers are prohibited from preventing «business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper» [109]. Also, the gatekeeper is not allowed to directly or indirectly prevent users from raising issues of non-compliance [110], or require them to use their identification, web browser or payment services [111]. Additionally, Article 6 of the DMA contains a provision prohibiting any discrimination based on self-preferencing in ranking servicing [112]. Furthermore, the gatekeeper cannot restrict multi-homing and switching to the services offered by other providers [113]. As highlighted by the literature and by the Commis-

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[107] Article 5(2) of the DMA.

[108] Within the meaning of Article 4(11) and Article 7 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[109] Article 5(3) of the DMA.

[110] Article 5(6) of the DMA.

[111] Article 5(7) of the DMA.

[112] Article 6(5) of the DMA.

[113] Article 6(6) of the DMA.

sion, most prohibitions are based on existing case law and practice [114], both at the EU [115] and national level [116].

3.2. Obligations

Article 5 of the DMA compels the gatekeepers to allow business users to communicate and promote offers and conclude contracts with end users [117] as well as to allow end users to access such business user services without using the CPSs [118]. Finally, gatekeepers have an obligation to provide advertisers and publishers with relevant information and data related to the advertisement placed [119]. Article 6 of the DMA contains, differently from Article 5 of the DMA, mostly obligations, which are subject to further specifications. These obligations include providing access to data on fair, reasonable, and non-discriminatory terms ("FRAND"), enabling easy un-installation or installation of software applications, and allowing effective interoperability between hardware and software. The prohibitions, instead, mostly target data free-riding, defaults, self-preferencing, and lock-in practices.

The obligations carved out in Articles 5-7 of the DMA are mostly based on a combination of information based on case law, scholarly work [120], and the Commission's own research as per their impact assess-

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[114] P. AKMAN, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, cit., pp. 9-10; F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 285. See also the List of antitrust decisions and investigations in core platforms services attached as Annex 5.6 to the Impact Assessment.

[115] For instance, the Commission considers the DMA's provisions against misuse of third-party data to be based on and shaped by Commission Decision of 20 December 2020 in case AT.40462 – *Amazon Marketplace*.

[116] For example, the Commission considers the DMA's provisions for other practices related to abuse of dominance and personal users' data to be based on several NCAs decisions, such as the Bundeskartellamt decision of 6 February 2019 in case B6-22/16 – *Facebook* and Autorità Garante della Concorrenza e del Mercato Decision of 11 may 2017 in case CV154 – *WHATSAPP - CLAUSOLE VESSATORIE*.

[117] Article 5(4) of the DMA.

[118] Article 5(5) of the DMA.

[119] Article 5(9) and (10) of the DMA.

[120] F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 285.

ment. These sets of obligations are geared toward ensuring fairness and contestability. In particular, they aim to prevent gatekeepers from enjoying an entrenched and durable position, by for instance preventing leveraging or enabling users to multi-home [121]. These obligations tend to prevent practices that undermine contestability and fairness, and have a direct impact on business and end users [122]. Gatekeepers may use their superior position to set unbalanced conditions and obtain a "disproportionate advantage", engage in behaviour that does not allow others to benefit from their contributions or set unfair conditions for using their services [123]. In addition, gatekeepers may exclude or discriminate against business users, particularly if they compete with the services provided by the gatekeeper [124]. The abuse of superior bargaining power is thus central to the DMA and it was instrumental to structuring the obligations in Articles 5 and 6 of the DMA.

A special set of obligations aims at ensuring transparency in the advertising markets and in ranking. A gatekeeper providing ranking and related indexing and crawling services has to apply transparent, fair and non-discriminatory conditions to such ranking [125]. This requirement emerged primarily from the Google cases regarding self-preferencing and the lack of transparency in their algorithm, which enabled their services to be ranked higher than others.

The DMA also aims to address the lack of transparency in online advertising services due to the complexity of programmatic advertising and practices of some platforms. This lack of transparency has been amplified by new privacy legislation [126]. Gatekeepers should therefore provide free of charge information to advertisers and publishers about the price paid for each online advertising service. They should also grant free access to their performance measuring tools and necessary data for independent verification by advertisers, authorized third parties, and publishers [127].

It is important to note that the DMA has been drafted taking into ac-

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[121] Recital 27 of the DMA.

[122] Recital 31 of the DMA.

[123] Recital 33 of the DMA.

[124] Recital 33 of the DMA.

[125] Article 6(5) of the DMA.

[126] Recital 45 of the DMA.

[127] Article 5(9) and Recital 58 of the DMA.

count the research in behavioural science and economics of the last 20 years. This is evident in the inclusion of "anti-steering provisions" which restrict app developers from informing users about alternative purchasing options. These provisions create both informational and behavioural barriers for users, limiting their awareness of alternative options and making it harder for them to access them. Article 6(3) of the DMA outlines the terms "easily", "without undue difficulty" and "or otherwise" in relation to the un-installation of apps or exercising a user's right. Article 6(4) of the DMA relates to defaults and addresses the status quo bias [128].

3.3. Enforcement

The DMA tasks the Commission with the power to enforce rules across the EU. The Commission will work closely with the NCAs and courts in Member States which may have the prerogative to provide information, opinion and intelligence to the Commission. NCAs may also investigate non-compliance and report back to the Commission.

These powers are to be exercised without prejudice to Articles 101 and 102 TFEU [129]. The Commission has repeatedly stated that there are slim chances of enforcement overlap, as the two instruments are complementary to each other. In general, competition law is accustomed to apply and enforce prohibitions, as Articles 101 and 102 TFEU are formulated as such. However, the powers of the Commission include the imposition of behavioural remedies among which for example the imposition of specific conducts, such as enabling customers to switch [130], or amending corporate governance provisions [131]. Nonetheless, it has been observed that such remedies are rarely applied as they do not change firms' incentives, are hard to enforce and monitor, and may even have distorting effects on competition [132]. The Commission has more frequently adopted

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[128] A. FLETCHER, *Behavioural Insights in the DMA: A Good Start, But How Will The Story End?,* in *Competition Policy International*, 2022, p. 2.

[129] Recital 10 of the DMA.

[130] Commission Decision of 20 December 2012 in case AT.39654 – *Reuters Instrument Codes*.

[131] Commission Notification of 19 May 2005 in case M.3817 – *Wegener/PCM/JV*.

[132] F. MAIER-RIGAUD, B. LOERTSCHER, *Structural vs. Behavioral Remedies*, in *Competition Policy International*, 2020, p. 7.

"access remedies" to impose an obligation to grant access to a key infrastructure or intellectual property, such as patents [133], technology [134], data [135], or a mobile telecommunication network [136], to remove entry barriers and allow competition [137]. Here the echo of the several DMA obligations aiming at ensuring market contestability is indeed visible.

In the DMA, on the other hand, prohibitions and obligations are complementary because if the obligations in Article 5-7 of the DMA succeed in creating more inter-platform competition, then the platform will have the right market incentives to increase also the fairness of its relationships with users and thus, inter-platform competition [138]. On the other hand, the prohibitions in Articles 5-6 of the DMA targeting gatekeepers' exclusionary and unfair practices may lead to more intra-platform competition which should benefit also adjacent services, thus triggering and promoting also inter-platform competition.

Finally, it has been rightly pointed out that competition for sales outside of a CPS, also known as extra-platform competition, is an important objective of the DMA [139].

However, the enforcement of these provisions is subject to the principle of proportionality [140]. The DMA specifies that the Commission applies only the obligations that are necessary and proportionate to achieve the specific objectives set out by the DMA, and «should regularly review whether such obligations should be maintained, suppressed or adapted» [141]. However, the DMA is a regulation and, thus, may have horizontal direct effect, if its provisions are deemed to be clear, precise and unconditional.

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[133] Commission Decision of 9 December 2019 in case AT.38636 – *Rambus*.

[134] Commission Decision of 6 November 2012 in case M.6564 – *ARM/Giesecke & Devrient/Gemalto/JV*.

[135] Commission Decision of 19 December 2014 in case M.7337 – *IMS Health/ Cegedim business*.

[136] Commission Decision of 28 May 2014 in case M.6992 – *Hutchison 3G UK/ Telefonica Ireland*.

[137] F. MAIER-RIGAUD, B. LOERTSCHER, *Structural vs. Behavioral Remedies*, cit., pp. 5-6.

[138] F. BOSTOEN, *Understanding the Digital Markets Act*, cit., p. 280.

[139] N. MORENO BELLOSO, N. PETIT, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, cit., p. 404.

[140] Article 5(4) TEU.

[141] Recital 27 of the DMA.

This means that, in these cases, businesses and end users can file claims for damages or injunctions based on violations of Article 5-7 of the DMA before national courts [142].

4. Justifications

In special circumstances, an undertaking providing CPSs may challenge the presumption that it has a significant impact on the internal market by proving that although it meets the quantitative thresholds established by the DMA, it does not meet the requirements for designation as a gatekeeper. The responsibility of providing evidence to refute the presumption arising from meeting the quantitative thresholds belongs to the company. The Commission should only consider evidence and arguments related to quantitative criteria, such as the company's impact on the internal market beyond revenue or market cap, its size, the number of Member States it is present in, how much the actual business user and end-user numbers exceed the thresholds, the importance of the company's CPS considering the overall scale of activities of the respective CPS, and the number of years for which the thresholds have been met. Any economic justifications seeking to enter into market definition or to demonstrate efficiencies deriving from a particular type of behaviour by the company providing CPSs should be disregarded as they are not relevant to the designation as a gatekeeper. If the arguments submitted are not sufficiently substantiated to challenge the presumption, the Commission may reject them within 45 working days. The Commission should be able to make a decision based on the available information on the quantitative thresholds if the company providing CPSs obstructs the investigation by failing to comply with the investigative measures taken by the Commission [143].

If the undertaking providing CPSs satisfies the quantitative thresholds set out in Article 3(2) of the DMA, a rebuttable presumption of it being a gatekeeper is triggered. However, if the undertaking presents valid and substantiated arguments in accordance with Article 3(5) of the DMA that question the presumption in Article 3(2) of the DMA, the Commission

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[142] See F. CROCI, *Judicial Application of the Digital Markets Act: The Role of National Courts*, in this *Book*, p. 233.

[143] Recital 23 of the DMA.

will try to complete the market investigation within five months from the date of opening [144].

If an undertaking providing a CPS meets the qualitative criteria in Article 3(1) of the DMA but does not satisfy each of the quantitative criteria in Article 3(2) of the DMA, then the Commission has to designate the gatekeeper in accordance with Article 17 of the DMA [145]. In this case, the Commission may conduct a market investigation to identify the CPSs to be listed in the designation decision. In doing so, the Commission should consider the size of the undertaking, including its turnover and market capitalization, the operations and position in the market [146]. Moreover, it should consider the number of business users and end users of the CPS [147]. Furthermore, the Commission is allowed to consider information such as network effects, data driven advantages, economies of scale and scope, lock-in effect, also due to high switching costs and behavioural biases, conglomerate corporate structure or vertical integration, and other structural business or service characteristics [148].

This special procedure should be concluded within 12 months with the adoption of an implementing act setting out the decision [149]. Within six months from the opening of the market investigation, the Commission has to communicate to the undertakings its preliminary findings [150].

The Commission has also the power to prevent an undertaking from achieving an «entrenched and durable position» in the market. According to Article 3(1)(c) of the DMA an undertaking shall be designated if, among the other things, it either enjoys an entrenched and durable position or it is «foreseeable that it will enjoy such a position in the near future». However, in this case the Commission will only apply those obligations that are appropriate and necessary to «prevent the gatekeeper concerned from achieving, by unfair means, an entrenched and durable position in its operations» [151].

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[144] Article 17(3) of the DMA.

[145] Article 3(8) of the DMA.

[146] Article 3(8)(a) of the DMA.

[147] Article 3(8)(b) of the DMA.

[148] Article 3(8)(g) of the DMA.

[149] Article 17(1) of the DMA.

[150] Article 17(2) of the DMA.

[151] Article 17(4) of the DMA.

As stated above, the DMA does not accept general justifications that are based on economic reasons to oppose a designation. Similarly, the DMA does not allow a general "efficiency defence" against violations of Articles 5-7 of the DMA obligations. This is mainly due to the Commission's past experience with dealing with efficiency defences in previous antitrust cases that involved gatekeepers. Here, the Commission has argued that «gatekeepers frequently raise arguments concerning the efficiencies that their practices bring about as a way to counterbalance and justify their potential negative effects […] are often one-sided and do not seem to match the evidence underlying this impact assessment […] and have also been rejected by the Courts as being unfounded» [152]. Moreover, the analysis of an efficiency justification would inevitably slow down the procedures, thus jeopardising the swift application of the DMA, which is at the centre of its enforcement strategy. Finally, the Commission can grant an exemption from the application of Articles 5-7 of the DMA obligations to gatekeepers based on specific grounds of public health or public security [153].

5. Between speed, flexibility and certainty

The DMA's structure aims to balance speed, flexibility, and predictability, with a preference for speed. The speed element is ensured through the selection of relatively easy-to-assess criteria and time-bound investigations for designation. Moreover, many of the obligations are immediately applicable, as they take stock from the experience of the Unfair Commercial Practices Directive ("UCPD") [154] and the Directive on unfair trading practices in the agricultural and food supply chain [155]. both including immediately applicable black-lists of prohibited conducts.

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[152] See para 158 of the Impact Assessment, referring to General Court, case T-201/04, *Microsoft v Commission* [2007] ECLI:EU:T:2007:289, at paras 1091 ff.

[153] Article 10 of the DMA.

[154] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council.

[155] Directive (EU) 2019/633 of the European Parliament and of the Council of 17

At the same time, the DMA incorporates several elements of flexibility in each stage of enforcement. In particular, the Commission can start investigations to determine CPSs [156], and when the quantitative criteria for designation are not fully met, but the qualitative criteria are [157]. Furthermore, the Commission can initiate a market investigation to add new services or practices to the lists currently included in the DMA [158]. In this case, the Commission's assessment of the new conducts should be based on the Article 101 and 102 TFUE cases and «other relevant developments» [159]. The Report should be submitted to the European Parliament and to the Council and, where appropriate, shall be accompanied by a legislative proposal to amend the DMA or a draft delegated act supplementing it [160]. Moreover, there are some systems in force to tame the unfettered applications of Articles 5-7 of the DMA. Firstly, their enforcement is subject to the principle of proportionality [161]. This means that the Commission can apply only obligations that are necessary and proportionate to achieve fairness and contestability in the CPSs [162]. We can, thus, expect gatekeepers to challenge the proportionality of obligations imposed, based on the Court of Justice jurisprudence.

Secondly, a gatekeeper has the right to submit a "suspension request" to the Commission demonstrating that the application of a specific obligation «would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union» [163]. If so, the Commission can suspend, in whole or in part, the obligation causing this exceptional danger to the gatekeeper [164]. Finally, at the enforcement stage, the Commission can start investigations for systematic non-compliance [165].

April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

[156] Article 17 of the DMA.

[157] Article 17(3) of the DMA.

[158] Article 19 of the DMA.

[159] *Ibidem*.

[160] Article 19(3) of the DMA.

[161] Article 5(4) TEU.

[162] Recital 27 of the DMA.

[163] Article 9(1) of the DMA.

[164] *Ibidem*.

[165] Article 18 of the DMA.

6. Conclusion

The DMA prioritizes speed, flexibility, and predictability. It contains easy-to-assess criteria, time-bound investigations, and immediately applicable obligations. The Act also includes flexibility in each enforcement stage, allowing the Commission to initiate investigations to add new services and practices. However, the Commission can only apply proportionate obligations necessary to achieve fairness and contestability. On the other hand, gatekeepers have the right to submit a "suspension request" to the Commission, while the Commission can start investigations for systematic non-compliance.

The DMA aims to achieve contestability, fairness and transparency in the digital markets. However, the definitions of contestability and fairness will have to be better defined in the upcoming case law. Contestability is the ability of businesses to compete and challenge established companies on the quality of their products and services, even when facing barriers to entry and expansion. However, digital platforms can limit competition due to certain factors like network effects and economies of scale. Meanwhile, unfairness is when a gatekeeper gains an unfair advantage over business users. Creating a contestable market would promote competition between different platforms, while fair market practices would encourage competition within a platform. It is' unclear how much of an imbalance between the rights and obligations of business users is considered unfair, but it is clear that it must result in the gatekeeper having a disproportionate advantage. It is unclear what level of advantage is considered "disproportionate" under the DMA provisions, and further clarification will be required through case law and decisions.

The DMA combines obligations and prohibitions to achieve these objectives. It is noteworthy that the DMA tends to build presumptions to determine the structural characteristics of certain markets and relies more on the study of relational power. The DMA also relies on the findings of behavioural science to ensure the effectiveness of its provisions. The justifications for the designation and enforcement process seem to be more flexible than initially envisaged, although they have to be interpreted restrictively. Furthermore, the simultaneous private and public enforcement of such provisions is one of the major points of the DMA. Overall, the DMA is a significant step towards ensuring a fair and competitive digital market in the EU, and its implementation will be closely watched by all stakeholders.

The Private Enforcement of Competition Law and Digital Markets: Issues of Jurisdiction and Applicable Law

Alberto Miglio [*]

1. Introduction

For national courts entrusted with the application of EU competition law, having to address issues of jurisdiction and applicable law is an increasingly frequent occurrence. If that is true of competition law in general, it may be the case especially in digital markets, since digitalisation has led to a multiplication of cross-border transactions [1]. Judges adjudicating competition law disputes in EU Member States are therefore expected to be familiar with the main tools of EU private international law.

Private international law is a complex, highly technical subject. Competition law cases relating to digital markets may prove especially challenging due to the interaction between private international law rules and

[*] Associate Professor of EU Law at the University of Turin, Italy, staff member of the COMP.EU.TER Project.

[1] Cf. OECD/ICN, *Report on International Co-operation in Competition Enforcement*, 2021, p. 3, available at www.oecd.org.

public law regulation [2]. Private international law addresses private relationships and is typically viewed as the realm of private autonomy, notably in contractual matters. By contrast, antitrust law constrains private autonomy for the purposes of enhancing market efficiency and maximising consumer welfare or, especially in the EU, protecting the competitiveness of the market structure and fostering the realization of the internal market [3].

Public law constraints are particularly significant in digital markets, which are heavily regulated in the EU. This entails that national courts may have to coordinate private international law not with one, but with several sets of regulatory measures. In addition to competition law proper, other regulatory regimes may very well be relevant to competition cases relating to digital markets. The 2023 *Meta* judgment [4], where the Court of Justice held that Member States' National Competition Authorities ("NCAs") are entitled to consider breaches of the General Data Protection Regulation (the "GDPR") [5] for the purpose of assessing the existence of a breach of competition law, and in doing so are bound by decisions of national data protection supervisors, is illustrative in this regard [6]. If the overlap between different regulatory regimes is relevant for administrative authorities, so it is *a fortiori* for national courts when private parties attempt to enforce the rights they derive from those regulatory measures. In addition to the GDPR, the recently enacted Digital Services Act (the "DSA") [7] and the proposed AI Act [8] come to mind as EU

[2] M. LEHMANN, *Regulation, Global Governance and Private International Law: Squaring the Triangle*, in *Journal of Private International Law*, Vol. 16, Iss. 1, 2020, p. 1.

[3] On the goals of EU competition law, with reference to digital markets, see A. EZRACHI, *EU Competition Law Goals and the Digital Economy*, 2018, available at www.beuc.eu; I. LIANOS, *Polycentric Competition Law*, CLES Research Paper Series 4/2018, available at deliverypdf.ssrn.com.

[4] Court of Justice, case C-252/21, *Meta Platforms and Others* [2023] ECLI:EU:C:2023:537.

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

[6] See C. CELLERINO, *Personal Data: Damages Actions Between EU Competition Law and the GDPR*, in this *Book*, p. 257.

[7] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19

regulatory instruments that are expected to have a major impact on digital markets [9].

In addition, in the EU digital markets have become a testbed for a new approach to the regulation of competition, where *ex-ante* obligations complement the *ex-post* enforcement of rules prohibiting anticompetitive conducts [10]. This approach is enshrined in the Digital Markets Act (the "DMA") [11], which contains provisions capable of private enforcement [12]. Yet, the task of national courts in giving effect to the DMA is not made easier by the lack of coordination between regulatory law and private international law rules. Typically, pieces of digital markets regulation define their territorial scope, but do not address – or only partially and imperfectly address – issues of jurisdiction and applicable law [13]. However, those issues may surface and require courts to deal with complex private international law questions.

Against this backdrop, the present chapter provides an overview of private international law aspects that are relevant to the adjudication of competition law disputes in the Member States. In line with the focus of the COMP.EU.TER Project, special emphasis is placed on issues that can be frequently encountered in digital markets.

The chapter is structured as follows. First, the question of characteri-

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October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[8] Commission proposal of 21 April 2021 for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

[9] For a comparison of those measures and a general assessment of the objective pursued by EU regulation of digital markets, see G. DI GREGORIO, P. DUNN, *The European Risk-based Approaches: Connecting Constitutional Dots in the Digital Age*, in *Common Market Law Review*, Vol. 59, Iss. 2, 2022, p. 473.

[10] See C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139.

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

[12] See F. CROCI, *Judicial Application of the Digital Markets Act: The Role of National Courts*, in this *Book*, p. 233.

[13] See T. LUTZI, *The Scope of the Digital Services Act and Digital Markets Act: Thoughts on the Conflict of Laws*, in *Dalloz IP/IT*, forthcoming, available at www.ssrn.com.

sation is addressed in light of the case law of the Court of Justice (paragraph 2). Subsequently, the chapter reviews the rules on jurisdiction set forth in Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia")[14], focussing in particular on tort jurisdiction (paragraph 3), and provides an overview of the rules on applicable law contained in Regulation (EU) 593/2008 on the law applicable to contractual obligations ("Rome I")[15] and especially in Regulation (EU) 864/2007 on the law applicable to non-contractual obligations ("Rome II")[16] (paragraph 4). The overview is completed by a discussion of the interplay between the DMA and EU private international law (paragraph 5). The conclusion sums up the main findings (paragraph 6).

2. Contract or tort? Characterisation of claims under EU private international law

Competition law applies to a wide range of conducts, some of which may raise issues of characterisation. In private international law, characterisation (or classification) consists of assigning a legal question arising from a given case to a legal category[17]. One of the main questions is whether competition law claims should be qualified as contractual or non-contractual. In EU private international law this is a decisive question, because both jurisdiction and the determination of the applicable law rest on different connecting factors for contractual and non-contractual obligations. Criteria for establishing the jurisdiction of Member State courts are different for «matters relating to contract» (Article 7(1) of the Brus-

[14] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[15] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[16] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[17] See S. BARIATTI, *Classification (characterization)*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International Law*, Elgar, Cheltenham, 2017, p. 358.

sels Ia Regulation) and for «matters relating to tort, delict or quasi-delict» (Article 7(2) of the Brussels Ia Regulation). The choice of applicable law is even addressed in distinct instruments for contractual and non-contractual obligations (the Rome I Regulation and the Rome II Regulation, respectively), which adopt different connecting factors. For instance, the Rome II Regulation includes a special set of rules on the law applicable to antitrust infringements. Limits to choice of law also differ depending on the characterisation of the claim as contractual or tortious.

Drawing a clear-cut line dividing contractual and non-contractual obligations has always proved a hard task, giving rise to several preliminary rulings by the Court of Justice, including in cases involving competition law issues.

At the outset, it should be considered that (*i*) the notion of «matters relating to contract» and «matters relating to tort» should be interpreted autonomously, regardless of the characterisation of a claim under national law; and that (*ii*) contractual and non-contractual matters are mutually exclusive. If a claim is contractual, it cannot be tortious, and vice versa.

In *Handte*, the Court of Justice ruled that «matters relating to contract» do not include situations «in which there is no obligation freely assumed by one party towards another» [18]. However, despite its frequent reiteration by subsequent case law, this criterion remains vague and is of limited value in distinguishing between contractual and non-contractual matters. Rather, the Court has resorted to «a case-by-case, piecemeal approach» [19] that may yield different outcomes depending on the type of claim.

According to the Court of Justice's case law, claims for damages intended to offset the overcharge incurred by purchasers as a result of price-fixing cartels qualify as non-contractual [20]. This is so irrespective of whether the plaintiffs purchased the goods or services affected directly from the alleged infringer or through a dealer or intermediary [21]. In such

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[18] Court of Justice, case C-26/91, *Handte* [1992] ECLI:EU:C:1992:268, para 15.

[19] M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, in M. REQUEJO ISIDRO (ed.), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012*, Cheltenham-Northampton, 2022, p. 96.

[20] Court of Justice, case C-133/11, *Folien Fischer* [2012] ECLI:EU:C:2012:664, para 32; case C-352/12, *CDC Hydrogen Peroxide*, [2015] ECLI:EU:C:2015:335, paras 34-56; case C-451/18, *Tibor-Trans* [2019] EU:C:2019:635, paras 22-25.

[21] See M. DANOV, *Private International Law and Competition Litigation in a Global Context*, Hart, Oxford, 2023, p. 112; see also, more broadly, Opinion of AG Saugmandsgaard

cases, the tortious characterisation makes sense because the overcharge paid does not depend on the purchase contract, but on the *ex-ante* coordination of prices by cartel participants [22].

Some cases involving abuses of dominant position, where the competition law claim is connected to the implementation of a pre-existing contract, may be more difficult to classify and require a more complex analysis on the part of the court seised.

In *Kalfelis*, Advocate General ("AG") Darmon had suggested that claims should be characterised as contractual in case of overlap between contractual and non-contractual grounds [23]. The Court of Justice did not follow the AG and instead found that «the concept of "matters relating to tort, delict and quasi-delict" covers all actions which seek to establish the liability of a defendant and which are not related to a "contract"» [24], paving the way for characterising claims as tortious in the context of a contractual relationship.

In the *Brogsitter* judgment, more than 25 years later, the Court of Justice started by noting that a claim for damages qualifies as contractual if it arises from a breach of contract, which can be established in light of the purpose of the contract. The decisive criterion, according to the Court, is whether «the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter» [25]. If that is the case, the claim concerns «matters relating to a contract», otherwise it must be classified as non-contractual [26].

The Court of Justice further elaborated on the dichotomy between contractual and non-contractual matters in *Wikingerhof* [27]. The case is il-

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Øe, case C-59/19 *Wikingerhof*, para 25 («it is clear from the Court's case-law that, in principle, civil actions for damages based on infringement of the rules of competition law come within 'matters relating to tort', within the meaning of Article 7(2) of the Brussels I bis Regulation»).

[22] S. FRANCQ, W. WURMNEST, *International Antitrust Claims under the Rome II Regulation*, in J. BASEDOW, S. FRANCQ, L. IDOT (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart, Oxford, 2012, p. 97.

[23] Opinion of AG Darmon, case 189/87, *Kalfelis* [1988] ECLI:EU:C:1988:312, para 29.

[24] Court of Justice, case 189/87 *Kalfelis* [1988] ECLI:EU:C:1988:459, para 17.

[25] Court of Justice, case C-548/12 *Brogsitter* [2014] ECLI:EU:C:2014:148, para 25.

[26] *Ivi*, para. 27.

[27] Court of Justice, case C-59/19, *Wikingerhof* [2020] ECLI:EU:C:2020:950.

lustrative for our purposes, because it involved an alleged abuse of dominant position by a digital platform. The plaintiff, a company operating a hotel in Germany, had entered into a contract with Booking in order to have the hotel listed on the platform. Contending that some of Booking's terms were unfair and amounted to an abuse of dominant position, Wikingerhof brought an action for injunctive relief before a German court. The claim was based on competition law rules, which were regarded in national law as relating to non-contractual matters, but arose out of a contractual relationship.

After reiterating the main holding of *Brogsitter*, the Court specified the indispensability criterion. It held that the interpretation of the contract is indispensable to establish the lawfulness of the conduct, in particular, in «the case of an action based on the terms of a contract or on rules of law which are applicable by reason of that contract» [28]. By contrast, if the plaintiff «relies […] on rules of liability in tort, delict or quasi-delict, namely breach of an obligation imposed by law, and where it does not appear indispensable to examine the content of the contract concluded with the defendant in order to assess whether the conduct of which the latter is accused is lawful or unlawful, since that obligation applies to the defendant independently of that contract, the cause of the action is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012» [29].

The test developed in *Brogsitter* and refined in *Wikingerhof* is problematic in two respects. First, its complexity and the vagueness of the criteria national courts are expected to apply may lead to divergent outcomes and undermine predictability [30]. It is telling that commentators are split on the implications of this line of cases. Some view it as endorsing «a conceptual preference for a contractual characterisation of a dispute» [31] and interpret *Wikingerhof* as a confirmation of *Brogsitter*, despite conceding that this judgment, «at first sight, may be taken as meaning exactly the opposite» [32]. Others, by contrast, view *Wikingerhof* as depart-

[28] *Ivi*, para. 32.

[29] *Ivi*, para. 33.

[30] See M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., p. 116.

[31] M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, cit., p. 99.

[32] *Ibidem*.

ing from *Brogsitter* and criticise the Court of Justice for expanding the scope of torts at the expense of contracts and for characterising as torts claims that could be framed as issues of contractual validity [33].

Second, the characterisation of a claim may too easily depend on the way it is framed by the plaintiff, rather than on objective factors, as is typically the case in the continental European private international law tradition [34]. This flexibility could provide an incentive to forum shopping, since parties could strategically frame their claims as contractual or non-contractual in order to trigger the jurisdiction of a forum that is closer or is perceived as more favourable.

Unfortunately, the Court has further blurred the line between contractual and non-contractual matters in its most recent case law. In *HRVATSKE ŠUME*, a case relating to the characterisation of unjust enrichment, it appears to have introduced an exception to the rule established in *Wikingerhof*. Relying on *Wikingerhof*, the Court of Justice came to the conclusion that unjust enrichment in principle qualifies as non-contractual, but then added that «a claim for restitution based on unjust enrichment may, in certain circumstances, be closely linked to a contractual relationship between the parties to the dispute and, consequently, be regarded as coming within "matters relating to a contract"» [35]. It also noted that such circumstances «include the situation in which the claim […] relates to a pre-existing contractual relationship between the parties» [36].

How does the test apply to cases of abuse of dominance? The Court of Justice's judgement in *flyLAL II*, where at issue was a predatory pricing practice by an airline company, may be viewed as implying that all abuses of dominance are «matters related to tort» [37]. However, *Wikingerhof* and *HRVATSKE ŠUME* suggest a more nuanced answer. Exclusionary abuses – as was the conduct at issue in the *flyLAL* case – are certainly

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[33] A. BRIGGS, Wikingerhof*: A View from Oxford*, in *EAPIL Blog*, 7 December 2020, available at www.eapil.org.

[34] For the view that the *Wikingerhof* judgment endorses concurrent claims, see S. PEARI, M. TEO, *Justifying Concurrent Claims in Private International Law*, in *Cambridge Law Journal*, Vol. 81, Iss. 1, 2023, p. 139.

[35] Court of Justice, case C-242/20, *HRVATSKE ŠUME* [2021], ECLI:EU:C:2021:985, para 47.

[36] *Ivi*, para 48.

[37] Court of Justice, case C-27/17, *flyLAL-Lithuanian Airlines* [2018] ECLI:EU:C:2018:533.

non-contractual, since plaintiffs typically are competitors, rather than contractual partners of the infringers. The characterisation of exploitative abuses is less straightforward. In the light of *Brogsitter* and *Wikingerhof*, they are arguably non-contractual, because the source of the obligation is statutory and the interpretation of the contract is unlikely to be indispensable in order to rule on the lawfulness of the conduct [38]. However, if its rationale applies beyond the specific case of unjust enrichment, the *HRVATSKE ŠUME* judgment might suggest a different answer in that the claim is connected to a pre-existing contractual relationship. The same considerations – statutory source of the obligation, but link between the claim and a pre-existing contractual relationship – apply to cases of refusal to supply, whereas disputes on the legality or termination of a contract should probably be viewed as contractual, especially after *HRVATSKE ŠUME*.

In conclusion, the guidance provided by the Court of Justice to Member State courts adjudicating competition law claims is still of limited value due to the Court's continuous refining of its interpretation of the contractual/non-contractual divide in light of the specificities of cases referred for preliminary ruling. The facts of the *Wikingerhof* case are illustrative of the difficulties facing domestic courts. While the German Supreme Court, which referred the case to Luxembourg, was inclined to characterise the claim as tortious (and was ultimately proved correct) [39] the Higher Regional Court of Schleswig had had no doubt in upholding the opposite view [40]. To add further confusion, one might ask whether the outcome of the test would have changed if the plaintiff had sought a different remedy. For example, had it requested a declaration of contractual nullity, would the claim still have been non-contractual? The answer arguably depends on whether the remedy sought by the plaintiff is viewed as a factor that must be taken into account in the characterisation of claims, as suggested by some authors [41].

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[38] Cf. W. WURMNEST, *Plotting the Boundary between Contract and Tort Jurisdiction in Private Actions against Abuses of Dominance:* Wikingerhof v. Booking, in *Common Market Law Review*, Vol. 58, Iss. 5, p. 1584.

[39] Case C-59/19, *Wikingerhof*, cit., para 17.

[40] Case C-59/19, *Wikingerhof*, cit., para 12.

[41] See, in this respect, M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., pp. 116-119, who argues that the desired legal remedy should be a relevant factor in characterisation.

3. Jurisdiction under the Brussels Ia Regulation

3.1. Defendant's domicile

Under Article 4(1) of the Brussels Ia Regulation, a person may be sued in the courts of the Member State where he or she is domiciled. Domicile thus performs a dual function: it delimits the scope of the Brussels Ia Regulation, preventing the application of most of its heads of jurisdiction vis-à-vis defendants domiciled in third countries, and it identifies the general forum of the defendant.

In commercial litigation, defendants typically are not natural persons but companies, or other legal persons. Pursuant to Article 63 of the Brussels Ia Regulation, they are deemed to be "domiciled" in the place where they have either (*i*) the statutory seat, (*ii*) the central administration, or (*iii*) the principal place of business. While these criteria may point to the same Member State, it is also relatively frequent for a company to have the statutory seat in a country that is not its principal place of business, for instance because of its lenient tax policy. Since the connecting factors listed in Article 63 of the Regulation are alternative, not cumulative, a company can thus be domiciled – and be sued – in more than one Member State. An infringer can be sued in the place of domicile for the entirety of the damage caused by the infringement. Instead, this is not always possible under the special jurisdiction for tort [42].

For the purposes of applying Article 4(1) of the Brussels Ia Regulation to competition law infringements, one must bear in mind that under EU competition law companies of the same group are part of a single economic unit, and thus form a single undertaking, if they do not determine independently their own conduct on the market [43]. Since all entities of which the economic unit was made of when the infringement was committed are jointly and severally liable for it, actions for damages may be brought against other companies of the same group as the one(s) which committed the infringement.

Based on this premiss, the Court of Justice held in *Sumal* that «where the existence of an infringement of Article 101(1) TFEU has been estab-

[42] See *infra*, para 3.3.

[43] Court of Justice, case C-97/08 P, *Akzo Nobel and Others v Commission* [2009] EU:C:2009:536, paras 54-55.

lished as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company» [44]. The only limitation is that the victim must prove the existence of a specific link between the economic activity of the subsidiary and the subject matter of the infringement committed by the parent company [45].

The potential for forum shopping is evident, because alleged victims can choose the most suitable jurisdiction among those where the infringing company has subsidiaries, provided that the latter exercises a connected economic activity. This risk of forum shopping is further exacerbated by the possibility of suing multiple defendants in the place where one of them is domiciled, pursuant to Article 8(1) of the Brussels Ia Regulation [46].

The risk of forum shopping would be even greater if the single economic unit doctrine, as suggested by the Hungarian Supreme Court in a pending reference for preliminary ruling, were also to apply in the reverse, i.e. whether it could be invoked by a parent company in order to claim damages suffered by its subsidiaries as a result of a competition law infringement in the courts of the place where the victim's holding is registered. AG Emiliou rejected this view in his opinion, which the Court will likely follow, noting that this possibility does not find support in the case law and that it would be incompatible with the requirement of predictability and the objective of consistency between the forum and the applicable law [47].

3.2. Jurisdiction for contractual claims

Since competition law claims might, in certain circumstances, qualify as contractual, a brief summary of the rules of jurisdiction for contractual disputes is in order.

Article 7(1)(a) of the Brussels Ia Regulation grants jurisdiction in con-

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[44] Court of Justice, case C-882/19, *Sumal* [2021] ECLI:EU:C:2021:800, para 51.

[45] *Ibidem*.

[46] See *infra*, para 3.4.

[47] Opinion of AG Emiliou, case C-425/22, *MOL* [2024] ECLI:EU:C:2024:131, paras 70-72.

tractual matters to «the courts for the place of performance of the obligation in question». As this criterion gives rise to uncertainties and may incentivise forum shopping, it is accompanied by a specification in Article 7(1)(b) of the Brussels Ia Regulation: for sales contracts, the place of performance for the obligation in question is identified with the place of delivery under the contract; for services contracts, it is the place «where, under the contract, the services were provided or should have been provided».

Special rules exist for consumer contracts (Articles 17-19 of the Brussels Ia Regulation). Consumers may bring proceedings either in the courts of the Member State where the other party is domiciled or in the courts of their own domicile [48], whereas they may only be sued in the courts of the State where they are domiciled [49]. The obvious rationale of the alternative forum is to facilitate access to justice for consumers, who might face excessive hurdles if they were to bring proceedings in a foreign jurisdiction. As a corollary of this provision, Article 19 of the Brussels Ia Regulation sets forth limitations to the choice of forum in consumer contracts. Jurisdiction agreements are valid only if (*i*) they are entered into after the dispute has arisen, (*ii*) grant the consumer additional fora, or (*iii*) confer jurisdiction on the courts of the Member State where both the consumer and the other party are habitually resident, provided that the choice-of-court agreement is not contrary to the law of the prorogated forum.

The application of the special rules on jurisdiction over consumer contracts may not be straightforward in the context of digital services.

First, they apply where the contract was «concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession» (Article 17(1) of the Brussels Ia Regulation). The distinction between commercial or professional purpose, on the one hand, and personal, non-professional purpose of the transaction, on the other, may be difficult to apply in the context of the provision of certain digital services. The typical example is the mixed (professional and non-professional) use of social media. If I use a social media account to interact with friends and post photos of my vacations, but also to promote my publications, do I qualify as a consumer vis-à-vis the provider of the social

[48] Article 18(1) of the Brussels Ia Regulation.

[49] Article 18(2) of the Brussels Ia Regulation.

media service (e.g. Meta)? In *Schrems II*, the Court of Justice held that for a person to qualify as consumer in a contract for the provision of digital services the link between the contract and his or her trade or profession must be marginal [50]. Additionally, the consumer status is lost if the predominately non-professional use of those services subsequently becomes predominately professional [51].

Second, for services contracts, Articles 17-19 of the Brussels Ia Regulation apply on the premiss that the other party «pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities» (Article 17(1)(c) of the Brussels Ia Regulation). For the activities to be "directed" to the Member State of the consumer's domicile it is not sufficient that a website is accessible from that State [52]. Evidence of the intention to solicit local customers is required, and may include factors such as the international nature of the activity, the use of different languages or currencies, the use of a top-level domain name other than that of the Member State in which the trader is established, or of neutral top-level domain names [53].

3.3. Jurisdiction for tort claims

In addition to the Member State where it has its statutory seat, central administration or principal place of business, a company may be sued «in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur» (Article 7(2) of the Brussels Ia Regulation). This rule applies not only to damages claims arising out of antitrust infringements, but also to negative declaratory actions brought by the potential infringer [54].

Despite its apparent simplicity, the provision hides several complex

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[50] Case C-498/16, *Schrems* [2018] ECLI:EU:C:2018:37, para 32.

[51] *Ivi*, para 38.

[52] Court of Justice, joined cases C-585/08 and C-144/09, *Pammer and Hotel Alpenhof* [2010] ECLI:EU:C:2010:740, para 73.

[53] *Ivi*, paras 83-84.

[54] Case C-133/11, *Folien Fischer*, cit., paras 36-54.

interpretative issues. To begin with, it points not to one, but to two different places. According to long-standing case law of the Court of Justice, the «place where the harmful event occurred or may occur» corresponds both to the place where the *damage* arose and to the place where the *harmful conduct* giving rise to damage took place [55]. If the two places differ, as is often the case in digital markets, the plaintiff has the choice between two alternative fora [56].

Neither the determination of the place of the causal event nor that of the place of damage rests on a single criterion applicable to all torts. By contrast, the Court of Justice has followed a case-by-case approach, whereby the location of either place rests on different factors depending on the type of tort concerned. Several cases decided over the course of the past decade provide clarifications as to how Article 7(2) of the Brussels Ia Regulation should be interpreted in relation to claim for damages arising out of competition law infringements. The test to be applied may differ according to the nature of the competition law breach.

The place of the causal event is determined based on different criteria in relation to cartels and abuses of dominance, respectively. As regards cartel cases, in *Cartel Damage Claims (CDC) Hydrogen Peroxyde* the Court of Justice devised a three-step test. If (*i*) a single place of conclusion of the cartel can be identified, then the courts of that place have jurisdiction over all cartel participants and for the whole of the damage. If, by contrast, (*ii*) the cartel consists of a series of collusive agreements concluded in various places, the court should ascertain whether there is among those a single agreement which is the sole cause of the event giving rise to the damage suffered by a particular victim. In that case, the court of the place where such agreement was concluded has jurisdiction over all the perpetrators, including those domiciled in other Member States, but solely for the loss suffered by the specific victim concerned. Finally (*iii*), if the loss is not exclusively caused by one agreement among those that make up the cartel, then no place of the harmful conduct can be identified, and jurisdiction under Article 7(2) of the Brussels Ia Regulation can only be established at the place where the damage occurred [57].

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[55] See Court of Justice, case 21/76, *Handelskwekerij Bier v. Mines de Potasse d'Alsace* [1976] ECLI:EU:C:1976:166, paras 15-18.

[56] *Ivi*, para 19.

[57] Case C-352/12, *CDC Hydrogen Peroxide*, cit., paras 43-50.

In cases of abuse of dominance, since the event giving rise to damage does not consist in one or several agreements, the connecting factor must be different. The Court of Justice held in *flyLAL II* – given the uncertain classification of a predatory pricing practice under Article 101 or Article 102 TFEU – that «the event giving rise to the damage in the case of abuse of a dominant position is [based] on the implementation of that abuse, that is to say, the acts performed by the dominant undertaking to put the abuse into practice» [58]. The court must therefore assess where the anti-competitive conduct was implemented. If several events together, as part of a common strategy, contribute to the occurrence of the alleged damage, it must be established which event is of particular importance for the implementation of that strategy [59].

For abuses allegedly committed in digital markets, it may be difficult to identify an event pinpointing a precise place of implementation of the anticompetitive conduct, as illustrated by a pending reference for preliminary ruling from the District Court of Amsterdam [60]. The reference originates from a collective action brought against Apple. The plaintiffs in the main proceedings argue that Apple has a dominant position in the market for distribution of apps that work on IOS devices and claim that it charges excessive commissions on the sale of paid apps and digital in-app products, distorting competition and harming the users. The conduct allegedly implementing the abuse therefore consists of maintaining an online sales platform (the App Store) with a language version specifically directed at the Dutch market, selecting the apps and digital in-app products that are offered on that platform, determining the conditions under which they are offered and deducting a commission. According to the referring court, since the sales platform is directed at the whole Dutch market, the criteria outlined in *flyLAL II* suggest that the place where the harmful event occurred is in the Netherlands, but do not pinpoint any specific location and therefore do not identify which court within that Member State is competent to hear the case. Against this background, the Amsterdam court seeks guidance as to how it should construe the place of the harmful conduct in such a scenario and wonders, in that regard,

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[58] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., para 51.

[59] Case C-352/12, *CDC Hydrogen Peroxide*, cit., para 52.

[60] Rechtbank Amsterdam, case C/13/708095 / HA ZA 22-1 [2023] ECLI:NL: RBAMS:2023:8330.

whether the worldwide accessibility of the platform is also a factor that should be taken into account.

Turning to the place where the damage is suffered, in *CDC Hydrogen Peroxide* the Court of Justice held that the place of damage consisting of the overprice paid by victims of a cartel «is identifiable only for each alleged victim taken individually and is located, in general, at the victim's registered office» [61]. In more recent cases, the Court emphasised the connection between the place of damage and the market affected by the infringement [62], finding that the court having jurisdiction over the action for compensation is the court of the place where the goods are purchased, provided that the purchases occurred within the market affected by the restriction of competition and entirely within the jurisdiction of a single court [63]. The criterion of the victim's registered office remains valid where purchases occurred in several places [64].

The Court of Justice has not explicitly stated that the victim's registered office, in order to be the relevant criterion for the identification of the place of damage, must be within the market affected by the infringement. However, the opinions of AG Bobek in *flyLAL II* and AG Emiliou in *MOL* support this conclusion. Both AGs argued that it would be inconceivable to locate the place where the damage occurred outside the affected market [65].

Where the criterion of the victim's registered office applies, all infringers can be sued before the courts of that place, but if a number of victims have their registered offices in different places, they will need to bring suit each in the place of the respective registered office.

The order for reference by the District Court of Amsterdam in the aforementioned *Apple* case assumes that the criterion of the victim's registered office also applies to cases of abuse of dominance and requests clarification on how this criterion applies to lawsuits brought by associa-

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[61] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., para 52.

[62] *Ivi*, paras 38-43; case C-451/18, *Tibor-Trans*, para 33.

[63] Court of Justice, case C-30/20, *Volvo and Others* [2021] ECLI:EU:C:2021:604, paras 39-40.

[64] *Ivi*, paras 41-42.

[65] Opinion of AG Bobek, case C-27/17, *flyLAL Lithuanian Airlines* [2018] ECLI:EU:C:2018:136, para 51; opinion of AG Emiliou, case C-425/22, *MOL*, cit., para 55.

tions representing collective interests, where the actual victims remain unknown [66].

Finally, the "damage" relevant for the purposes of Article 7(2) of the Brussels Ia Regulation is only the initial damage resulting directly from the event giving rise to damage, whereas it is irrelevant where indirect financial consequences are felt [67]. Thus, the loss occurs, in principle, in the place where sales would have been made, rather than where the losses are recorded in the accounts [68].

3.4. Multiple defendants, counterclaims, choice-of-court agreements

Actions for antitrust damages often involve multiple parties, especially in cartel cases. Article 8(1) of the Brussels Ia Regulation, dealing with multi-party proceedings, is therefore highly relevant to the private enforcement of competition law. Pursuant to that provision, the courts for the place where a defendant is domiciled also have jurisdiction on any co-defendants, «provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings». If those conditions are met, undertakings participating in a cartel may be sued together in the courts of the place where one of them has its statutory seat, central administration or principal place of business.

To limit incentives to forum shopping, the Court of Justice held that Article 8(1) of the Brussels Ia Regulation «cannot be interpreted as allowing an applicant to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the State in which the defendant is domiciled» [69]. However, ac-

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[66] Rechtbank Amsterdam, case C/13/708095 / HA ZA 22-1, cit., para 7.7.

[67] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., paras 31-32; case C-451/18, *Tibor-Trans*, paras 27-28. The distinction is consistent with the Court of Justice's general approach to the determination of the place of damage in case of purely financial loss (see Court of Justice, case C-709/19, *Vereniging van Effectenbezitters* [2021] ECLI:EU:C:2021:377, para 37).

[68] Case C/13/708095 / HA ZA 22-1, cit., para 7.7.

[68] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., para 32; case C-451/18, *Tibor-Trans*, cit., para 28.

[69] Case C-352/13, *CDC Hydrogen Peroxide*, cit., paras 27-29; case C-832/21, *Beverage City Polska* [2023] ECLI:EU:C:2023:635, para 43.

cording to the Court that risk does not materialise «where there is a close connection between the claims brought against each of the defendants» at the time when proceedings are initiated [70].

The potential for forum shopping is especially high in follow-on actions – i.e. actions brought after that a decision ascertaining the antitrust violation has been issued by the European Commission (the "Commission") or a NCA – in cartel cases due to the jurisdictional implications of the single economic unit doctrine drawn by the Court of Justice in *Sumal* [71]. Since all companies of a group are deemed to constitute a single economic unit, alleged victims may (*i*) bring indemnification claims against a company of the group other than the one taking part in the cartel (anchor defendant) and (*ii*) rely on Article 8(1) of the Brussels Ia Regulation to sue all cartel participants as co-defendants, irrespective of where they have their seat of principal place of business. Numerous businesses allegedly harmed by cartels have begun to exploit this possibility of concentrating claims, prompting several references for preliminary ruling by Dutch courts [72]. All pending references, which are likely to be joined and decided together, relate to the interpretation of the "close connection" requirement under Article 8(1) of the Brussels Ia Regulation. In essence, the Court of Justice is requested to clarify whether such close connection exists between claims against an anchor defendant that is not an addressee of the Commission's (or NCA's) cartel decision and the claims against the co-defendants.

It should also be recalled that jurisdiction of a court hearing a claim on the basis of the Brussels Ia Regulation extends to counter-claims, provided that they arise «from the same contract or facts on which the original claim was based» [73].

Finally, choice-of-court agreements are admissible in relation to competition law claims [74] as long as they satisfy the conditions laid down in

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[70] Court of Justice, case C-98/06, *Freeport* [2007] ECLI:EU:C:2007:595, paras 52-54; case C-832/21, *Beverage City Polska*, cit., para 44.

[71] See *supra*, para 3.1.

[72] Case C-393/23, *Athenian Brewery and Heineken* (request for a preliminary ruling from the Hoge Raad der Nederlanden); case C-672/23, *Electricity & Water Authority of the Government of Bahrain and Others* (request for a preliminary ruling from the Gerechtshof Amsterdam); case C-673/23, *Smurfit Kappa Europe and Others* (request for a preliminary ruling from the Gerechtshof Amsterdam).

[73] Article 8(3) of the Brussels Ia Regulation.

[74] Case C-352/13, *CDC Hydrogen Peroxide*, cit., paras 59-63.

Article 25 of the Brussels Ia Regulation. The admissibility of choice-of-court agreements creates a mismatch between jurisdiction and applicable law, since the Rome II Regulation does not allow the parties to choose the law applicable to obligations arising out of acts of unfair competition or of restrictions of competition [75].

4. Applicable law

4.1. Law applicable to contractual obligations

Article 3(1) of the Rome I Regulation provides that contracts are governed by the law chosen by the parties. However, party autonomy encounters some limits. Where all other elements relevant to the situation at the time of choice are located in a country other than the one whose law was chosen, the choice of law shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement [76]. Similarly, the mandatory provisions of EU law may not be derogated from where all other relevant elements are located in one or more Member States [77].

Absent a choice, Article 4(1) of the Rome I Regulation resorts to different connecting factors for different types of contracts. In particular, contracts for the provision of services are governed by the law of the country where the service provider has his or her habitual residence [78]. Franchise and distribution contracts are governed by the law of the country of habitual residence of the franchisee [79] and the distributor [80], respectively. Contracts not listed in Article 4(1) of the Regulation are governed by the law of the country where the party required to effect the characteristic performance of the contract is habitually resident [81].

Like the Brussels Ia Regulation, the Rome I Regulation includes spe-

[75] See *infra*, para 4.2.

[76] Article 3(3) of the Rome I Regulation.

[77] Article 3(4) of the Rome I Regulation.

[78] Article 4(1)(b) of the Rome I Regulation.

[79] Article 4(1)(e) of the Rome I Regulation.

[80] Article 4(1)(f) of the Rome I Regulation.

[81] Article 4(2) of the Rome I Regulation.

cial rules for consumer, insurance and employment contracts. In particular, with regard to consumers, the contract is governed by the law of the country where the consumer has his or her habitual residence, provided that the professional pursues his or her commercial or professional activities in the country of the consumer's habitual residence, or directs them to that country, and the contract falls within the scope of such activities (Article 6(1) of the Rome I Regulation). Pursuant to Article 6(2) of the Regulation, in addition to limitations on choice of law under Article 3, the choice may not «have the result of depriving the consumer of the protection afforded» by mandatory provisions of the country where he or she is habitually resident. The latter provision is relevant especially with regard to third countries, as from the substantive viewpoint the protection of consumers is largely harmonized at the EU level, so that it is not frequent for mandatory provisions to exist only in a given Member State.

4.2. Law applicable to non-contractual obligations

The Rome II Regulation includes specific provisions on the law governing damages arising out of restrictions of competition. Under Article 6(3)(a) of the Rome II Regulation, «[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected».

Recital 23 of the Regulation provides some clarification as to the scope of the provision. The notion of «restrictions of competition» is meant to «cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles [101] and [102] of the Treaty or by the law of a Member State».

There are at least two problems with this definition. The first is whether the rule could also apply to restrictions of competition prohibited by the law of third countries [82]. Whilst the debate was mostly theoretical until the

[82] In favour of an extensive reading of Article 6(3) of the Rome II Regulation, see M.

UK withdrawal from the EU, it gained some practical relevance after Brexit. On the one hand, since the Rome II Regulation was still applicable as such in the UK during the transitional period, it had to be established whether UK courts could apply Article 6(3)(a) thereof to infringements affecting the market in the UK, which by then was no longer a Member State. On the other hand, the issue may even surface before courts in EU Member States, if the restriction affects (also) the British market.

The second problem is that the definition only covers the categories of anticompetitive conduct prohibited under Articles 101 and 102 TFEU. However, some national legislations have a broader reach and prohibit specific conducts by non-dominant undertakings. In this case, it is unclear whether (*i*) recital 23 is non-exhaustive and Article 6(3) of the Rome II Regulation applies nonetheless, (*ii*) the obligation should be considered as one arising out of an act of unfair competition pursuant to Article 6(1), or (*iii*) the general rule on the law applicable to torts under Article 4 of the Rome II Regulation applies. The first option appears to be the most reasonable, as it is the only one that would prevent applying different connecting factors to essentially analogous situations [83].

As to the connecting factor employed, Article 6(3)(a) of the Rome II Regulation rests on the criterion of (actual or potential) market affectation. This is a different notion compared to that of geographic market for the purposes of ascertaining whether an undertaking has market power or a conduct is anticompetitive [84]. From the perspective of the court seised, the criterion of the country where the market is or is likely to be affected requires the performance of some economic analysis at an early stage of the proceedings, for the sole purpose of determining the applicable law. This may be particularly complex in stand-alone cases, i.e. when actions are brought without a decision being previously issued by the Commission or a NCA.

DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., p. 289. *Contra*, S. FRANCQ, W. WURMNEST, *International Antitrust Claims under the Rome II Regulation*, cit., p. 100.

[83] See T. ACKERMANN, *Antitrust Damages Actions under the Rome II Regulation*, in M. BULTERMANN, L. HANCHER, A. MCDONNELL, H. SEVENSTER (eds.), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot*, Kluwer Law International, Austin-Boston-Chicago-New York-The Netherlands, 2009, p. 116.

[84] M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., pp. 292-293.

Since EU competition law infringements typically have a cross-border dimension, the restriction may well affect a plurality of national markets. This is particularly evident in follow-on actions where a Commission decision established an infringement affecting the whole EU/EEA market [85]. As a result, a court may be required to apply a plurality of different national laws to a single action for damages. Pursuant to Article 6(3)(a) of the Rome II Regulation courts should in principle apply the law of each country where the market is affected. Since this is often impractical, courts tend to avoid applying the law of States whose markets are only marginally affected by the restriction or where the plaintiff suffered minimal damage [86]. Such solution may be justified by implicitly reading into Article 6(3)(a) of the Regulation a requirement that the affectation of the market be somewhat significant [87].

In some cases, however, the Rome II Regulation explicitly provides an alternative to the fragmentation of applicable law described above. For that purpose, Article 6(3)(b) of the Rome II Regulation introduces a special rule for cross-border infringements, offering the plaintiff the option for the application of the sole law of the forum on certain conditions. According to this provision, «[w]hen the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises». Where there are multiple defendants, the plaintiff may choose the law of the forum only if the restriction on which the claim against each of the defendants relies affects directly and substantially the market of the forum State. This requirement may somewhat mitigate the effect of the combined applica-

[85] Case C-451/18, *Tibor-Trans*, cit., para 32.

[86] R. MEIJER, E.-J. ZIPPRO, *Private Enforcement in the Netherlands*, in F. WOLLENSCHLÄGER, W. WURMNEST, T.M.J. MÖLLERS (eds.), *Private Enforcement of European Competition and State Aid Law. Current Challenges and the Way Forward*, Kluwer Law International, Alphen aan den Rijn, 2020, pp. 174-175, with references to Dutch court practice; M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., p. 297.

[87] T. ACKERMANN, *Antitrust Damages Actions under the Rome II Regulation*, cit., pp. 114-115.

tion of Article 8(1) of the Brussels Ia Regulation and of Article 6(3)(b) of the Rome II Regulation: plaintiffs could rely on the former in order to concentrate claims against multiple defendants in one jurisdiction, and then exploit the latter to subject the whole dispute to the law of the forum.

Apart from the option granted to the plaintiff under Article 6(3)(b), which does not properly constitute a choice of law as it is a unilateral option afforded to one of the parties, the Rome II Regulation excludes choice of law in relation to competition law infringements. According to Article 6(4) of the Rome II Regulation, the law designated by virtue of the connecting factors listed in Article 6 may not be derogated from by agreement.

5. Private international law issues in the private enforcement of the Digital Markets Act

As cases discussed in this chapter show, the private enforcement of competition law, particularly against digital platforms, is not limited to damages claims. Increasingly, plaintiffs turn to court to request injunctive relief, raising questions of characterisation of claims [88]. This trend is likely to increase in the wake of the DMA having become applicable in May 2023. The DMA imposes specific obligations on undertakings offering core platform services and designated as gatekeepers [89]. Provisions of the DMA that are sufficiently precise and unconditional are capable of having direct effect and can thus be relied upon before national courts by business- or end- users of platform services. This is also implicit in several provisions of the DMA that address the relationship between public enforcement by the Commission and court proceedings [90]. DMA provi-

[88] See *supra*, para 2.

[89] For a comprehensive overview of gatekeepers' obligations, see C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, cit.

[90] See Article 39(1) of the DMA, which refers to information national courts may request from the Commission in «proceedings for the application of [the DMA]»; Article 39(2) and (5) of the DMA, which refer to judgments issued by national courts in that respect; Article 42 of the DMA, which extends the applicability of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive

sions imposing obligations on gatekeepers (Article 5, and likely also Articles 7 and 6) may thus be enforced in domestic courts, primarily in order to seek injunctive relief and, possibly, to claim damages [91].

Like more traditional competition law cases, the private enforcement of the DMA is likely to give rise to questions of jurisdiction and applicable law. Whilst the Regulation contains neither provisions on jurisdiction nor bilateral conflict-of-law rules that determine the applicable law based on connecting factors, it includes a unilateral conflict norm that delimits its scope. Pursuant to Article 1(2) thereof, the DMA «shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service». This provision rests on the so-called marketplace approach, whereby the DMA applies to services offered to European citizens – *rectius*, more broadly, to individuals located in the EU – and to businesses established in the EU [92]. The same criterion has been employed, with some variations, in other measures regulating digital markets, such as the GDPR [93] and the DSA [94]. The last sentence of Article 1(2) of the DMA also makes clear that the EU legislature views the entire regulation as a set of mandatory norms (a *loi de police*) that applies irrespective of the law governing the contract for the provision of services.

From the perspective of national courts in private enforcement actions, this criterion may raise two types of issues. First, the interpretation of the marketplace criterion itself may prove contentious. In particular, it is uncertain whether the notion of providing or offering services to users established or located in the EU corresponds to that of "directing" services to the State of domicile of a consumer within the meaning of Article 17(1)(c) of the Brussels Ia Regulation or is broader as the different wording might suggest.

2009/22/EC to «the representative actions brought against infringements by gatekeepers of [DMA provisions] that harm or may harm the collective interests of consumers».

[91] See F. CROCI, *Judicial Application of the Digital Markets Act*, cit., pp. 248-251.

[92] T. LUTZI, *The Scope of the Digital Services Act and Digital Markets Act: Thoughts on the Conflict of Laws*, cit., 2.

[93] Article 3(1) of the GDPR.

[94] Article 2(1) of the DSA.

Second, the unilateral conflict rule of Article 1(2) of the DMA does not do away with the need to address issues of jurisdiction and applicable law pursuant to the Brussels Ia, Rome I and Rome II Regulations. Obviously, a Member State court may only decide on a claim provided it has jurisdiction over the case, which must be determined according to the Brussels Ia Regulation (or possibly domestic private international law, if the defendant is domiciled in a third country and the case falls within the residual jurisdiction of national courts) [95].

But even as regards the applicable law, the DMA is hardly self-sufficient. Suffice it to note here that, whilst it provides for unform substantive law obligations, the DMA does not harmonise remedies. In the context of damages actions, the applicable national law matters even more than in proceedings for the private enforcement of Articles 101 and 102 TFEU, since Directive 2014/104/EU, which harmonises several aspects of antitrust actions, does not apply to the enforcement of the DMA [96].

In sum, the lack of coordination between the DMA and the main EU private international law instruments is likely to be a source of additional challenges for national judges expected to apply this complex new piece of legislation.

6. Conclusion

The analysis carried out in this chapter has shown that issues of jurisdiction and applicable law may pose significant challenges in the private enforcement of EU competition law claims. With respect to characterisation, the case law of the Court of Justice has struggled so far to provide

[95] In this regard, the DMA differs from the GDPR, which contains a special head of jurisdiction for actions against controllers or processors (Article 79(2)).

[96] Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The Directive applies to infringements of competition law defined as «infringement[s] of Article 101 or 102 TFEU, or of national competition law» (Article 2(1) of Directive 2014/104/EU, cit.). In turn, the notion of "national competition law" is limited to «provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition» (Article 2(3) of Directive 2014/104/EU, cit.).

consistent guidance to national courts. Whilst the Court in the preliminary ruling procedure is tasked with interpreting provisions of EU law beyond the specificities of a given case, its rulings must also provide guidance to national courts in actual litigation. In light of the cases it was confronted with, the Court of Justice has thus provided answers that national courts can apply to individual cases with a certain degree of flexibility. However, this course of action increases the burden on national courts and can potentially undermine the consistent application of EU rules on jurisdiction and applicable law.

As regards heads of jurisdiction in tort matters, the case law has interpreted them broadly, opening avenues for forum shopping. In respect of cartel damages actions, perhaps the most controversial development is the finding in *Sumal* that victims may bring proceedings against different companies of the group the infringer belongs to [97]. Combined with the generous conditions for suing multiple defendants under Article 8(1) of the Brussels Ia Regulation, this ruling encourages forum shopping. While similar cases are less likely to arise in digital markets than in markets for physical goods, the chapter has shown that issues of jurisdiction are equally crucial when it comes to claims arising out of alleged competition law infringements in those markets, and that the logic of facilitating private enforcement – the same underpinning the seminal *Courage* and *Manfredi* judgments that kickstarted the private enforcement of EU competition law [98] – continues to play a key role in the interpretation of heads of jurisdiction.

Finally, the impending private enforcement of the DMA calls upon courts to carefully coordinate this new instrument of market regulation with the rules granting them jurisdiction in particular cases and with those determining the law applicable to issues not exhaustively addressed in the DMA.

Open questions and pending references show a need of further guidance from Luxembourg on several issues and suggest that new developments in the case law of the Court of Justice should be expected.

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[97] Case C-882/19, *Sumal*, cit.

[98] See Court of Justice, case C-453/99, *Courage and Crehan* [2001] ECLI:EU:C:2001:181; case C-295/04, *Manfredi* [2006] ECLI:EU:C:2006:461.

Judicial Application of Commitment Decisions: from *Gasorba* to the Digital Markets Act

Luca Calzolari [*]

1. Introduction

At least since the 1980s, the European Commission (the "Commission") has created and used alternative techniques, other than those explicitly provided by Council Regulation (EEC) 17/62 [1], to close antitrust proceedings without the issuance of a formal decision [2]. In addition to comfort letters [3], the Commission engaged in informal negotiations with

[*] Associate Professor of EU Law at the University of Turin, Italy.

[1] Council Regulation (EEC) 17/1962, First Regulation implementing Articles 85 and 86 of the Treaty.

[2] I. VAN BAEL, *The Antitrust Settlement Practice of the EC Commission*, in *Common Market Law Review*, 1986, Vol. 23, Iss. 1, p. 61; D. WAELBROECK, *New Forms of Settlements of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?*, in *European Law Review*, 1986, Vol. 11, Iss. 4, p. 268.

[3] See Court of Justice, case 37/79, *Anne Marty* [1980] ECLI:EU:C:1980:190, para 9.

the undertakings involved in antitrust proceedings to convince them to "voluntarily" modify the behaviours under investigation [4]. If the undertakings agreed to change their conducts to meet the Commission's *desiderata*, the issuance of a formal decision was deemed unnecessary and therefore suspended. Despite the limited number of published decisions, and therefore the obscurity of this *modus operandi* [5], this practice is well illustrated for example by the *IBM* case [6].

Codifying this informal practice, commitment decisions have been introduced into EU competition law by Article 9 of Council Regulation (EC) 1/2003, according to which if «the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings» and «conclude that there are no longer grounds for action by the Commission» [7].

Commitment decisions have rapidly become a pivotal tool for the enforcement of Articles 101 and 102 TFEU. Their importance is confirmed not only by their practical diffusion but also by the fact that this remedy has been mirrored in the legal orders of all the Member States [8]. The power to accept commitments was included among those that Article 5 of Council Regulation (EC) 1/2003 already directly conferred also to the Member States' National Competition Authorities ("NCAs"): even if no similar instruments were available at the national level, NCAs could al-

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[4] G.M. ROBERTI, *Procedure applicative delle regole di concorrenza*, in M. BESSONE (dir.), *Trattato di diritto privato dell'Unione europea*, Giappichelli, Torino, 2006, p. 1223, p. 1249.

[5] Leading to the creation of an «alternative body of secret jurisprudence» (I. VAN BAEL, *The Antitrust Settlement Practice*, cit., p. 90).

[6] See para 94 of the Commission, Fourteenth Report on Competition Policy (1984) [1985].

[7] Article 9 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[8] With reference to the Italian legal order see Article 14-*ter* of Law No 287 of 13th October 1990, Norme per la tutela della concorrenza e del mercato, which has been added by Article 14 of Law Decree No 223 of 4th July 2006, recante disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale.

ready use commitment decisions by directly applying this provision [9]. In any case, Directive (EU) 2019/1 ("ECN+ Directive") later introduced an obligation for the Member States to introduce and maintain similar instruments [10].

Being based on the agreement between the antitrust authority and the undertakings, commitment decisions changed the traditional way of enforcing competition rules. Competition law is no longer applied only (or mainly) through the exercise of an authoritative power, but rather by negotiation [11]. This led to a qualitative shift in the Commission's and NCAs' activity: commitment decisions have expanded their possibilities to use competition rules for "meta-competitive" and quasi-regulatory purposes [12]. This shift from antitrust to regulation found its natural and coherent conclusion in the Digital Markets Act (the "DMA") [13], which also allows the Commission to adopt commitment decisions [14].

After a brief overview of the main – substantive and procedural – features of commitment decisions (in section one) and an equally brief discussion of the relationship between this instrument and market regulation (in section two), this chapter, in line with the focus of the COMP.EU.TER Project, will focus (in section three) on the interplay between commitment decisions and private enforcement.

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[9] E.g. Autorité belge de la Concurrence's decision of 31 August 2006 in case CONC-I/O-00/0049 – *Banksys*. However, the direct application of this provision by the NCAs was limited by the fact that the power to sanction the undertakings in the event of a violation of commitments (conferred to the Commission by Article 9(2) of Council Regulation (EC) 1/2003, cit.) did not enjoy direct effect. See *infra* notes 151-155.

[10] Article 12 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

[11] Commitment decisions are «part of a wider trend that promotes what one could call "consensual competition law enforcement"» (F. WAGNER-VON PAPP, *Best and even Better Practices in Commitment Procedures after Alrosa: The Dangers of Abandoning the "Struggle for Competition Law"*, in *Common Market Law Review*, 2012, Vol. 49, Iss. 3, p. 929).

[12] M. SIRAGUSA, *Le decisioni con impegni*, in P. BARUCCI, C. RABITTI BEDOGNI (eds.), *Vent'anni di antitrust. L'evoluzione dell'autorità garante della concorrenza e del mercato*, Giappichelli, Torino, 2010, p. 386.

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

[14] Article 25 of the DMA.

2. Commitment decisions: procedural issues and key features

2.1. Preliminary remarks

Articles 9 of Council Regulation (EC) 1/2003 and 12 of ECN+ Directive allow the Commission and the NCAs to initiate antitrust proceedings based on competition concerns. At the EU level, the Commission shall inform the undertakings of these concerns by adopting a preliminary assessment ("PA"). According to the Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, the PA must summarise «the main facts of the case» and identify «the competition concerns that would warrant a decision requiring that the infringement is brought to an end» [15]. The PA is a sort of streamlined version of the ordinary statement of objections ("SO") and replaces it. The PA's main purpose is to allow the parties to formulate appropriate commitments capable of addressing the competitive issues raised by the Commission [16].

The regime is similar also with reference to the majority of the NCAs. However, the ECN+ Directive does not explicitly rule out the need for NCAs to send a SO. The reference to the NCAs' "concerns" suggests that the SO should not be necessary [17]. This wording, however, does not seem sufficiently clear to prevent differing practices at the national level. The point is relevant because the need to draft a fully-fledged SO would reduce one of the key benefits that NCAs can gain from commitment decisions, i.e. time and resource savings, allowing the NCAs to detect and investigate more antitrust offenses. This, in turn, may further reduce the deterrent effects of competition rules, already affected by commitment decisions [18].

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[15] Para 121 of Commission Notice of 20 October 2011 on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.

[16] Para 122 of Commission Notice on best practices, cit.

[17] Article 12 of the ECN+ Directive.

[18] While «it is desirable for there to be mechanisms through which settlements can be arrived at in appropriate cases […], the success of [antitrust rules] also depends to a large extent on its deterrent effect, which means that there is also an important public interest in infringement cases proceeding» (cf. Competition Appeal Tribunal, case 1026/2/3/04, *Wanadoo UK* [2004] paras 123-124; Tribunale Amministrativo Regionale Lazio, No 6173, *Carte di credito* [2011] para 4.2.1). See also A. GAUTIER, N. PETIT, *Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty*, CORE Discussion Papers No 63/2014.

Indeed, if the undertakings offer commitments that are deemed appropriate to address the competitive concerns described in the PA, the Commission and the NCAs have the possibility to close the proceeding without the burden (nor the possibility [19]) of «concluding whether or not there has been or still is an infringement» [20]. As the proceeding is closed without ascertaining any antitrust offence, no sanction can be imposed on the undertakings. The decision has the sole effect to close the proceeding making the commitments binding for the undertakings.

2.2. The scope of application and practical diffusion

Thanks to these characteristics, commitment decisions have become a very popular enforcement instrument [21], especially in the context of new markets and new technologies [22]: as there is no need to prove an antitrust infringement, this instrument allows the antitrust authorities to tackle conducts – not illicit, but simply raising competitive concerns – and to rapidly develop flexible solutions to cope with the innovative competitive issues that often characterize new markets, and especially digital markets [23].

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[19] Article 9 of Council Regulation (EC) 1/2003, cit. «prevent[s] the Commission from making a formal finding of infringement of Article 101 TFEU or Article 102 TFEU» (General Court, case T-342/11, *CEEES* [2014] para 55).

[20] Recital 13 of Council Regulation (EC) 1/2003, cit. and Recital 39 of the ECN+ Directive.

[21] Data published on the Commission's website (available at https://competition-cases.ec.europa.eu/search) show that, between January 2004 and January 2024, about 27% of the cases handled (48 out of 179) and about 63% of non-cartel cases (48 out of 76) were defined with commitments.

[22] E.g. Commission decisions of 16 December 2009 in case COMP/39.530 – *Microsoft (Tying)*; 29 April 2014 in case AT.39939 – *Samsung*; 13 December 2011 in case COMP/39.692 – *IBM (Maintenance Services)*; 12 December 2012 in case COMP/39.847 – *E-books*; 4 May 2017 in case AT.40153 – *E-book MFNs and related matters*; 11 July 2022 in case AT.40305 – *Network sharing - Czech Republic*; 20 December 2020 in case AT.40462 – *Amazon Marketplace* and in case AT.40703 – *Amazon Buy Box*. See also the failed attempt that led to Commission decision of 27 June 2017 in case AT.39740 – *Google Search (Shopping)*.

[23] Accordingly, commitment decisions could represent a useful and appropriate tool to address, from the viewpoint of the Commission or the NCAs, the (clear) competitive concerns created by new digital practices whose illegality is (by contrast) questionable or

Here the rapidity of the intervention is often a key factor. Solving a competitive concern by timely correcting the undertakings' behaviours may be more important than sanctioning them, especially if a fine can be imposed only after a long administrative proceeding and it is likely to become final only after years of litigation. Being characterized by strong network effects and economies of scale and scope and near-zero marginal and distributional costs, digital markets are often "tipping markets", i.e. markets prone to rapidly shift from a competitive status to an oligopolistic or monopolistic one [24]. Sanctioning an undertaking after that the market tipped in its favour and the undertaking became dominant or super-dominant [25], may not be the best solution to safeguard the competitiveness of the market structure, i.e. to achieve one of the priorities of antitrust enforcement [26].

Indeed, the main purpose of the negotiated procedure is to reach an agreement between the antitrust authorities and the undertakings on the adjustments that the latter should make to their future behaviours to eliminate the competitive concerns described in the PA. The attention is therefore directed toward the future, rather than to the assessment of the undertakings' past conducts [27]: the agreement of the undertakings allows

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difficult to prove before a court, such as so-called algorithmic collusion. See L. CALZOLARI, *The Misleading Consequences of Comparing Algorithmic and Tacit Collusion: Tackling Algorithmic Concerted Practices Under Art. 101 TFEU*, in *European Papers*, 2021, Vol. 6, Iss. 2, p. 1193, p. 1220 ff. See also J. BLOCKX, *Dawn of the Robots: First Cases of Algorithmic Collusion*, in this *Book*, p. 117, p. 135.

[24] Cf. F. MUNARI, *Competition on Digital Markets: An Introduction*, in this *Book*, p. 7.

[25] General Court, case T-612/17, *Google* [2021] ECLI:EU:T:2021:763, paras 182-183.

[26] *Inter alia* Court of Justice, case 85/76, *Hoffmann-La Roche* [1979] ECLI:EU:C:1979:36, para 91; Court of Justice, joined cases C-501, C-513, C-515 e C-519/06 P, *GlaxoSmithKline Services* [2008] ECLI:EU:C:2008:738, para 63; Court of Justice, case C-52/09, *TeliaSonera Sverige* [2011] ECLI:EU:C:2011:83 paras 22-24; Court of Justice, case C-883/19 P, *HSBC Holdings* [2023] ECLI:EU:C:2023:11 para 121.

[27] The change of perspective from yesterday to tomorrow was already highlighted by the Opinion of AG Kokott, case C-441/07 P, *Alrosa* [2009] ECLI:EU:C:2009:555 para 74. In other words, the antitrust authorities focus on treating the competitive "symptoms" rather than establishing the "pathology" (M. MARINIELLO, *Commitments or Prohibition? The EU antitrust dilemma*, in *Bruegel Policy Brief*, 2014, p. 1, p. 2) and «[t]he issue is no longer what the parties did but what the Commission wants» (F. JENNY, *Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions*, in *Fordham International Law Journal*, 2015, Vol. 38, Iss. 3, p. 701, pp. 762-763).

the antitrust authorities to conduct the analysis of the most complex profiles of antitrust litigation in a less detailed manner [28].

2.3. The selection of cases and procedural overview

The Commission and the NCAs are granted wide discretion with respect to the acceptance (or rejection) of commitments. Undertakings are therefore not entitled to receive a commitment decision [29]. The use of commitment decisions by the Commission is considered inappropriate when the latter «intends to impose a fine» [30]. The tie imposed on NCAs is even looser: by stating that «commitment decisions are not appropriate in the case of secret cartels», Recital 39 of the ECN+ Directive does not exclude their use in case of serious violations of Article 102 TFEU [31]. In any case, also because of the limited judicial review in this field, these limitations have a rather limited practical effect: commitment decisions have been used in cases involving (if proved) serious antitrust offences [32], including information exchange between competitors [33] and even price-fixing [34].

From a procedural viewpoint, "negotiations" must be initiated by the undertakings [35]. From the Commission's (and NCAs') standpoint, therefore, there is no difference between beginning an "ordinary" procedure or one

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[28] C.J. COOK, *Commitment Decisions: The Law and Practice under Article 9*, in *World Competition*, 2006, Vol. 29, Iss. 2, p. 209, p. 211.

[29] See para 90 of the White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty.

[30] Recital 13 of Council Regulation (EC) 1/2003, cit. and para 116 of Commission notice on best practices, cit.

[31] A further difference compared to Council Regulation (EC) 1/2003, is that the inappropriateness only operates «[i]n principle», thereby suggesting that the use of commitments in cartel cases is not entirely ruled out.

[32] Cf. A. JONES, B. SUFRIN, *EU Competition Law*, Oxford University Press, Oxford-New York, 2014, p. 982. E.g. Commission decision of 9 December 2009 in case COMP/38.636 – *RAMBUS*; case COMP/39.530 – *Microsoft (Tying)*, cit.; case COMP/39.692 – *IBM (Maintenance services)*, cit.

[33] Commission decision of 7 July 2016 in case AT.39850 – *Container Shipping*.

[34] Case COMP/39.847 – *E-books*, cit.

[35] Para 118 of Commission notice on best practices, cit.

that will be closed with commitments [36]. Unlike in some national legal orders [37], the initiative of the undertakings is not subject to any time limit [38]. This suggests that the remedy can be used also in cases where a rapid conclusion is unlikely: coherently, if the Commission decides to negotiate, it can always revert to the ordinary scenario [39]. Despite the above, in practice, commitments are informally negotiated before being formally offered to the Commission or the NCAs [40].

Both at the EU and national level, the adoption of commitment decisions must follow a market test phase [41]. This is a fundamental procedural stage: the information provided by third parties (e.g. consumers, customers and competitors) increases the transparency of the procedure and the protection of the third parties [42], enabling the antitrust authorities to reduce the information deficit from which they might suffer vis-à-vis the undertaking [43], not least due to the lower intensity with which the investigation phase is carried out during commitments procedures.

In practice, the market test is performed by publishing the provisional draft of the commitments negotiated with the undertakings to allow interested third parties to submit comments. The Commission is not bound to amend the commitments because of the comments receiv-

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[36] E. DE SMIJTER, A. SINCLAIR, *The Enforcement System under Regulation 1/2003*, in J. FAULL, A. NIKPAY (eds.), *The EU Law of Competition*, Oxford University Press, Oxford, 2014, p. 91, p. 131.

[37] This point has not been harmonized by the ECN+ Directive.

[38] Para 123 of Commission notice on best practices, cit.

[39] Discussing commitments «merely represents a preliminary procedural option that […] cannot constitute a precise assurance that the Commission will not revert to the standard procedure for finding an infringement and that it will not impose a penalty» (case T-612/17, *Google*, cit., para 637).

[40] N. DUNNE, *Commitment Decisions in EU Competition Law*, in *Journal of Competition Law and Economics*, 2014, Vol. 10, Iss. 2, p. 399, p. 403.

[41] Article 27(4) of Council Regulation (EC) 1/2003, cit. and Article 12(1) of the ECN+ Directive.

[42] S. MARTÍNEZ LAGE, R. ALLENDESALAZAR, *Commitment Decisions ex Regulation 1/2003: Procedure and Effects*, in C.D. EHLERMANN, M. MARQUIS (eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, Hart Publishing, Oxford-Portland, 2010, p. 581, p. 583.

[43] D. RAT, *Commitment Decisions and Private Enforcement of EU Competition Law: Friend or Foe?*, in *World Competition*, 2015, Vol. 38, Iss. 4, p. 527, p. 529.

ed [44]. However, if the market test leads to the revision of the commitments [45], a second market test must be performed [46].

2.4. The content of the commitments and the peculiar application of the principle of proportionality

Commitments can be structural (e.g. assets' divestiture) or behavioural (e.g. do's and don'ts) [47]. The distinction echoes the one applied to concentrations under Council Regulation (EC) 139/2004 [48]. A preference for behavioural commitments seems to exist, at least in the Commission's practice [49]. One of the reasons is that behavioural commitments are *per se* more proportional than structural ones [50].

Although in a peculiar way, the principle of proportionality indeed applies also to commitment decisions [51]: the Commission is not required to identify by itself the least restrictive commitments out of all the possible alternatives; however, if an undertaking proposes more than one set of commitments suitable to solve the competitive con-

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[44] Commission decision of 4 October 2006 in case COMP/C2/38.681 – *The Cannes Extension Agreement*, paras 47-48.

[45] Commission decisions of 12 April 2006 in case COMP/B-1/38.348 – *Repsol CPP*, para 39; 17 March 2010 in case COMP/39.386 – *Long term electricity contracts in France*, paras 52-66; 18 March 2009 in case COMP/C.39.402 – *RWE Gas Foreclosure* para 44.

[46] Commission decision of 20 December 2012 in case COMP/39.654 – *Reuters Instrument Codes (RICs)*.

[47] Para 127 of Commission notice on best practices, cit.

[48] Cf. Article 8(2) of Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[49] Structural remedies have been used mainly in the energy sector to support the liberalization of domestic markets. E.g. Commission decisions of 26 November 2008 in cases COMP/39.388 – *German Electricity Wholesale Market* and COMP/39.389 – *German Electricity Balancing Market*; 3 December 2009 in case COMP/39.316 – *Gaz de France*; 29 September 2010, COMP/39.315 – *ENI*.

[50] Others expected that authorities would have developed a preference for structural commitments because these do not require monitoring (J. TEMPLE LANG, *Commitment decisions under Regulation 1/2003: legal aspects of a new kind of competition decision*, in *European Competition Law Review*, 2003, Vol. 24, Iss. 8, p. 347, p. 349).

[51] General Court, case T-170/06, *Alrosa* [2007] ECLI:EU:T:2007:220, para 92; Court of Justice, case C-441/07 P, *Alrosa* [2010] ECLI:EU:C:2010:377, para 36.

cerns, the Commission must select the least intrusive one [52].

While proportionality should in theory make behavioural commitments preferable, its reduced practical scope with respect to commitments actually extends the possibilities to use structural remedies. Since no antitrust violation is ascertained, the standard set forth in *Microsoft* cannot be applied: the "negotiated" remedies can thus exceed «what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed» [53].

In any case, the difference between the two categories becomes more nuanced as the duration of behavioural commitments increases [54]. Neither Council Regulation (EC) 1/2003 nor the ECN+ Directive takes a position on this point. From an empirical analysis, the average duration of commitments appears to be around five years [55], but there are examples of both longer [56] and shorter commitments [57].

3. Competition law and market regulation: the role of commitment decisions

3.1. Bridging the gap between antitrust and regulation: from Article 9 of Council Regulation (EC) 1/2003 …

The above should have already highlighted that commitment decisions can be used by the Commission and NCAs (also) to pursue broader pur-

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[52] Case C-441/07 P, *Alrosa*, cit., para 41.

[53] General Court, case T-201/04, *Microsoft* [2007] ECLI:EU:T:2007:289, para 1276.

[54] If behavioural commitments last for a long period of time, they eventually acquire «a quasi-structural dimension» (also for some references, P. MOULLET, *How should Undertakings Approach Commitment Proposal in Antitrust Proceedings*, in *European Competition Law Review*, 2013, Vol. 34, Iss. 2, p. 86, p. 92.

[55] E.g. Commission decisions of 22 June 2005 in case COMP/A.39.116/B2 – *Coca-Cola*, para 52; 15 November 2011 in case COMP/39.592 – *Standard & Poor's*, para 80; case AT.39939 – *Samsung*, cit., para 62; case COMP/B-1/38.348 – *Repsol CPP*, cit., para 47.

[56] Commission decision of 4 May 2010 in case COMP/39.317 – *E.ON Gas*, para 40.

[57] For example, all the commitments in the automotive sector lasted less than three years (Commission decisions of 13 September 2007 in cases COMP/E-2/39.142 – *Toyota*; COMP/E-2/39.141 – *Fiat*; COMP/E-2/39.140 – *DaimlerChrysler*; COMP/E-2/39.143 – *Opel*).

poses than ensuring compliance with Articles 101 and 102 TFEU. Since there is no formal connection to an antitrust infringement, this enforcement tool can be used in situations beyond those that could lead to the adoption of a prohibition decision.

The fact that the action of the antitrust authorities is forward- rather than past-oriented [58] led many to believe that commitment decisions entail a shift from a system where the Commission and NCAs play an "adjudicative" role, detecting and punishing infringements of competition rules, to one in which they are entitled to exercise (also) a market regulatory power [59].

Articles 101 and 102 TFEU should apply to (anticompetitive, and thus illegal) conduct already implemented by undertakings, while regulatory activity should be functional to prevent future market failures. Commitment decisions may blur the difference between these two – *prima facie* different – functions, especially in the light of the discretion enjoyed by antitrust authorities in selecting the cases and negotiating the remedies, as well as of the limited extension of judicial review over commitment decisions [60]. The fact that commitment decisions can be directed toward meta-competitive goals is particularly evident if one considers the large number of decisions that, following a market investigation performed in 2007 [61], the Commission adopted in the energy sector. In nearly all cases, commitment decisions were used to support the liberalization of this sector, which was at the time a Commission's political priority. In other words, the Commission used commitment decisions to shape the future structure of the energy market [62], both at the EU and national levels. The (regulatory) results

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[58] See above notes 27-28.

[59] E.g. N. DUNNE, *Commitment decisions*, cit., p. 419; M. SIRAGUSA, E. GUERRI, *Antitrust Settlements under EC Competition Law: The Point of View of the Defendants*, in C.D. EHLERMANN, M. MARQUIS M. (eds.), *European Competition Law*, cit., p. 185, p. 191; H. SCHWEITZER, *Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law*, in C.D. EHLERMANN, M. MARQUIS (eds.), *European Competition Law*, cit., p. 547, p. 577.

[60] Indeed, the agreement between undertakings and antitrust authorities reduces the likelihood that commitment decisions are challenged. See W.P.J. WILS, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, in *World Competition*, Vol. 31, Iss. 3, 2008, p. 335, p. 339; M. SIRAGUSA, E. GUERRI, *Antitrust Settlements*, cit., p. 192.

[61] Inquiry of 10 January 2007 pursuant to Article 17 of Regulation (EC) 1/2003 into the European gas and electricity sectors, COM (2006) 851 final.

[62] The wording used in the Commission decision of 11 October 2007 in case

achieved by the Commission were even more incisive than what was envisaged and permitted, in those years, by EU secondary legislation.

One of the main factors that allow the Commission to influence the (future) structure of the market is the mentioned limited scope of proportionality, and hence the possibility of using structural remedies more easily than in the context of ordinary procedures. Any measure proposed by the undertakings, even if particularly cumbersome [63], and even if not strictly related to the content of the PA, can be enshrined in a commitment decision. The principle of proportionality is not infringed, unless the undertakings proposed other commitments that, although suitable to achieve the same result, were less restrictive [64].

One may wonder why undertakings should accept commitments (more or less) unrelated to any violation of competition rules and, admittedly, even not linked to their behaviours. The answer is straightforward: undertakings are not interested in whether the commitments do or do not address a legitimate competitive concern or a regulatory objective pursued by the Commission (or an NCA). If the negotiated commitments do not affect too heavily their core business, the undertakings are likely to base their decision mainly (or only) on the fact that accepting the commitments leads to a quick and safe closure of the proceeding: as no violation is established, undertakings avoid the risk of being sanctioned and, as we will see below, reduce the risk of damages actions. In other words, the choice is based on a costs-benefits analysis: if the expected costs of the commitments (e.g. lower revenues or higher costs resulting from their implementation) are lower than the expected costs of the prosecution of the public enforcement proceeding according to the ordinary procedure (e.g., legal costs, sanctions, follow-on actions), the undertakings are likely to commit.

Commitment decisions, therefore, can alter the mission of public antitrust enforcement. While the Commission's "regulatory overreach" is certainly not a consequence of commitment decisions alone [65], the possi-

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COMP/B-1/37.966 – *Distrigas*, para 5 is self-explanatory of the Commission's efforts to reshape European energy markets through competition enforcement: «[t]*he concern is that the effect of these long-term contracts could be to foreclose the market to alternative suppliers and therefore hinder the development of competition following liberalisation of the gas sector*». See also N. DUNNE, *Commitment Decisions*, cit., p. 421.

[63] See above para 2.4.

[64] Case C-441/07 P, *Alrosa*, cit., para 41.

[65] Suffices it to recall that state aid rules are often (and often improperly) used to trig-

bility of occupying a regulatory space through a (perhaps) too relaxed approach to commitment decisions has been often criticized [66]. The issue is more problematic when it comes to NCAs: the Commission, at least, is not only – nor mainly – an antitrust authority, having much broader functions [67]; the NCAs' institutional mission, conversely, is limited to the enforcement of EU and national competition rules.

3.2. … to the Digital Markets Act

This shift from antitrust to regulation found its natural and consistent conclusion in the DMA. By establishing a regulatory regime aiming at ensuring that digital markets remain (or become again) fair and contestable, the DMA aims at safeguarding the proper functioning of the internal market in the digital era [68]: it is therefore a regulatory instrument falling at the borders of the competition law realm. The target of the DMA are so-called gatekeepers, i.e. undertakings «providing core platform services» [69] (qualitative requirement) and having a strong and durable economic and intermediation position (quantitative requirement) [70]. The status of gatekeeper is not directly applicable: undertakings are not gatekeepers because they meet the requirements but only following the adoption of a designation decision

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ger Member States to reform important industrial sectors. See e.g. Commission decision of 4 December 2020 in case SA.38399 – *Corporate Taxation of Ports in Italy*, only partially annulled by General Court, case T-166/21, *Autorità di sistema portuale del Mar Ligure occidentale and Others v Commission* [2023] ECLI:EU:T:2023:862.

[66] F. JENNY, *Worst Decision of the EU Court of Justice*, cit., p. 763; N. DUNNE, *Commitment decisions*, cit., pp. 434-442.

[67] This practice is criticized because the Commission's powers must be exercised according to the procedures set by EU primary law and respecting the other Institutions' powers, while the Commission seem to use commitment decisions to achieve regulatory objectives that it has failed to achieve through legislative procedures. See H. VON ROSENBERG, *Unbundling through the back door…the case of network divesture as a remedy in the energy sector*, in *European Competition Law Review*, 2009, Vol. 30, Iss. 5, p. 237; Y. SVETIEV, *Settling or Learning: Commitment Decisions as a Competition Enforcement Paradigm*, in *Yearbook of European Law*, 2014, Vol. 33, Iss. 1, p. 466.

[68] Article 1(1) of the DMA.

[69] Article 2(2) of the DMA.

[70] Article 3(1) of the DMA.

by the Commission. So far Alphabet [71], Amazon [72], Apple [73], ByteDance [74], Meta [75] and Microsoft [76] have been designated as gatekeepers.

The DMA imposes about twenty obligations (do's and don'ts) on gatekeepers with the aim of avoiding practices that are unfair or limit the contestability of digital markets [77]. However, the system is flexible and the Commission can create new obligations through delegated acts [78]. While there is a macro-division between self- [79] and non-self-executing [80] obligations, the list of obligations somehow "resembles" traditional competition law concepts. First, the list echoes the distinction between exploitative and exclusionary practices that characterizes Article 102 TFEU. Secondly, the DMA is inspired by recent case law, and in particular by cases brought, once again pursuant to Article 102 TFEU, against some of the undertakings later designated as gatekeepers [81]. While the above seems

[71] Cf. Commission Decision of 5 September 2023 in cases DMA.100011 – *Alphabet – OIS Verticals*; DMA.100002 – *Alphabet – OIS App Stores*; DMA. 100004 – *Alphabet – Online search engines*; DMA.100005 – *Alphabet – Video sharing*; DMA.100006 – *Alphabet – Number-independent interpersonal communications services*; DMA.100009 – *Alphabet – Operating systems*; DMA.100008 – *Alphabet – Web browsers*; and DMA.100010 – *Alphabet – Online advertising services*.

[72] Cf. Commission Decision of 5 September 2023 in cases DMA.100018 – *Amazon - online intermediation services – marketplaces*; DMA.100016 – *Amazon - online advertising services*.

[73] Cf. Commission Decision of 5 September 2023 in cases DMA.100013 – *Apple – online intermediation services – app stores*; DMA.100025 – *Apple – operating systems*; and DMA.100027 – *Apple – web browsers*.

[74] Cf. Commission Decision of 5 September 2023 in case DMA.100040 – *ByteDance - Online social networking services*.

[75] Cf. Commission Decision of 5 September 2023 in cases DMA.100020 – *Meta – online social networking services*; DMA.100024 – *Meta – number-independent interpersonal communications services*; DMA.100035 – *Meta – online advertising services*; DMA.100044 – *Meta - online intermediation services – marketplace*.

[76] Cf. Commission Decision of 5 September 2023 in cases DMA.100017 – *Microsoft - online social networking services*; DMA.100023 – *Microsoft - number-independent interpersonal communications services*; DMA.100026 – *Microsoft - operating systems*.

[77] Articles 5 to 7 of the DMA. See C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139.

[78] Article 12 of the DMA.

[79] Article 5 of the DMA.

[80] Articles 6 and 7 of the DMA.

[81] Case AT.39740, *Google Shopping*, cit. for the prohibition of self-preferencing and

to confirm (rather than denying) the connection between competition policy and the DMA [82], the significant differences between them should not be overlooked.

The Commission pushed for the adoption of the DMA precisely to complement (and perhaps almost replace) competition law in digital markets. The Commission was convinced that digital markets cannot be safeguarded from the market power of the largest companies through antitrust law alone. Indeed, antitrust enforcement, and even more so cases under Article 102 TFEU, requires the antitrust authorities to overcome particularly complex issues (e.g. the relevant market, dominance, the theory of harm, anticompetitive effects) before a decision can be adopted. According to the Commission, public antitrust enforcement is thus not fully effective on digital markets, which are innovative by definition and subject to rapid transformation.

This also helps explaining the relationship between the DMA and competition law: like the two sides of a coin, they are very similar but at the same time diametrically opposed one to another. As mentioned, and in any case shown by the legal basis [83], the DMA is a regulatory instrument that imposes on gatekeepers clear and predetermined legal obligations: by introducing specific *ex ante* regulation, the DMA offers the Commission a much simpler solution for acting against gatekeepers than antitrust litigation. The Commission does not need to deal with the (mentioned) complex issues that characterize antitrust litigation and cases against gatekeepers under the DMA seem to have a "quasi-contractual" nature: the Commission must ascertain whether the gatekeepers complied with Articles 5-7 of the DMA, rather than establishing whether, on a given relevant market, a dominant undertaking has violated an open-ended

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cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, cit. for cross-markets data leveraging.

[82] After all, having an open market structure is indeed a (if not the) goal of EU competition law (see above note 26).

[83] The DMA has been adopted pursuant to Article 114 TFEU alone, which is the internal market legal basis. Contrary to what was done for both the ECN+ Directive and Directive (EU) 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Article 103 TFEU (which is the competition policy legal basis) has not been used as a joint legal basis.

provision as Article 102 TFEU. As the DMA appears to ease the Commission's task, many believe that, on digital markets, more actions are likely to be brought under the DMA than under competition rules.

Going back to the main topic of this paper, it is not fully clear why the DMA conferred to the Commission the power to adopt commitment decisions. By way of background, the Commission is given the power to conduct market investigations to designate new gatekeepers or to assess any systematic non-compliance of gatekeepers with their obligations under the DMA [84]. If systematic non-compliance is associated with a strengthening of the gatekeeper's position, the Commission is entitled to adopt an implementing act imposing on that gatekeeper «any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance» [85]. As an alternative, the Commission may decide to accept the commitments «for the relevant core platform services» that the gatekeeper may offer if they ensure «compliance with the obligations laid down in Articles 5, 6 and 7» of the DMA. In this case, the Commission shall «declare that there are no further grounds for action» against the gatekeeper [86]. In this respect, the text of Article 25 of the DMA differs from Article 9 of Council Regulation (EC) 1/2003 insofar as the wording «by the Commission» is not repeated. This is probably due to the limited role the DMA reserves to NCAs [87], but one might wonder whether this difference may also affect and somehow prevent the possibility that Article 25 DMA decisions can be applied by national courts [88]. Although with different legal force, however, Recital 76 of the DMA is worded in a "traditional" manner, thereby further reducing the possibility of developing an argument such as the one just alluded to.

In the context of the DMA, the legal framework to be applied to the specific case by an ordinary or a commitment decision is composed by clear and precise rules, i.e. the gatekeepers' obligations. The Commission, therefore, does not have to deal with generally worded provisions that need to be filled through complex legal-economic analysis as Articles 101 and especially 102 TFEU. In addition, systematic non-compli-

[84] Articles 17 and 18 of the DMA.

[85] Article 18(1) of the DMA.

[86] Article 25(1) of the DMA.

[87] Articles 37 and 38 of the DMA.

[88] See *infra* para 5.

ance can be presumed if the Commission, in the last eight years, already sent to the gatekeeper at least three non-compliance decisions under Article 29 of the DMA; similarly, the assessment of the strengthening of the gatekeeper's position is based on the already mentioned quantitative requirements set by Article 3 of the DMA, for which there are presumption thresholds.

As the Commission's effort seems to be lower than the one needed, for example, to identify the relevant market or to establish dominance, it is not entirely clear what benefits the Commission can derive from adopting a commitment decision *ex* Article 25 of the DMA instead of one under Article 18 of the DMA. The difference between competition rules and Articles 5, 6 and 7 of the DMA makes it equally challenging to imagine what the difference might be in terms of the content of the two kinds of decisions. In this regard, one difference is that proportionality is not mentioned in Article 25 of the DMA, whereas this principle shall guide (and limit) the Commission when it drafts the remedies to be imposed on gatekeepers under Article 18 of the DMA. Although proportionality is a general principle of EU law and thus applicable to any piece of EU secondary law, the different wording could imply that, with the gatekeeper's consent, the Commission could be entitled to implement commitments even if not strictly related to the systematic non-compliance at stake or that go beyond what is strictly necessary to address it. Or, in other words, that Article 25 of the DMA could originate a sort of regulatory activity "on steroids" by the Commission, i.e. the application of a regulatory instrument for regulatory purposes other than the ones for which it was implemented.

4. The judicial application of commitment decisions

The interplay between commitment decisions and private enforcement can be assessed by three different perspectives. The key factor to be considered is timing. Damages or other kind of private actions can be brought before national courts with regard to a conduct occurred prior, within or after the period covered by the commitment decision [89].

[89] This taxonomy is inspired by M. SOUSA FERRO, *Committing to Commitment Deci-*

4.1. Conducts that occurred before the period covered by a commitment decision

The first scenario can be discussed briefly. The differences with the ordinary scenario (i.e., actions concerning a conduct that occurred before an infringement ascertained by a prohibition decision) are indeed limited. In both cases, we are dealing with a stand-alone action, whose difficulties (especially from an evidentiary perspective) have already been outlined.

However, one may wonder whether the qualitative difference in the enforcement activity of the antitrust authorities when they use commitment rather than prohibition decisions can have any relevance. When it adopts a prohibition decision, an antitrust authority must ascertain the existence of the violation as accurately as possible, if only because the decision is likely to be challenged by the undertakings. The ascertainment of the infringement also includes the definition of its temporal scope. If a prohibition decision establishes that the infringement began on a specific date, it means that the Commission or the NCAs themselves believed that, before that date, there was no offense (or anyway it could not be proven). *Tertium non datur*: there is no reason why antitrust authorities should exclude from a prohibition decision a period (or a market) in which they believe a violation occurred. The longer the duration of the infringement is, the higher the sanction that can be imposed on undertakings: the higher the sanction, the greater the benefit to the public enforcement of EU competition law and the authorities themselves, both in terms of deterrence, accountability, and reputation.

The picture changes for commitment decisions. As mentioned, here the antitrust authorities focus on the future rather than the past. The Commission and the NCAs have no incentive to establish the exact starting date of the conduct originating concerns. The limited scope of proportionality and the unlikelihood of judicial review loosen the ties between the conduct and remedies: a shorter duration does not imply lighter remedies. Undertakings, moreover, are interested that the decision covers the shortest possible period, precisely to further reduce the (already limited) benefit for damaged parties in subsequent litigation. The Commission and NCAs might therefore be tempted to use the temporal (or geo-

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sions – Unanswered Questions on Article 9 Decisions, in *European Competition Law Review*, 2005, Vol. 26, Iss. 8, p. 451, p. 453.

graphic) scope of the decision as a bargaining chip to encourage the acceptance of more vigorous commitments by the undertakings.

The above cannot per se extend the evidential value of commitment decisions. However, one may wonder if there may be other consequences. For example, contrary to the ordinary scenario, it cannot be ruled out that the material collected by the antitrust authorities, although related to facts predating those considered in the decision, could be helpful for potential claimants. Commitment decisions, therefore, could arguably help potential claimants to meet the plausibility threshold for disclosure set by Article 5(1) of Directive 2014/104/EU even if the envisaged damages action relates to facts occurred before the temporal scope of the decision.

4.2. Conducts that occurred during the period covered by a commitment decision

This is by far the most important example of how commitment decisions and private enforcement can overlap and, therefore, deserves to be discussed in greater detail [90]. Immediately after the introduction of commitment decisions among the enforcement tools of EU competition law, it was sometimes argued that they had to grant some sort of immunity to undertakings from civil liability toward third parties. Drawing inspiration from leniency programs [91], the argument was that the risk of being involved in damages actions would have reduced the undertakings' incentives to commit. The more efficient private enforcement is, the less interest undertakings may have in negotiating commitments and, in any case, in waiving their right to challenge the decision.

In addition, damages actions were also deemed inconsistent with the "operative part" [92] of commitment decisions. As under Article 9 of Coun-

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[90] See generally E. OLMEDO-PERALTA, *The Evidential Effect of Commitment Decisions in Damage Claims. What is the Assumptive Value of a Pledge?*, in *Common Market Law Review*, 2019, Vol. 56, Iss. 4, p. 979.

[91] Commission Notice of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases.

[92] See for example the opinion requested, pursuant to Article 15(1) of Council Regulation (EC) 1/2003, cit., by the Juzgado de lo Mercantil de Barcelona to the Commission in the context of a follow-on action related to the case COMP/B-1/38.348 – *Repsol CPP*, cit.

cil Regulation (EC) 1/2003 the Commission shall declare that no more enforcement actions are needed to tackle the concerns initially envisaged [93], it was argued that commitment decisions make any further intervention by NCAs and national courts redundant and, therefore, not permitted [94]. A judgment awarding damages could therefore breach not only Article 16 of Council Regulation (EC) 1/2003 [95] but also the general principle of loyal cooperation enshrined in Article 4(3) TFEU [96].

As suggestive as these arguments may seem, they clash with the very wording of Recital 13 of Council Regulation (EC) 1/2003 and Recital 39 of the ECN+ Directive [97], according to which commitment decisions are «without prejudice to the powers of competition authorities and national courts to make such a finding and decide upon the case» [98]. Recital 22 of Reg. (EC) No 1/2003 further clarifies that commitment decisions adopted by the Commission «do not affect the power of the courts and the [NCAs] to apply Articles» 101 and 102 TFEU.

Unsurprisingly, therefore, legal scholars [99] and national courts have long since recognized that commitment decisions cannot deprive poten-

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[93] See Recital 13 of Council Regulation (EC) 1/2003, cit.

[94] Before the Court solved the issue in the opposite way (see notes 104-105 below), this approach had been suggested by the Commission Staff working paper of 29 April 2009, accompanying the communication from the Commission to the European Parliament and Council, report on the functioning of regulation 1/2003, SEC(2009) 574, paras 106-108.

[95] Although with opposite purposes and effects than the one discussed now, the fact that commitment decisions fall within the scope of Article 16 of Council Regulation (EC) 1/2003, cit., has been held by the Opinion of AG Kokott, case C-547/16, *Gasorba* [2017] ECLI:EU:C:2017:692 para 29 and later confirmed by Court of Justice, case C-132/19 P, *Groupe Canal+* [2020] ECLI:EU:C:2020:1007, paras 109-112.

[96] These arguments are discussed and discarded, for example by W.P.J. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Hart Publishing, Oxford/Portland, 2008, p. 43.

[97] Directive 2014/104/EU, cit., does not address the relation between commitment decisions and private enforcement.

[98] Recital 13 of Council Regulation (EC) 1/2003 refers to the «courts of the Member States».

[99] E.g. I. TACCANI, *Gli effetti delle decisioni della Commissione e delle Autorità nazionali della concorrenza nei giudizi civili per il risarcimento del danno per violazione delle norme di concorrenza*, in F. MUNARI, C. CELLERINO (eds.), *L'impatto della nuova direttiva 104/2014 sul private antitrust enforcement*, Aracne Editrice, Roma, 2016, p. 103, p. 116; M. SIRAGUSA, E. GUERRI, *Antitrust Settlements*, cit., p. 189; D. RAT, *Com-*

tial claimants of their right to bring proceedings before national courts [100]: in other words, commitment decisions do not entail immunity from civil liability for the concerned undertakings [101]. Also considered that commitment decisions do not establish whether or not competition rules were breached [102], there are no regulatory or systemic obstacles that can prevent national courts to exercise their (autonomous) authority to ascertain the antitrust infringement and, if opportune, to grant the necessary remedies [103].

The fact that commitment decisions do not confer to the Commission (or the NCAs) an exclusive competence to deal with the matter nor prevent further – public [104] and – private enforcement initiatives was later definitively confirmed by the CJEU. As far as private enforcement is concerned, in *Gasorba* the CJEU held that national courts remain competent to ensure the effectiveness of individuals' rights arising from Articles 101 and 102 TFEU even when the action is brought with reference to facts already examined by an NCA in a commitments decision: the latter

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mitment Decisions, cit., p. 534; M. TAVASSI, *Le controversie civili in materia antitrust tra diritto nazionale e indicazioni della Direttiva 104/2014*, in F. MUNARI, C. CELLERINO (eds.), *L'impatto della nuova direttiva 104/2014*, cit., p. 49, p. 53.

[100] More specifically, «[a]ttendu que l'acceptation par l'Autorité des engagements répond aux préoccupations de concurrence soulevées dans cette affaire mais non à l'objectif d'indemnisation des préjudices allègues par le demandeur a la procédure et que la décision administrative de l'Autorité de la concurrence ne peut avoir pour effet de priver le demandeur de toute possibilité de faire valoir ses droits dans le cadre d'un contentieux en indemnisation devant le présent tribunal» (cf. Tribunal de commerce de Paris, No 201014911, *Ma Liste de Courses c. Highco* [2011] see also Cour d'Appel de Paris, 12/06864, *Eco-Emballages et Valorplast c. DKT International* [2014].

[101] As the lack of a «formale accertamento dell'illecito non esclude con certezza che gli elementi probatori raccolti fino al momento dell'accettazione degli impegni possano venire utilizzati anche in un giudizio civile», una «decisione con impegni non comporta alcuna immunità sul piano civilistico ma rende solo più difficile il proficuo esperimento delle azioni risarcitorie» (Tribunale Amministrativo Regionale Lazio, No 2900, *Tele2/Tim-Vodafone-Wind* [2008] para 5.1.2).

[102] Indeed, «la nulidad de las relaciones jurídicas litigiosas por entrañar fraude de ley no es incompatible con la Decisión de la Comisión [...] COMP/B-1/38.348-REPSOL C.C.P. [...] porque la propia Decisión [...] no se pronuncia sobre si se ha producido o no una infracción del Derecho de la competencia» (cf. Tribunal Supremo, No 272, *Estación de servicio Fontanet c. Repsol* [2013]).

[103] Consiglio di Stato, No 4773, *AGCM/Conto TV* [2014] para 19.

[104] Case T-342/11, *CEEES*, cit., para 67.

«cannot create a legitimate expectation in respect of the undertakings concerned as to whether their conduct complies with Article 101 TFEU» nor can «'legalise' the market behaviour of the undertaking concerned, and certainly not retroactively» [105]. Even though the case concerned an action for nullity under Article 101(2) TFEU of an agreement whose content was modified following a commitments decision, the points of law can be extended also to damages actions: the individuals' right to compensation cannot depend on the Commission or NCAs' choice to close an investigation by accepting the commitments proposed by an undertaking rather than by a prohibition decision.

The issue, however, deserves to be further discussed. The fact that commitment decisions do not shield *de jure* undertakings from damages actions does not mean that their widespread use in practice cannot *de facto* affect private enforcement. Indeed, the main features that distinguish prohibition and commitment decisions blur the distinction between stand-alone and follow-on actions [106], making it more complex (and therefore less likely, although possible [107]) for prospective claimants to pursue civil actions [108]. In addition to preventing the imposition of sanctions on the undertakings, the fact that the proceeding is closed without ascertaining that an antitrust offence was committed leaves prospective claimants without the so-called "privileged evidence" that suffices to prove before national courts that an antitrust offence occurred [109]. It is therefore the very nature of this enforcement tool that leads to questioning its capability to support damaged parties before national courts [110].

Emphasizing (precisely) the lack of any finding of antitrust infringement, a first and quite restrictive approach holds that commitment deci-

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[105] Court of Justice, case C-547/16, *Gasorba* [2017] ECLI:EU:C:2017:891 para 28.

[106] They should therefore be called «*"quasi follow-on" o "semi follow-on"*» (M. TAVASSI, *Le controversie civili*, cit., p. 53).

[107] The (indisputable) admissibility of stand-alone actions was confirmed by Court of Justice, case C-595/17 *Apple Sales International* [2018] ECLI:EU:C:2018:854, para 35).

[108] M. SIRAGUSA, *Le decisioni con impegni*, cit., p. 392.

[109] As no violation is established, commitment decisions fall outside the scope of Article 9 of Directive 104/2014/EU, cit.

[110] C. FRATEA, *Il private enforcement del diritto della concorrenza dell'Unione europea*, Edizioni Scientifiche Italiane, Napoli, 2015, p. 231).

sions cannot but be irrelevant for the purposes of damages actions: while it may be true that commitment decisions do not grant immunity to the concerned undertakings, they cannot have any evidential effect either. According to this view, also to not reduce their appeal for undertakings, and thus to preserve the *effet utile* of Article 9 of Council Regulation (EC) 1/2003 and Article 12 of the ECN+ Directive, actions based on commitment decisions should be considered as fully stand-alone ones: commitment decisions should have no relevance for the purpose of convincing national courts that Articles 101 and 102 TFEU have been breached [111]. Potential claimants must therefore prove, without the help of a public enforcement decision, the anticompetitive nature of the conduct, in addition to (and before) demonstrating that they have suffered damages and that these damages were caused by the infringement [112]. As stand-alone cases are notoriously much more difficult (and therefore less frequent) than follow-on cases, the decision to submit commitments can be considered as part of a broader strategy of the undertakings to limit as much as possible the expected costs of the investigated conduct [113]. Indeed, when proposing commitments, undertakings are very careful to state that this is not an admission of guilt [114].

This approach raised significant concerns for the development of private enforcement. Although more respectful of the wording of Council Regulation (EC) 1/2003 and the ECN+ Directive than claiming that commitment decisions should grant a *de jure* immunity to the undertakings, the practical effect is not much different: rather than being granted by law, the "immunity" is conferred *de facto*. The concerns are enhanced by the fact that, as mentioned [115], commitment decisions are often used

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[111] *Ex pluribus* C.J. COOK, *Commitment Decisions: The Law and Practice under Article 9*, in *World Competition*, 2006, Vol. 29, Iss. 2, p. 209, p. 219.

[112] D. RAT, *Commitment Decisions*, cit., p. 539.

[113] *Ex pluribus* L. DE LUCIA, *Le decisioni con impegni nei procedimenti antitrust tra sussidiarietà e paradigma neoliberale*, in G. FALCONI, B. MARCHETTI (eds.), *Pubblico e privato nell'organizzazione e nell'azione amministrativa*, Cedam, Padova, 2013, p. 109, p. 115; A. SCOGNAMIGLIO, *Decisioni con impegni e tutela civile dei terzi*, in *Diritto amministrativo*, Vol. 18, Iss. 3, p. 503.

[114] E.g. case COMP/C.39.402 – *RWE Gas Foreclosure*, cit., para 38, which is self-explanatory: «RWE does not agree with the Commission's Preliminary Assessment. It has nevertheless offered Commitments […] to meet the Commission's competition concerns».

[115] See above notes 32-34.

also with respect to conducts that – if proved, could – represent serious antitrust infringements [116]. It is also for this reason that, in practice, a more permissive view emerged soon. The basic idea is simple: while commitment decisions do not establish any antitrust infringement, a violation is not excluded either [117]. Rather, the beginning of the procedure cannot but be based on the existence of some (although not fully defined) competitive concern of the Commission (or NCA) [118]. As put it by Advocate General Pitruzzella, the adoption of a commitment decision «must be founded on a 'potential infringement', that is, on an analysis of the undertakings' conduct and of the context surrounding it that supports the conclusion that it is possible, and actually probable, even if not yet certain, that the undertakings in question have been causing harm to competition» [119]. Otherwise, the principle of proportionality would call for the dismissal of the case [120].

At least to a certain extent, therefore, commitment decisions may "help" potential claimants to meet the burden of proof required in damages actions. While the evidential effect of commitment decisions was already recognized by national courts [121], also this issue was addressed for the first time at the EU level in the *Gasorba* case. Following the opinion of Advocate General Kokott [122], the CJEU held that «the principle of

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[116] L. DI VIA, *Le decisioni in materia di impegni nella prassi decisionale dell'Autorità garante*, in *Mercato, Concorrenza, Regole*, 2007, Vol. 9, Iss. 2, p. 229, p. 233.

[117] E.g. Audiencia Provincial di Madrid, No 278, *Estación de Servicio Villafria c. Repsol* [2011].

[118] J. RATLIFF, *Negotiated Settlements in EC Competition Law: The Perspective of the Legal Profession*, in C.D. EHLERMANN, M. MARQUIS (eds.), *European Competition Law*, cit., p. 305; A. SCOGNAMIGLIO, *Decisioni con impegni*, cit., p. 515.

[119] The opinion goes on clarifying that «[i]t is not a finding, yet the Commission must not confine itself to conjecture or to general hypotheses that are not even summarily tested in the light of the material that has been produced in the proceedings» (Opinion of AG Pitruzzella, case C-132/19 P, *Groupe Canal+* [2020] ECLI:EU:C:2020:355, para 70).

[120] A. PERA, G. CODACCI PISANELLI, *Decisioni con impegni e private enforcement nel diritto antitrust*, in *Mercato, Concorrenza, Regole*, 2012, Vol. 14, Iss. 1, p. 69, p. 85.

[121] According to Tribunal de commerce de Paris, J2012000109, *DKT International* c. *Eco-Emballages et Valorplast* [2015], «*a commitment decision may provide prima facie evidence of wrongdoing of undertakings before the Civil Courts, which undertakings may not be able to rebut such elements, as they have provided commitments to address the competition concerns expressed*», so that «*commitments cases would involve a quasi-admission of an infringement*».

[122] Opinion of AG Kokott, case C-547/16, *Gasorba*, cit., para 35.

sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature» [123] of the conduct at stake.

After *Gasorba* two points can no longer be disputed. Firstly, commitment decisions are not "privileged evidence" *ex* Articles 16 of Council Regulation (EC) 1/2003 or 9 of Directive 104/2014/EU [124] and, thus, do not compel national courts to establish that competition rules were breached: if a court believes that the conduct was lawful, a commitments decision does not force it to "change its mind" [125], paving the way for possible conflicting judgments by different courts. Secondly, however, commitment decisions *must* be taken into consideration by national courts [126]: differently from the ordinary follow-on scenario, claimants must prove the existence of the antitrust infringement; however, the text of the commitments decision and the evidence collected by the antitrust authorities during the investigation [127] shall be evaluated by national courts [128]. Even if in the final decision the Commission (or the NCA) holds that its preliminary competition concerns had not been confirmed during the investigations, this «cannot alter the nature of the [commitments] decision and prevent the national competition authorities and the national courts from taking action», so that «a national court may conclude that the conduct which is the subject of a commitment decision infringes Article 101 or 102 TFEU» [129].

The question, therefore, is no longer *if* commitment decisions can have

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[123] Case C-547/16, *Gasorba*, cit., para 29.

[124] Cf. I. TACCANI, *Gli effetti delle decisioni*, cit., 116.

[125] Also to distinguish commitment from settlement decisions, it has been clarified that commitment decisions «lasciano impregiudicato il potere delle giurisdizioni e delle autorità garanti della concorrenza degli stati Membri di applicare gli articoli 81 e 82 del trattato, così chiarendo che non vincolano il giudice adito in sede di risarcimento del danno con riguardo all'esistenza dell'infrazione antitrust» (see Tribunale di Milano, No 9759, Cave Marmi Vallestrona Srl c. Iveco S.P.A. [2018]). See also Audiencia Provincial di Madrid, No 278, Estación de Servicio Villafria c. Repsol [2011].

[126] E. DE SMIJTER, A. SINCLAIR, *The Enforcement System*, cit., p. 130.

[127] See *infra*.

[128] M. TAVASSI, *Le controversie civili*, cit., p. 53.

[129] General Court, case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo* [2022] ECLI:EU:T:2022:43, para 133.

evidential effects, but rather *what* evidential effects they can have, i.e. how the content of the decision (and the documents gathered during the investigation) can "help" the prospective claimants. In this perspective, the issue becomes more complex and the case law more variegated. National courts have often (and correctly) recognized that the benefits that the potential claimants can derive from commitment decisions are lower than those resulting from a prohibition decision. After all, commitment decisions are not out-of-court confessions [130] and, therefore, the submission of commitments is not an admission of guilt [131]. Prospective claimants must therefore state and prove the specific facts on which their claim is based in a way that is coherent with the findings of the decision of the Commission or the NCA that they invoke to support their plead [132].

Sometimes a perhaps too restrictive approach to the evidential value of commitment decisions has been applied. For example, despite recognizing that commitment decisions are issued by independent authorities, at the end of particularly complex and technical proceedings, it was considered adequate to set their evidential value (at least) at the level of any other document that a party can submit according to domestic procedural rules [133].

In other cases, the approach of national courts has been closer to, and more consistent with, the already mentioned principles established by the CJEU. Two judgments of the Italian Supreme Court (*Corte di Cassazione*) represent two prominent examples. In the first one, it was held that national courts shall not only duly considered the content of the PA, the pieces of evidence gathered by the antitrust authorities, and the text of the decision but also be ready to qualify these elements as an indication, or even as a principle of proof, of the anti-competitive nature of the relevant conduct [134].

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[130] Tribunale di Milano, No 11893, *Industria Chimica Emiliana Spa c. Prodotti Chimici Alimentari Spa* [2019]. *Contra*, Consiglio di Stato, No 4393, *Carte di credito* [2011] para § 5.2.8, according to which negotiating commitments is, for the undertakings, a decision «dai connotati sostanzialmente confessori in ordine alla sussistenza dell'illecito commesso».

[131] Tribunale di Milano, No 9109, *BT Italia c. Vodafone Omnitel* [2015].

[132] Tribunale di Milano, No 5122 *Dipharma Francis c. Industria Chimica Emiliana e Prodotti Chimici Alimentari* [2019].

[133] *Industria Chimica Emiliana c. Prodotti Chimici Alimentari* [2019], cit., according to which, moreover, in case of action based on commitment decisions, the claimants shall prove the antitrust offence, since these are stand-alone actions.

[134] Corte di Cassazione, No 26869, *Toscana Energia c. Pace Strade* [2021] where the

In the second case, the Italian Supreme Court noted that commitment decisions, being neither infringement nor clearance decisions, cannot have evidential effect equal to either of them. On these premises, the Court held that, in the Italian legal order, commitment decisions must be capable of generating, in follow-on actions, a rebuttable presumption of the anti-competitive nature of the conduct of the undertaking. Being a rebuttable presumption, the concerned undertaking can of course provide evidence to the contrary in court [135], pursuant to Article 2729 of the Italian Civil Code. Although in a different perspective, a similar approach has been proposed also by Advocate General Pitruzzella: in a case dealing with the remedies available to third parties whose contractual rights are affected by a commitment decision [136], he held that the ability of said third parties to «succeed in [their] claim for damages against [their counterparty] is significantly weakened, since it will be necessary to rebut the presumption that the relevant clauses are unlawful» [137].

The differences that can be found in the case law (even within the same Member State) are not surprising. At least in some cases, such differences may entail a "dogmatic" different understanding of commitment decisions by different courts. In most cases, however, such differences are perhaps more likely to be explainable in the light of the specific content of the commitment decision and additional documentation (e.g. the PA) brought to the court's attention in the individual cases. Indeed, there are some features (that will be discussed below) that, by definition, reduce the utility of commitment decisions for the purposes of damages actions. In cases where these aspects are more pronounced [138], the utility that can be drawn from commitment decisions is very limited: it is likely, therefore, that it was in these cases that national courts have taken a more cautious approach to the issue at stake, and vice versa [139]. This is why the

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Italian Supreme Court also clarified that national courts shall not neglect the opposing evidence (if any) that may have been collected during the public enforcement procedure.

[135] Corte di Cassazione, No 5381, *Uno Communications c. Vodafone Italia* [2020].

[136] See below para 4.3.

[137] Opinion of AG Pitruzzella case C-132/19 P, *Groupe Canal+*, cit., para 130.

[138] E.g. case COMP/39.692 – *IBM (Maintenance Services)* cit., paras 26 and 32 («[w]ithout having reached a definitive view, the Commission preliminarily concluded that IBM appeared to be dominant»; the assessment «remains provisional and would need further analysis before any definitive findings could be made».

[139] See case COMP/A.39.116/B2 – *Coca-Cola*, cit.

evidential value of commitment decisions shall be assessed on a case-by-case basis.

The evidential value of commitment decisions is reduced mainly because they contain a less thorough description (compared to prohibition decisions) of the facts, conducts and – most importantly – their effects on the markets and third parties [140]. Prohibition decisions usually consist of hundreds of pages, while commitment decisions do not exceed a few dozen. The same applies to SOs and PAs [141]. Although this should be (at least partly) mitigated by the duty to state reasons incumbent on the Commission (pursuant to Article 296(2) TFEU [142]) and NCAs (under similar national provisions) the burden of proof of potential claimants is therefore lessened to a limited extent.

In addition, one should consider that the most sensitive elements for the purposes of follow-on actions can be "negotiated" between the undertaking and the antitrust authorities. Undertakings can engage with the Commission and the NCA from the very beginning of the investigation: undertakings, therefore, can participate in the definition of aspects such as the relevant market or the temporal scope of the conduct under investigation, and have the possibility of "influencing" the authorities before the latter have taken a stance on the matter [143]. If these (and other) elements are redefined more narrowly than the Commission's or the NCAs' initial assumptions, the effect is to protect undertakings from the possibility of follow-on actions with respect to, precisely, these periods and markets. As commitment decisions are unlikely to be challenged, the antitrust authorities may – be tempted to – use private enforcement as leverage to convince undertakings to "propose" commitments that fit their (often regulatory) purposes [144].

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[140] Tribunal de Grande Instance de Paris, 15/09129, *Société Betclic Enterprises Limited c. GIE Pari mutuel urbain* [2018].

[141] The PA highlights the Commission's concerns, which is «a word notably weaker than the word "objections"» (S. MARTÍNEZ LAGE, R. ALLENDESALAZAR, *Commitment Decisions*, cit., p. 589).

[142] The Commission shall find «a fine balance between the Treaty obligation to give reason and the obligation under Regulation 1/2003 not to conclude whether there has been or still is an infringement» (E. DE SMIJTER, A. SINCLAIR, *The Enforcement System*, cit., p. 133).

[143] See also para 4.1 above.

[144] This «is implicitly part of the deal: the absence of a clear identification of the con-

The above may also reduce the benefit that third parties can gain from accessing the Commission's or NCAs' investigation file. The adoption of a commitment decision is arguably an element that third parties can use to support the plausibility of their claims *ex* Article 5(1) of Directive 2014/104/EU and therefore to convince national courts to order the disclosure of evidence collected by the Commission or the NCA [145]. Just like the text of the decision, however, also the documents included in the Commission's or NCA's file are likely to be less useful for potential claimants than those that could be found if the public enforcement proceeding followed the ordinary procedure. The expectation to close the case with a commitment decision affects the scope of all the activities carried out by the antitrust authorities, not only the text of the final decision. As mentioned, the Commission's and NCA's attention is indeed directed toward the future, rather than the past. Hence, the fact-finding activity of the public enforcers is oriented toward the aim of enabling the drafting and negotiation of commitments that will ensure the development of the market toward the desired structure, rather than to gather evidence on the "lawful" behaviours of undertakings, let alone to assess their effect on third parties.

An (at least partial) exception is represented by hybrid proceedings. Just as for cartel settlements [146], it can happen that only some of the addressees of a PA propose commitments [147]. Commitment decisions may therefore be adopted alongside prohibition ones, the latter being addressed to the undertakings that did not "settle" [148]. Here, commitment decisions

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cerns minimises the risk of private actions for damages against the companies» (M. MARINIELLO, *Commitments or prohibition*, cit., p. 2; F. WAGNER-VON PAPP, *Best and even better practices*, cit., p. 949).

[145] Cour de Cassation, No 08-19761, *Semavem c. JVC*, [2010]. The issuance of a PA should also suffice to meet the requirement. In this case, however, disclosure is limited to pre-existing information, as documents prepared for the proceeding fall within the so-called "grey list" under Article 6(5) of Directive 2014/104/UE, cit.

[146] Commission Regulation (EC) 622/2008 of 30 June 2008 amending Regulation (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases.

[147] See also E. OLMEDO-PERALTA, *The Evidential Effect of Commitment Decisions*, cit., p. 997.

[148] See AGCM decision of 25 January 2007, in case A357 – *Tele2/TIM-Vodafone-Wind*, where the AGCM found that Telecom Italia and Wind abused their dominant position and accepted commitments submitted by Vodafone. Several follow-on actions were launched against both the wrongdoers (e.g. Corte di Appello di Milano, No 1, *Telecom*

cannot be kept completely separated from the prohibition ones: they both originated from the same public enforcement procedure and concern the same or similar practices. Unsurprisingly, national courts have sometimes operated a sort of "cross-fertilization" between the two sets of decisions: the prohibition decisions, the PA and the evidence gathered with respect to the undertakings that did not settle have been used to interpret and "reinforce" the evidential value of commitment decisions [149], the PA [150] and the related evidence [151] for the purposes of damages actions against the committing undertakings.

4.3. Conducts that occurred after the period covered by a commitment decision

Two different cases fall within the third and last scenario: actions before national courts can be brought against the undertakings that breached the commitments or those that, despite complying with them (and perhaps because of such compliance), have nonetheless caused harm (anticompetitive or otherwise) to third parties.

From the public enforcement perspective, Article 9(2) of Council Regulation (EC) 1/2003 provides the Commission with an instrument of "self-protection" to react to the first scenario. If undertakings fail to comply with their commitments, the Commission can reopen the procedure and fine them *ex* Article 23 of Council Regulation (EC) 1/2003. Microsoft was the first undertaking to be fined for breaching a commitment decision when it failed to offer its operating system's users the option to choose alternative browsers than the pre-installed one [152]. This is «a serious breach of Union

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Italia c. *Brennercom* [2017]; Tribunale Milano, No 16319, *Brennercom* c. *Telecom Italia* [2013]; Tribunale di Milano, No 5049, *Uno Communications* c. *Telecom Italia* [2014]) and the committing undertaking (e.g. Tribunale di Milano, No 12227, *Teleunit* c. *Vodafone* [2013]; Tribunale di Milano, No 4587, *Uno Communications* c. *Vodafone* [2014]; Tribunale di Milano, No 12043, *Fastweb* c. *Vodafone* [2014].

[149] Commitment decisions rendered in hybrid cases should have «*valore di prova privilegiata quanto alla posizione rivestita dalla parte sul mercato ed al suo abuso*» (*Teleunit* c. *Vodafone* [2013], cit.).

[150] *Fastweb* c. *Vodafone* [2014], cit.

[151] *Teleunit* c. *Vodafone* [2013], cit.

[152] Commission decision of 6 March 2013 in case AT.39.530 – *Microsoft (Tying)*.

law», as «it undermines the effectiveness of the mechanism provided for in Article 9» of Council Regulation (EC) 1/2003 [153].

While Article 5 of Council Regulation (EC) 1/2003 already empowered NCAs to accept commitments, this provision did not confer NCAs the power to sanction defaulting undertakings: therefore, NCAs used commitments almost only if domestic rules already provided them with sanctioning powers [154], as it was the case for the Italian ANC (the AGCM) [155]. The gap has been filled by Article 12 of the ECN+ Directive, according to which NCAs shall «have effective powers to monitor the implementation of the commitments», including the possibility to «reopen enforcement proceedings» inter alia when the undertakings «act contrary to their commitments». In these cases, what is being punished is the undertaking's default, not a violation of competition rules. Since antitrust authorities do not have to prove the existence of an antitrust offence, the case somehow resembles a contractual dispute.

The question is whether also third parties can trigger this quasi-contractual liability for breaching commitments before national courts. Council Regulation (EC) 1/2003 and the ECN+ Directive remain silent on the private enforceability of commitment decisions. It could be argued that only the "counterpart" of the defaulting undertaking shall be entitled to react: in other terms, one could qualify Articles 9 of Council Regulation (EC) 1/2003 and 12 of the ECN+ Directive as exclusive remedies and hold that the Commission or the NCA shall have a monopoly in this field. Although as an *obiter dictum*, the Tribunal of Rome seems to have recently endorsed this view, stating that only the AGCM can verify compliance of the undertakings with commitment decisions and, in case of default, intervene [156].

Several reasons support the opposite conclusion [157]. Firstly, the deci-

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[153] Case AT.39.530 – *Microsoft (Tying)*, paras 56 e 58.

[154] F. CINTIOLI, *Le nuove misure riparatorie del danno alla concorrenza: impegni e misure cautelari*, in *Giurisprudenza commerciale*, 2008, Vol. 35, Iss. 1, p. 109, p. 118.

[155] Cf. Article 14-*ter* (1) and (2) of Legge No 287/1990, cit. These powers were firstly used in AGCM decision of 28 January 2015 in case I689C – *Organizzazione servizi marittimi nel golfo di Napoli*. The infringed commitments were made binding by AGCM decision of 15 October 2009 in case I689 – *Organizzazione servizi marittimi nel golfo di Napoli*.

[156] Tribunale di Roma, No 5775, *ARTISTI 7607 c. NU. IM.* [2023].

[157] E.g. J. DAVIES, M. DAS, *Private enforcement of Commission commitment deci-*

sion to begin a proceeding *ex* Articles 9(2) of Council Regulation (EC) 1/2003 or 12 of the ECN+ Directive is a discretional choice of the antitrust authorities [158]. This type of control, therefore, may never occur. Secondly, it is difficult to imagine a case in which the commitments made binding by an antitrust authority affect only the legal position of the undertaking that proposed them. As the "settling" undertakings do not operate in a legal and economic vacuum, the ordinary situation is that commitments also affect third-parties that have economic relations with the former [159]. It is also for this reason that, as discussed above, commitment decisions can be adopted only after the performance of the market test [160]. The effects of commitment decisions on third-parties are generally (but not always [161]) favourable to them: undertakings, for example, may commit to set prices below certain thresholds or to apply non-discriminatory conditions [162], to supply third parties, or to refrain from enforcing certain contractual clauses [163]. Third-parties' standing before national courts is instrumental to the protection of such effects [164].

The private enforceability of Commission's decision, however, is also a direct and (inevitable) consequence of the fact that decisions enjoy vertical and horizontal direct effect [165]: if they are clear, precise, unconditional, and capable of conferring rights [166], «[t]here is no reason why this

sions: A steep climb not a gentle stroll, in *Fordham International Law Journal*, 2005, Vol. 29, Iss. 5, p. 921; M. LIBERTINI, *Le decisioni "patteggiate" nei procedimenti per illeciti antitrust*, in *Giornale di Diritto Amministrativo,* 2006, Vol. 12, Iss. 12, p. 1284, p. 1290.

[158] Case T-342/11, *CEEES*, cit., paras 48 e 64.

[159] E. LECCHI, J. LOGENDRA, R. THOMASEN, *Committing others: the commitment procedure and its effect on third parties*, in *Global Competition Litigation Review*, 2011, Vol. 4, Iss. 4, p. 162.

[160] See above notes 41-46.

[161] Case C-132/19 P, *Groupe Canal+*, cit.; General Court, case T-76/14, *Morningstar* [2016] ECLI:EU:T:2016:481.

[162] Case COMP/39.692 – *IBM (Maintenance services)*, cit.

[163] Case COMP/B-1/37.966 – *Distrigas*, cit., para. 27.

[164] Third parties must have the «possibility of protecting the rights they may have in connection with their relations with th[e] undertaking» (case C-441/07 P, *Alrosa*, cit., para 49).

[165] Court of Justice, case 9/70, *Franz Grad* [1970] ECLI:EU:C:1970:78, paras 5-6.

[166] Court of Justice, case 26-62, *Van Gend & Loos* [1963] ECLI:EU:C:1963:1. On the

general principle of EU law should not also apply to commitment rendered binding by an EU act» [167]. Anyone, therefore, can invoke a commitment decision against its addressee [168] and national courts must ensure compliance, in accordance to the principles of equivalence and effectiveness [169] and to preserve their *effet utile* [170].

Using well-known terms in antitrust law, third parties can use commitment decisions both as a "shield", to seek protection from the behaviours that the undertaking undertook not to engage in, or as a "sword", claiming the fulfilment of their content or compensation in case of default. Just like for public enforcement, the subject matter of these cases, therefore, is the undertaking's non-compliance with the obligations agreed with the antitrust authorities, rather than a violation of competition rules. By virtue of the quasi-contractual nature of this kind of litigation, the burden of proof on prospective claimants is lower.

Turning to the second scenario, the fact that undertakings that properly implemented the commitments could nevertheless face litigation before national courts seems more controversial. Many general principles of EU law (e.g. legitimate expectations, legal certainty [171], etc.) and, more generally, the need to ensure the consistency of the legal order seem to suggest the inconceivability of this scenario [172]. However, there are also reasons to hold that compliance with commitments cannot ensure immunity from civil liability. Firstly, such immunity could only be granted if, before accepting the commitments, the Commission or the NCA were required to verify that their implementation can prevent any (current, future, and even only potential) possible violation of com-

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conferral of a right, however, see Court of Justice, case C-61/21, *Ministre de la Transition écologique e Premier minister* [2021] ECLI:EU:C:2022:1015.

[167] E. DE SMIJTER, A. SINCLAIR, *The Enforcement System*, cit., p. 129.

[168] By contrast, individuals may not be able to rely, in legal proceedings against other individuals concerning contractual liability, on decisions addressed to one or more Member States (Court of Justice, case C-80/06, *Carp* [2007] ECLI:EU:C:2007:327, paras 21-22).

[169] M. SIRAGUSA, E. GUERRI, *Antitrust Settlements*, cit., p. 189.

[170] J. TEMPLE LANG, *Commitment Decisions*, cit., p. 351.

[171] Court of Justice, cases C-247/11 P and C-253/11 P, *Areva SA* [2014] ECLI:EU:C:2014:257.

[172] S. MARTÍNEZ LAGE, R. ALLENDESALAZAR, *Commitment Decisions*, cit., pp. 599-600.

petition rules, rather than only assessing their suitability to meet the concerns raised in the PA. Clearly, this would represent a so-called *probatio diabolica*, as the antitrust authorities would be asked to prove a negative fact. Commitment decisions would be impossible to use.

Secondly, it cannot be excluded that commitment decisions may themselves restrict competition. Commitments are initially proposed by the undertakings that, in this context, have no interest in protecting the competitive process. As commitments are often used to pursue regulatory purposes, their content may not be tailored to ensure compliance with competition rules: the authorization of otherwise anticompetitive conduct, after all, is one of the typical features of regulatory activity [173]. The limited scope of judicial review contributes to make such a possibility far from implausible.

Thirdly, an antitrust infringement is a violation of EU primary law (Articles 101 and 102 TFEU) and it cannot become lawful just because it is carried out during the implementation of a piece of EU secondary law, i.e. the commitment decision.

Fourthly, third parties may wish to seek compensation for damages they suffered not as a result of "anticompetitive commitments" but, more simply, by virtue of a breach of contract caused by the commitment decision: for example, if an exclusive supply agreement for or by a (potentially) dominant undertaking leads an antitrust authority to issue a PA, the undertaking might agree to no longer comply with that supply agreement; this commitment clearly affects the contractual rights of the third party that was exclusively supplying or supplied by the dominant undertaking.

While, at least in principle, actions against undertakings that complied with a commitment decision should therefore be considered admissible, they represent a sort of *sui generis* and "aggravated" stand-alone action. Commitment decisions not only do not help the potential claimants to meet their burden of proof, but they make their action even more difficult. Potential claimants must indeed meet a higher burden of proof than if there was no commitment decision. Although it cannot lead to conferring a *de jure* immunity upon the "settling" undertakings, the fact that they have implemented the commitments that an antitrust authority considered suitable to solve the concerns initially detected may (correctly)

[173] J. TEMPLE LANG, *Competition Law and Regulation Law From an EC Perspective*, in *Fordham International Law Journal*, 1999, Vol. 23, Iss. 6, p. 117.

influence national courts in finding that, at least *prima facie*, there were no unlawful behaviours.

The relation between commitment decisions and third parties' pre-existing contractual rights was discussed in the mentioned *Groupe Canal+* case [174]. The case concerns the annulment of a decision by which the Commission accepted the commitments proposed by Paramount [175]. The commitments affected the contractual rights of Canal+ (which of course neither offered nor subscribed to them), as they led Paramount to no longer honor some clauses of the contract in place whit Canal+.

The General Court dismissed Canal+ application *ex* Article 263 TFEU holding that it had alternative domestic remedies: Canal + could have asked a national court to enforce against Paramount the contractual terms that the latter committed to no longer apply. According to the General Court, if a national court finds that the contractual terms do not breach Article 101 TFEU, said clauses may be enforceable under national contract law and, therefore, the national court may order the addressee of the decision to contravene the commitments to comply with its pre-existing contractual obligation [176].

While Advocate General Pitruzzella highlighted the nature of "aggravated" stand-alone action of these claims [177], the Court of Justice took a more radical stance and held that national courts cannot find that a contractual clause made inapplicable by a commitment decision is compatible with Articles 101 and 102 TFEU. According to the Court of Justice, national courts cannot request undertakings to contravene the content of a commitment decision nor uphold damages actions brought by their contractual counterpart, as these situations «would clearly run counter to that decision» within the meaning of Article 16(1) of Council Regulation (EC) 1/2003 [178].

The prohibition to issue "negative decisions" is based on the presumption of the anticompetitive nature of the conduct of the undertak-

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[174] Case C-132/19 P, *Groupe Canal+*, cit.

[175] Commission Decision of 26 July 2016 in case AT.40023 – *Cross-border access to pay-TV*.

[176] General Court, case T-873/16, *Groupe Canal+* [2018] ECLI:EU:T:2018:904 paras 103-104.

[177] See above note 137.

[178] Case C-132/19 P, *Groupe Canal+*, cit., paras 109-111 and 114.

ings that propose commitments and, therefore, fosters the possibilities for potential claimants to seek damages with reference to behaviours covered by a commitment decision. The Court of Justice imposed this prohibition upon national courts on the grounds that, on the one hand, commitment decisions are issued to close proceedings where the Commission intended «to adopt a decision requiring that an infringement be brought to an end» and, on the other hand, the issuance of a commitment decision does not prevent the Commission from reopening the proceeding and adopting «a decision containing a formal finding of an infringement» [179].

The reasoning of the Court, however, is not entirely satisfactory. Firstly, it is true that the Commission could have adopted a prohibition decision, but it chose not to do so: no infringement, therefore, was ended. Secondly, under Article 9(2) of Council Regulation (EC) 1/2003, the possibility to reopen the proceeding is subject to specific conditions: in addition to non-compliance, a material change in the facts on which the decision was based should occur or the information provided by the parties should result to be incomplete, incorrect, or misleading. If this happens, the Commission may, but is not obliged to, reopen the proceeding. The Court, therefore, used something that did not happen and something that may never happen to overcome the wording of Article 9 (which refer to «concerns», and not to «infringement») and of Recitals 13 of Council Regulation (EC) 1/2003 (according to which the Commission shall not conclude «whether or not there has been or still is an infringement» [180]). The fact that no infringement is established would seem to suggest that there can be no "negative decision".

This approach seems too restrictive for the position of third parties, especially if one considers the wide diffusion of commitment decisions and the fact that the latter are used also for regulatory purposes, i.e. with respect to situations that may not be strictly related to an antitrust infringement. The Court's concern and effort to preserve the *effet utile* of commitment decisions, and thus the effectiveness of the obligations negotiated between the Commission and the undertakings, is understandable. However, it would have been enough to rule out only the possibility for third parties to bring enforcement actions, without excluding damages

[179] Case C-132/19 P, *Groupe Canal+*, cit., para 113.

[180] See also Case T-342/11, *CEEES*, cit., para 55.

actions too [181]. Anticompetitive contracts are null and void pursuant to Article 101(2) TFEU so that, in the event of default by one party, the other party is entitled to neither fulfilment nor compensation. However, as commitment decisions represent a grey area, an alternative – and perhaps more proportionate – solution would have been to include only enforcement actions in the scope of the prohibition of "negative decision", leaving the third parties' right to compensation unaffected.

Also to counterbalance the above, the Court affirmed that third parties must be entitled to challenge the Commission's commitment decisions that affect their pre-existing contractual rights before the General Court [182]. However, the recognition of their *locus standi* under Article 263 TFEU does not seem to provide sufficient protection to third parties, if only because of the short time limit for challenging the decision. Actually, it might even be detrimental to their position if this had the effect of preventing the possibility of a preliminary reference of validity in a potential contractual dispute at the national level [183].

5. Conclusion

Commitment decisions have radically altered the traditional ways of enforcing competition rules. Their introduction in Council Regulation (EC) 1/2003 and then in the ECN+ Directive both codified and reinforced a definitive shift from a top-down model in which Articles 101 and 102 TFEU were enforced by the Commission and the NCAs from a position of "power" vis-à-vis the undertakings to a system in which these subjects negotiate on a position of (almost) equal standing.

In the light of their innovative nature and instant practical diffusion, it is not surprising that commitment decisions have originated countless

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[181] Case C-132/19 P, *Groupe Canal+*, cit., para 114.

[182] Case C-132/19 P, *Groupe Canal+*, cit., paras 115-117; see already case C-441/07 P, *Alrosa*, cit.; case T-76/14, *Morningstar*, cit.).

[183] Individuals «who could undoubtedly have sought [the] annulment under Article [263 TFEU]» of a given act are not entitled to plead the illegality of that act before national courts for the purposes of Article 267 TFEU (Court of Justice, case C-441/05, *Roquettes Frères* [2007] ECLI:EU:C:2007:150 para 40) See also Court of Justice, case C-188/92, TWD [1994] ECLI:EU:C:1994:90.

theoretical and practical issues, relating to both public and private enforcement of Articles 101 and 102 TFEU. As discussed in this paper, some of these issues have already been addressed and resolved thanks to the intervention of the Court of Justice and national courts: the case law, for example, had the chance to highlight the peculiar application of the principle of proportionality in this field [184] as well as to address the main profiles of the complex interplay between commitment decisions and third parties' actions for damages. While they do not (nor can [185]) ascertain an antitrust offence, commitment decisions must be taken into account by national courts, which must confer them specific evidential value [186]: the need not to undermine their useful effect, may therefore lead, in some instances, to specific limitations for national courts, which for example cannot authorize undertakings to break the commitments made binding by an antitrust authority [187].

Of course, the above does not mean that there are no longer open questions regarding the private enforcement of commitment decisions issued pursuant to Article 9 of Council Regulation (EC) 1/2003 and 12 of the ECN+ Directive, and indeed there are still many controversial aspects capable of creating relevant doubts and practical problems [188]. A particularly interesting profile, however, could occur at the "border" of competition law. Reference is made to the question as to whether commitment decisions issued by the Commission under Article 25 of the DMA may also be subject to judicial application at the national level. This issue is of course part of the broader – and much heated – debate about whether private enforcement of the whole DMA, including the substantive obligations imposed on gatekeepers, is per se admissible and in which terms [189].

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[184] Case C-441/07 P, *Alrosa*, cit.

[185] Case T-342/11, *CEEES*, cit.

[186] Case C-547/16, *Gasorba*, cit.

[187] Case C-132/19 P, *Groupe Canal+*, cit.

[188] For example, the General Court has recently held that national courts may grant an application for annulment of an arbitration award if the award is contrary to a commitment decision adopted under Article 9 of Council Regulation (EC) 1/2003, cit. (see General Court, case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo* [2022] ECLI:EU:T:2022:43 para 292).

[189] The issue has only partially been solved by Article 39 of the DMA. See F. CROCI, *Judicial Application of the Digital Markets Act: The Role of National Courts*, in this *Book*, p. 233.

If such a question will arise, it will initially do so before national courts, e.g., at the initiative of a third party who may desire to secure compliance by a gatekeeper with the commitments the latter negotiated with the Commission, and then, sooner or later, it will likely reach the Court of Justice through the preliminary ruling procedure. In this context, it is not easy to predict whether the principles established by the Court of Justice and national courts with respect to the private enforcement of "ordinary" commitment decisions can and will be extended to the private enforcement before national courts of the DMA's commitment decisions.

The first impression, however, seems to point in that direction, at least in the sense that the possibility for national courts to protect the rights of third parties with respect to such delegated acts could very hardly be ruled out, unless the latter are drafted by the parties (the Commission and the gatekeeper) in such a way that they cannot meet the requirements for direct effect, a circumstance that appears, however, difficult to be achieved. If this is not the case, the judicial application of – the DMA, including – the DMA's commitment decisions will increase the effectiveness of this regulatory instrument and it is likely that the Court of Justice and the national courts will not fail to consider the fundamental role of third partes to foster its *effet utile*.

Judicial Application of the Digital Markets Act: The Role of National Courts

Filippo Croci [*]

1. Introduction

The adoption of the Digital Markets Act ("DMA") – i.e. Regulation (EU) 2022/1925 [1] – is generally considered an important step forward, as

[*] Assistant Professor (*Ricercatore TD-B*) of EU Law at the University of Milan, Italy.

[1] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). Among the numerous scholarly works on the DMA in general, see, for instance, P. IBÁÑEZ COLOMO, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, in *Journal of European Competition Law & Practice*, 2021, Vol. 12, Iss. 7, p. 561; P. MANZINI, *Il Digital Market Act decodificato*, in P. MANZINI, M. VELLANO (eds.), *Unione europea 2020. I dodici mesi che hanno segnato l'integrazione europea*, Wolters Kluwer-CEDAM, Padova, 2021, p. 317; G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, in *European Competition and Regulatory Law Review*, 2021, Vol. 5, Iss. 2, p 90; P. AKMAN, *Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*, in *European Law Review*, 2022, Vol. 47, Iss. 1, p. 85; A.C. WITT, *The Digital Markets Act – Regu-*

well as a paradigm shift, in the EU's approach towards large digital platforms [2]. At the same time, the innovative and complex nature of the DMA raises several questions, many of which are hotly debated and, at least in part, still unanswered.

Some of these questions revolve around the enforcement of the DMA. As a new regulatory tool in the complex normative landscape of the EU, the DMA poses both old and new problems in terms of application [3].

As a preliminary observation, it bears noting that the DMA, as clarified by its Article 1(1), aims at contributing «to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users» [4]. That provision reveals that, from a subjective standpoint, the DMA chiefly concerns «gatekeepers», on the one hand, and, on the other, «business users» and «end users».

Under the DMA, the notion of gatekeepers refers to the undertakings subject to DMA obligations and prohibitions, that is the digital platforms designated by the European Commission (the "Commission"), pursuant to Article 3 of the DMA, on the basis of a set of requirements laid down by the same provision.

It is also clear that the DMA confers extensive powers on the Commission to achieve the objectives mentioned above, making it the key player in the *public enforcement* of the Regulation. In this framework,

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lating the Wild West, in *Common Market Law Review*, 2023, Vol. 60, Iss. 3, p. 625; R. PODSZUN (ed.), *The Digital Markets Act. Article-by-Article Commentary*, Nomos–Hart–Beck, Baden-Baden, 2024.

[2] See F. MUNARI, *Competition on Digital Markets: An Introduction*, in this *Book*, p. 7; C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139. As summarised by A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, in N. CHARBIT, S. GACHOT (eds.), *Eleanor M. Fox. Antitrust Ambassador to the World.* Liber Amicorum, Concurrences, Paris, 2021, p. 425, the change of focus brought by the DMA concerns, at least, the following aspects: «(i) from *ex post* to *ex ante* intervention, (ii) from an effects-based analysis to a list of *per se* prohibitions and (iii) from flexible prohibitions based on general clauses to a *numerus clausus* of specific but inflexible prohibitions».

[3] See, e.g., R. PODSZUN, *Private enforcement and the Digital Markets Act*, in *Verfassungsblog*, 1 September 2021, available at www.verfassungsblog.de; B. BEEMS, *The DMA in the Broader Regulatory Landscape of the EU: an Institutional Perspective*, in *European Competition Journal*, 2023, Vol. 19, Iss. 1, p. 1.

[4] Article 1(1) of the DMA.

business users and end users are presumed to benefit, at least indirectly, from the Commission's application of the DMA [5]. The Regulation also provides for the same categories of subjects to have some (minor) forms of procedural involvement, including possible consultations in the context of market investigations conducted by the Commission [6], as well as the faculty to inform the Member States' National Competition Authorities ("NCAs") [7], or the Commission directly, about any practice or behaviour by gatekeepers allegedly falling within the scope of the DMA [8].

By contrast, the DMA devotes limited attention to the role of national courts, which are essential for the *private enforcement* of EU law. Indeed, it is before such courts that business users and end users (and, more generally, any individual, including the gatekeepers' competitors) may bring lawsuits against the gatekeepers to enforce their rights under the DMA. The absence of clear indications in this regard raises many questions about the enforcement of the DMA before national courts [9].

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[5] In this perspective, see, for instance, O. ANDRIYCHUK, *Do DMA Obligations for Gatekeepers Create Entitlements for Business Users?*, in *Journal of Antitrust Enforcement*, 2023, Vol. 11, Iss. 1, p. 123.

[6] Article 19(2) of the DMA.

[7] Article 27(1) of the DMA actually refers to the «national competent authority of the Member State, enforcing the rules referred to in Article 1(6)» of the DMA, which in turns refers to Articles 101 and 102 TFEU.

[8] See Article 27(1) of the DMA, which, in reality, grants the faculty at issue to an extremely wide category of subjects: «Any third party, including business users, competitors or end-users of the core platform services listed in the designation decision pursuant to Article 3(9) [of the DMA], as well as their representatives».

[9] See, *ex multis*, A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, cit.; ID., *The DMA and private enforcement – Yes but with moderation!*, in *Chillin' Competition*, 2 September 2021, available at https://chillingcompetition.com; G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 96 ff.; R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, in *Competition Forum*, 2022, No 0042, available at www.competition-forum.com/; R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, in *Journal of European Competition Law and Practice*, 2022, Vol. 13, Iss. 4, p. 254; C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, in *Quaderni AISDUE*, 2022, Vol. I, Iss. 1, p. 49; O. ANDRIYCHUK, *Do DMA obligations for gatekeepers create entitlements for*

The purpose of the present chapter is tackling these questions and reflecting on the role of national courts in applying the provisions of the DMA [10]. After offering some brief considerations on the first draft of the DMA proposal (paragraph 2), it will look at the relevance of national courts according to the provisions of the final version of the DMA (paragraph 3), with particular attention to the relationship between national courts and the Commission (paragraph 3.1), the applicability of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (paragraph 3.2) [11], and the absence of specific indications about important operative aspects of private enforcement within the broader context of the DMA (paragraph 3.3). Against this backdrop, it will then provide an analysis of the possible features of and prospects for the private enforcement of the DMA (paragraph 4), before concluding with a few final remarks (paragraph 5).

It is important to note that, at the time of this writing, the DMA has already entered into force (as of 1 November 2022) and become applicable (2 May 2023) [12]. Moreover, the Commission has already designated six gatekeepers pursuant to Article 3 of the DMA – namely Alphabet [13], Amazon [14],

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business users?, cit.; A.P. KOMNINOS, *DMA Specification Decisions – An Interesting Feature of Public Enforcement and Its Interaction with Private Enforcement*, in *EU Law Live*, 13 November 2023, available at www.eulawlive.com; A.C. WITT, *The Digital Markets Act – Regulating the Wild West*, cit., p. 658.

[10] For further reflections on private enforcement of the DMA, with particular regard to commitment decisions envisaged in Article 25 of the DMA, see L. CALZOLARI, *The Judicial Application of Commitment Decisions: from* Gasorba *to the Digital Markets Act*, in this *Book*, p. 193.

[11] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[12] See Article 54 of the DMA.

[13] Cf. Commission Decision of 5 September 2023 in cases DMA.100011 – *Alphabet – OIS Verticals*; DMA.100002 – *Alphabet – OIS App Stores*; DMA. 100004 – *Alphabet – Online search engines*; DMA.100005 – *Alphabet – Video sharing*; DMA.100006 – *Alphabet – Number-independent interpersonal communications services*; DMA.100009 – *Alphabet – Operating systems*; DMA.100008 – *Alphabet – Web browsers*; and DMA.100010 – *Alphabet – Online advertising services*.

[14] Cf. Commission Decision of 5 September 2023 in cases DMA.100018 – *Amazon - online intermediation services – marketplaces*; DMA.100016 – *Amazon - online advertising services*.

Apple [15], ByteDance [16], Meta [17] and Microsoft [18] – as of 6 September 2023. However, the deadline of six months starting from the latter date, by which the gatekeepers are to ensure full compliance with the DMA provisions, has not yet expired. The obligations and prohibitions set out by the DMA, therefore, are not yet fully operational. That is also the reason why – in the lack of any enforcement of the obligations and prohibitions at issue by the Commission, let alone by national courts – the reflections developed in the present chapter are necessarily prospective in nature.

2. The "silence" on the role of national courts in the first draft of the DMA proposal

Before considering the DMA in its present form, it is useful to recall that the first version of the DMA proposal, issued by the Commission on 15 December 2020, did not mention national courts at all [19].

As we will see [20], this gap was partially filled by the EU co-legislators, i.e. the European Parliament and the Council (given that the legal basis of the DMA is Article 114 TFEU and that, consequently, the Regulation was adopted through the ordinary legislative procedure laid down in Article 294 TFEU). Nevertheless, the original "silence" of the DMA pro-

[15] Cf. Commission Decision of 5 September 2023 in cases DMA.100013 – *Apple – online intermediation services – app stores*; DMA.100025 – *Apple - operating systems*; and DMA.100027 – *Apple – web browsers*.

[16] Cf. Commission Decision of 5 September 2023 in case DMA.100040 – *ByteDance - Online social networking services*.

[17] Cf. Commission Decision of 5 September 2023 in cases DMA.100020 – *Meta - online social networking services*; DMA.100024 – *Meta - number-independent interpersonal communications services*; DMA.100035 – *Meta - online advertising services*; DMA.100044 – *Meta - online intermediation services – marketplace*.

[18] Cf. Commission Decision of 5 September 2023 in cases DMA.100017 – *Microsoft - online social networking services*; DMA.100023 – *Microsoft - number-independent interpersonal communications services*; DMA.100026 – *Microsoft - operating systems*.

[19] Commission Proposal of 15 December 2020 for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

[20] *Infra*, para 3.

posal on the role of national courts could be read as a clear indication of the Commission's general approach towards a paradigm of (at least primarily) public enforcement of the DMA. In other words, the absence of any reference to national courts was indicative of the fact that the Commission intended the DMA to be applied, first and foremost, by the Commission itself[21].

At the same time, the Commission's silence clearly did not entail, *per se*, the exclusion of national courts from the enforcement of the DMA. Indeed, the Commission's choice to present the proposal in the form of a Regulation opened its provisions having direct effect up to be invoked by private parties before national courts. This holds true whether its provisions are invoked against a public or private entity – i.e. it applies also in horizontal disputes – in accordance with the established case-law of the Court of Justice[22].

Needless to say, direct effect (in this case of Articles 101 and 102 TFEU) is also the fundamental basis underpinning the private enforcement of EU competition law[23], which often serves as a reference point for judicial application of the DMA. Indeed, even though the DMA states that its overall objective is «complementary to, but different from that of protecting undistorted competition»[24], the practical experience over time in the field of competition law is an important point of refer-

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[21] For a critical analysis on this point, from the perspective of private enforcement, see, for instance, R. PODSZUN, *Private enforcement and the Digital Markets Act*, cit. The approach of the Commission entailed consequences also on public enforcement of the DMA: indeed, the NCAs were largely excluded from the enforcement of the DMA, notwithstanding the relations between the DMA and competition law, as well as the positive experience of the European Competition Network. In this regard, see the Joint paper of the heads of the national competition authorities of the European Union, *How national competition agencies can strengthen the DMA*, 22 June 2021, available at www.bundeskartellamt.de/.

[22] See, *ex multis*, Court of Justice, case 43/71, *Politi v Ministero delle Finanze* [1971] ECLI:EU:C:1971:122, para 9; Court of Justice, case 93/71, *Leonesio v Minstero dell'Agricoltura e Foreste* [1972] ECLI:EU:C:1972:39, paras 18 and 23; Court of Justice, case C-253/00, *Muñoz and Superior Fruiticola* [2002] ECLI:EU:C:2002:497, paras 27-32.

[23] Among the numerous judgments, see, for instance, Court of Justice, case 127/73, *BRT v SABAM* [1974] ECLI:EU:C:1974:6, para 16; Court of Justice, case C-453/99, *Courage and Crehan* [2001] ECLI:EU:C:2001:465, para 26; Court of Justice, joined cases C-295/04 to C-298/04, *Manfredi* [2006] ECLI:EU:C:2006:461, paras 39 and 59-61.

[24] Recital 11 of the DMA.

ence when it comes to several aspects of private enforcement [25].

The Commission itself confirmed that actions may be brought before national courts on the basis of DMA provisions having direct effect, albeit in the informal context of a "Questions & Answers" webpage and in a quite simplistic way. On that webpage (which has since been updated but remains unchanged for present purposes) the Commission made clear that the (then proposed) DMA envisaged «precise obligations and prohibitions for the gatekeepers», and was, therefore, suitable to be «enforced directly in national courts» [26]. This, in the words of the Commission, would «facilitate direct actions for damages by those harmed by the conduct of non-complying gatekeepers» [27]. Therefore, the applicable "Q&A" answer referred and continues to refer only to actions for damages, without elaborating further, even though the private enforcement of EU law is generally considered to include actions for injunctions and interim relief, as well as, in some cases, actions for nullity [28].

In light of this background, it was necessary – or at least advisable – to supplement the draft DMA with greater clarity regarding private enforcement before national courts. In this respect, various lines of action were suggested by commentators and institutional actors.

One suggestion was that the introduction of mechanisms for cooperation between national courts and the Commission and, more generally, specific provisions on the relationship between proceedings before, and

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[25] It is worth noting that the debate on the relationship between the DMA and EU competition law is particularly lively and wide; due to the limits of the present paper, it cannot be analysed here: for some considerations on the matter, see, *ex multis*, G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 98 ff.; A.C. WITT, *The Digital Markets Act – Regulating the Wild West*, cit., p. 649 ff.; EDITORIAL COMMENTS, *Missing in action? Competition law as part of the internal market*, in *Common Market Law Review*, 2023, Vol. 60, Iss. 6, p. 1503, p. 1506.

[26] See Commission, *Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets* – Updated on 6 September 2023, available at www.ec.europa.eu/.

[27] *Ibidem*.

[28] In general terms, see, e.g., F.G. WILMAN, *The end of the absence? the growing body of EU legislation on private enforcement and the main remedies it provides for*, in *Common Market Law Review*, 2016, Vol. 53, Iss. 4, p. 887, who mentions also possible contractual remedies. For a more specific focus on the remedies available in the framework of private enforcement of competition law (and the DMA), see, *inter alia*, R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, cit., p. 254.

decisions of, the Commission and national courts, could clarify some practical aspects of the judicial application of the DMA. Competition law, and more specifically Council Regulation (EC) 1/2003 [29] on the application of the current Articles 101 and 102 TFEU, was put forward as a potentially useful model [30].

A second recommendation was to include the DMA among the EU acts that can be enforced before national courts through representative actions started by consumers, pursuant to Directive (EU) 2020/1828 [31]. This would allow consumers (and hence end users) to take advantage of the procedural rules laid down in that Directive [32].

A third suggestion made pending the legislative procedure of the DMA was to introduce dispute resolution mechanisms like the ones envisaged by Regulation (EU) 2019/1150 [33], the so-called Platform-to-Business Regulation (the "P2B Regulation") [34]. The P2B Regulation applies horizontally to several digital platforms and pursues objectives that are, at least in part, similar to those of the DMA, aiming to secure fair relations between platforms and businesses [35]. The provisions of the P2B

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[29] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[30] In this vein, see, for instance, the Amendment 53 of the *Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)), available at www.europarl.europa.eu/. Among the legal scholars who suggested such an integration of the DMA proposal, see R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, cit., p. 266; A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, cit., p. 442.

[31] Directive (EU) 2020/1828, cit.

[32] See, for instance, Bureau européen des unions des consommateurs, *Digital Markets Act Proposal. Position Paper*, 1 April 2021, p. 3 and p. 17, available at www.beuc.eu.

[33] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

[34] See, in particular, A. DE STREEL, R. FEASEY, J. KRÄMER, G. MONTI, *Making the Digital Markets Act more resilient and effective*, CERRE Recommendations Paper, May 2021, pp. 77-78, available at www.cerre.eu; G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 96.

[35] G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 96.

Regulation that could serve as a model for the DMA include: those requiring online intermediation service providers to set up an internal system for handling complaints [36], a system expected to solve a significant proportion of complaints [37]; those on establishing a mediation procedure to deal with cases that are not solved through said internal system [38]; those encouraging providers of online intermediation services to draw up codes of conduct [39]; and so on.

A similar, but more innovative proposal was also put forward: to establish an independent "platform complaints panel" composed of independent adjudicators (not necessarily judges, according to the authors of the proposal, but rather experts in digital markets), potentially with the involvement of Commission's officials [40]. This panel would have power to make quick decisions on claims brought by private parties in relation to the obligations and prohibitions set out by the DMA [41]. This last proposal, however, would have added yet another DMA enforcement body to the field, with the risk of increasing confusion and inconsistencies, while calling into question the fundamental role of national courts.

A fourth, more general expectation was to see new provisions explicitly allowing for private enforcement of the DMA [42], and perhaps even defining its scope of application and laying down specific procedural and substantive rules for actions brought before national courts. These could

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[36] See Article 11 of the P2B Regulation.

[37] See Recital 37 of the P2B Regulation.

[38] See Articles 12 and 13 of the P2B Regulation.

[39] See Article 17 of the P2B Regulation.

[40] See P. MARSDEN, R. PODSZUN, *Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement*, Konrad-Adenauer-Stiftung, Berlin, 2020, pp. 83-85; R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, cit., p. 266.

[41] R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, cit., p. 266.

[42] See, for instance, the non-paper issued in 2021 by the so-called "Friends of an effective Digital Markets Act" (that includes the Ministries of Economic Affairs of France, Germany and the Netherlands), *Strengthening the Digital Markets Act and Its Enforcement*, available at www.bmwk.de/, which includes the following statement: «Private enforcement would further increase the effectiveness of the DMA. Therefore, it must be clarified that private enforcement of the gatekeeper obligations is legally possible». See also R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, cit., p. 265.

be potentially similar to the ones set out in Directive 2014/104/EU [43] in the field of competition law [44]. Of course, such more ambitious addition would have entailed major changes to the Commission's proposal and a thorough reflection on the overall consistency of the DMA and the appropriateness of adopting such rules through a Regulation [45]. In any event, the clarity – and most probably the effectiveness – of DMA enforcement as a whole would have likely increased significantly for business users and end users.

As the following paragraphs will describe, only the first two suggested amendments of the draft DMA were implemented in its final version. As a result, several uncertainties remain as to the features of private enforcement of the DMA.

3. The role of national courts according to the final version of the DMA

3.1. The mechanisms for cooperation between national courts and the Commission

Aside from some references of a general nature in its recitals [46], the only provision of the DMA specifically devoted to the role of national courts is Article 39 [47]. Following the first suggestion described above (paragraph 2), the provision was formulated on the basis of the relevant

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

[44] See, among others, R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act*, cit., p. 266, according to whom «[i]deally, the rules of the Damages Directive could be made applicable to the DMA». See also C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, cit., p. 60.

[45] Even though, in the latter regard, the idea of proposing a separate Directive on the matter could also have been explored.

[46] See, in particular, Recitals 42 and 92 of the DMA.

[47] On this point, see, *inter alia*, R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, cit., p. 1.

provisions of Council Regulation (EC) 1/2003 on the implementation of current Articles 101 and 102 TFEU.

The contents of Article 39 of the DMA can be divided into two parts.

The first part of the provision – Article 39(1), (2), (3) and (4) of the DMA – is modelled on Article 15 of Council Regulation (EC) 1/2003 and has the same heading («Cooperation with national courts»).

Pursuant to Article 39(1) of the DMA, national courts are entitled to ask the Commission to transmit to them *information* in its possession or its *opinion* on questions concerning the application of the DMA. These are useful tools to ensure an effective and consistent implementation of the DMA and, therefore, should be welcomed.

Article 39(2) of the DMA requires Member States to forward to the Commission a copy of any written judgment of national courts deciding on the application of the DMA itself. While the rationale of the provision is clear, it nonetheless raises justifiable doubts about its effectiveness. This is because the corresponding provision of Council Regulation (EC) 1/2003 (i.e. Article 15(2) thereof) has been largely ignored by the Member States (and national courts). Indeed, the Commission's database of judgments forwarded by Member States in the almost twenty years of application of Council Regulation (EC) 1/2003 [48], contains only two judgments of Italian courts [49], four judgments of French courts, and seven judgments of German courts – discouraging numbers to say the least. Considering the data, improvements to the provision may have been in order, rather than the mere reproduction of its text in Article 39(2) of the DMA.

Article 39(3) and (4) of the DMA confirm that the Commission may take part in proceedings before national courts in the form of *amicus curiae*, submitting written or oral observations. It may ask national courts for copies of any documents necessary for the assessment of the case.

The second part of Article 39 of the DMA is substantially identical to Article 16(1) of Council Regulation (EC) 1/2003. Pursuant to Article 39(5) of the DMA, first, national courts are prevented from giving a decision which runs counter to a decision adopted – or even only contemplat-

[48] The database is available at www.ec.europa.eu.

[49] The Italian judgments on the private enforcement of EU and national competition law are available on the database ITA.CA (Italian Case-Law on Private Antitrust Enforcement): https://itaca.europeanlitigation.eu/en/.

ed – by the Commission under the DMA. Second, the same provision specifies that, to that effect, a national court may assess whether or not it is necessary to stay the proceedings. Finally, Article 39(5) of the DMA clarifies that this «is without prejudice to the possibility for national courts to request a preliminary ruling under Article 267 TFEU», or – one might add – the obligation to do so, in cases falling within the scope of application of Article 267(3) TFEU concerning national courts or tribunals of last instance [50].

Once again, therefore, the relevant provision of Council Regulation (EC) 1/2003 was reproduced in the DMA, with no particular innovation. However, it should be borne in mind that the provision at issue "codified" the case law of the Court of Justice concerning the application of Articles 101 and 102 TFEU before national courts [51]. The need for uniformity underlying that line of case law (and thus Article 16(1) of Council Regulation (EC) 1/2003) is fully consistent with the general objectives – and "centralised" public enforcement – of the DMA.

In short, despite the fact that the EU co-legislators did not capitalise on the opportunity to update and improve the relevant provisions of Council Regulation (EC) 1/2003, overall the introduction of Article 39 of the DMA can be assessed positively. This is all the more true given the earlier silence of the Commission on the position of national courts in the enforcement of the DMA.

Nevertheless, it is important to point out that Article 39 of the DMA itself does not say much about the actual scope and purposes of the judicial application of the DMA. Indeed, the provision assumes, so to speak, that the DMA can be enforced before national courts, without specifying the extent of such enforcement or which procedural rules should apply [52].

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[50] On this issue see for example Court of Justice, case 283/81, *CILFIT v Ministero della Sanità* [1982] ECLI:EU:C:1982:335; Court of Justice, case C-495/03, *Intermodal Transports* [2005] ECLI:EU:C:2005:552; Court of Justice, case C-160/14, *Ferreira da Silva e Brito e a.* [2015] ECLI:EU:C:2015:565; Court of Justice, joined cases C-72/14 and C-197/14, *X and van Dijk* [2015] ECLI:EU:C:2015:564; Court of Justice, case C-561/19, *Consorzio Italian Management e Catania Multiservizi* [2021] ECLI:EU:C:2021:799.

[51] Court of Justice, case C-234/89, *Delimitis v Henninger Bräu* [1991] ECLI:EU:C:1991:91; Court of Justice, case C-344/98, *Masterfoods and HB* [2000] ECLI:EU:C:2000:689.

[52] In the same perspective, see, among others, A.C. WITT, *The Digital Markets Act – Regulating the Wild West*, cit., p. 658.

3.2. The applicability of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers

Another provision that assumes the DMA will be enforced before national courts is Article 42 of the DMA («Representative actions»), which makes Directive (EU) 2020/1828 [53] applicable to the representative actions brought against infringements by gatekeepers of DMA provisions that harm or may harm the collective interests of consumers.

This extension of the scope of application of Directive (EU) 2020/1828, which is to be reflected in the transposition measures adopted by the Member States to implement it at the national level, is aimed at facilitating the actions brought by consumers, on a collective basis, against gatekeepers alleged to have breached one or more obligations and/or prohibitions laid down by the DMA.

While the formulation of Article 42 of the DMA is very concise, it bears noting that Recital 104 of the Regulation (to be read in conjunction with Article 42 of the DMA) explicitly acknowledges the entitlement of consumers «to enforce their rights in relation to the obligations imposed on gatekeepers under [the DMA]», notably through representative actions in accordance with the abovementioned Directive (EU) 2020/1828. The obligations set out by the DMA are, thus, linked to corresponding rights that can be enforced by consumers before national courts against the gatekeepers designated under the DMA. As noted above, this is the essence of EU law provisions having (horizontal) direct effect and, therefore, this conclusion may seem rather obvious. However, the DMA's general reference to the rights of consumers, as well as the availability of representative actions, can be read as a way of encouraging, at least with specific reference to such actions, the private enforcement of the DMA.

Of course, it remains to be seen if the complex nature of representative actions for the protection of the collective interests of consumers will reduce the effectiveness of this way of enforcing the DMA, but the fact remains that this seems a positive aspect of the Regulation as regards its judicial application.

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[53] Directive (EU) 2020/1828, cit.

3.3. The lack of specific indications about several aspects of private enforcement of the DMA before national courts

Having examined the few provisions of the DMA that relate to national courts and/or assume its private enforceability, let us now consider what the DMA does *not* say in that regard.

First, as noted above [54], no specific provisions are laid down in the final version of the DMA with regard to the availability of private enforcement of the DMA as such or, more specifically, the role of national courts in applying the Regulation, apart from the general rules set out in Article 39 of the DMA.

This marks a difference both from the Digital Services Act ("DSA") [55] and Council Regulation (EC) 1/2003. Indeed, Article 54 of the DSA, entitled «Compensation», expressly recognises a «right» (in that case, for «recipients» of digital services) to seek, in accordance with EU and national law, «compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations». This difference between the DMA and the DSA is somewhat surprising, given that the DSA proposal [56] was presented by the Commission on the same day as the DMA proposal [57] (even though, in reality, the DSA proposal did not include any provision such as the one laid down in the abovementioned Article 54 of the DSA) and the legislative procedures of the two acts went ahead substantially in parallel with each other.

At the same time, the fact that Articles 39 and 42 of the DMA assume the private enforceability of the DMA, as mentioned above [58], makes the difference more apparent than real, and the clarification made by the Commission in the "Questions & Answers" on the DMA mentioned above

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[54] See *supra*, para 2.

[55] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[56] Commission Proposal of 15 December 2020 for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final.

[57] *Ibidem*.

[58] See *supra*, respectively, para 3.1 and para 3.2.

serves to confirm this [59]. Moreover, Article 54 of the DSA considers only actions for damages, omitting any reference to actions for injunctions and interim relief, for instance (just like the said Q&As on the DMA), and, therefore, acknowledging the potential role of national courts only in part.

On the other hand, a more significant divergence can be detected between the DMA and Council Regulation (EC) 1/2003, which, in addition to containing the provisions that served as a model for Article 39 of the DMA [60], explicitly acknowledges that national courts «have an essential part to play in applying the [EU] competition rules» [61] and that, in the context of disputes between private parties, «they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringements» [62]. Moreover, Council Regulation (EC) 1/2003 devotes a specific provision (Article 6) to the power of national courts to apply, in that case, current Articles 101 and 102 TFEU. It is worth noting, however, that the emphasis of Council Regulation (EC) 1/2003 on the role of national courts should be read in the light of the innovative decentralisation of the application of competition rules, notably of the current Article 101(3) TFEU, which the Regulation at issue aimed to realise.

In any event, a similar explicit empowerment of national courts to apply the provisions of the DMA, although not strictly necessary [63], would have been significant at least symbolically, i.e. in order to increase the "visibility" of the enforceability of the rights arising from the DMA before national courts.

Second, none of the mechanisms laid down in the P2B Regulation [64] was included in the final version of the DMA. This means that the enforcement of the DMA will develop along the lines of the 'classic' distinction between public enforcement – left chiefly to the Commission, with

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[59] See *supra*, para 2.

[60] Namely, Articles 15 and 16(1) of Council Regulation (EC) 1/2003, cit.: see *supra*, para 3.1.

[61] Recital 7 of Council Regulation (EC) 1/2003, cit.

[62] *Ibidem*.

[63] As already mentioned (see *supra*, paras 2 and 3.2), the only condition to invoke a right conferred by one or more provisions of an EU regulation before national courts (also in horizontal disputes, involving private parties) is the direct effect of such provision(s). On this point, see also *infra*, para 4.

[64] Regulation (EU) 2019/1150, cit. See *supra* para 2.

a very limited role for the NCAs – and private enforcement, taking the exclusive form of actions to be brought before national courts.

Finally, and perhaps most importantly, the DMA – as already mentioned – does not contain any rules on important procedural and substantial aspects of private enforcement before national courts, such as the ones laid down in Directive 2014/104/EU. The consequences of that choice, as well as the main characteristics of the judicial application of the DMA, will be addressed in the following section.

4. Possible features and prospects of the private enforcement of the DMA

Notwithstanding the gaps left by the DMA concerning the role of national courts, it seems that private enforcement of the DMA will very soon become a reality [65]. Indeed, although the Regulation undoubtedly focuses primarily on public enforcement, the (admittedly, minority) opinion that the rationale of the DMA would essentially exclude *tout court* the creation of subjective rights that can be enforced before national courts is unconvincing [66].

In operational terms, one central issue concerns the identification of the provisions of the DMA which have direct effect and, therefore, can be invoked by private parties (including business users and end users, as well as gatekeepers' competitors) before national courts.

The main provisions imposing obligations and prohibitions of a substantive nature are Articles 5, 6, and 7 of the DMA [67]. The applicability of these provisions presupposes the designation of gatekeepers pursuant to Article 3 of the DMA, which confers the Commission exclusive competence to make such designations. Therefore, national courts will not

[65] In this perspective, see, for instance, A.P. KOMNINOS, *The DMA and private enforcement – Yes but with moderation!*, cit.; R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, cit., p. 2 ff.

[66] Such a position is advocated, in particular, by O. ANDRIYCHUK, *Do DMA obligations for gatekeepers create entitlements for business users?*, cit., p. 123, who states that his view «is unlikely to gain many supporters».

[67] On the various obligations and prohibitions laid down in the DMA, see, in particular, C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139.

be able to designate gatekeepers autonomously and, by the same token, they will be entitled to rule only on claims brought against gatekeepers under Article 3 of the DMA, following their designation by the Commission [68].

That being said, the obligations and prohibitions set out in Articles 5, 6 and 7 of the DMA are commonly divided into two categories, i.e., to quote the explanatory memorandum of the DMA proposal [69], «self-executing obligations» (Article 5 of the DMA) and «obligations that are susceptible to specification» (Articles 6 and 7 of the DMA). While the former are intended to be applied as such, the latter may be subject to a «specification process» pursuant to Article 8 of the DMA – i.e. a sort of dialogue between the Commission and gatekeepers – concerning the effective compliance measures that gatekeepers shall implement [70].

Considering Article 5 of the DMA, the clear, precise and unconditional character of that provision confirms the self-executing nature of the obligations and prohibitions listed therein. As a consequence, claimants will surely be entitled to bring actions based on alleged breaches of Article 5 of the DMA before national courts.

With reference to Articles 6 and 7 of the DMA, a close look at Article 8 of the DMA reveals that the (possible but not necessary) specification process it establishes concerns not the *content* of said provisions, but rather the *compliance measures* to be implemented. Therefore, the obligations and prohibitions laid down in Articles 6 and 7 of the DMA are also clear, precise and unconditional, making them likewise eligible to serve as a basis for private claims before national courts [71]. Of course, this does

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[68] A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, cit., p. 429; C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, cit., p. 54.

[69] COM(2020) 825 final, cit., p. 81.

[70] For further reflections on the procedure at issue, see A.P. KOMNINOS, *DMA specification decisions – an interesting feature of public enforcement and its interaction with private enforcement*, cit.

[71] In this vein, see A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, cit., p. 429; C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, cit., p. 54. For a different position, see R. PODSZUN, *Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Par-*

not mean that the specification process bears no relevance at all to private enforcement: to the contrary, it is necessary to make a distinction according to whether or not the Commission has issued a specification decision [72], or there is a pending specification procedure, pursuant to Article 8(2) of the DMA. One helpful categorisation identifies four different scenarios in this regard [73]: (*i*) if an individual decision (or, better, «implementing act») under Article 8(2) of the DMA has already been adopted by the Commission, the national court will be bound by such decision, as confirmed by Article 39(5) of the DMA [74]; (*ii*) if a specification process and a national lawsuit are simultaneously pending before the Commission and a national court, the latter could stay the proceedings until the Commission takes its decision pursuant to Article 8(2) of the DMA (this solution is explicitly foreseen in Article 39(5) of the DMA as well); (*iii*) if the Commission did not take any decision and no specification process is pending, the national court basically retains full discretion; (*iv*) if a national court rendered a final judgment and then a specification process starts before the Commission, the latter is not bound by the national decision: in the event of a subsequent contrasting decision at the EU level, the conflict may be resolved before higher national courts, on appeal or cassation, if possible [75].

Another important question on the private enforcement of the DMA relates to the type of remedies that may be available before national courts.

Actions for damages naturally come to mind – and this is also the approach of the Commission's Q&As on the DMA mentioned above – even though the private enforcement of EU law may also take the form of ac-

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ties in the Digital Markets Act, cit., p. 264, who deems that the direct effect of Article 6 (and 7) of the DMA is «an open question».

[72] More precisely, Article 8(2) of the DMA states that the Commission may adopt an «implementing act» to specify the compliance measures needed for respecting the obligations laid down in Articles 6 and 7 of the DMA.

[73] Reference is made to the thorough analysis carried out by A.P. KOMNINOS, *DMA specification decisions – an interesting feature of public enforcement and its interaction with private enforcement*, cit.

[74] See *supra*, para 3.1.

[75] Besides A.P. KOMNINOS, *DMA Specification Decisions – an Interesting Feature of Public Enforcement and Its Interaction with Private Enforcement*, cit., see also ID., *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, 2008, pp. 124-136.

tions for injunctions and interim relief[76] as well as, in some cases, actions for nullity[77].

In reality, considering the peculiarities of the DMA, as well as the extremely rapid evolution of digital platforms, interim measures ordered by national courts may be the most efficient tool for the application of the Regulation on the private enforcement side[78], in addition to the activity of the Commission as public enforcer[79]. This will call for particular care on the part of national courts, especially when dealing with interim requests, considering the complexity of digital markets and the highly technical nature of the conduct to be assessed under the DMA. Member States would do well to confer the power to deal with lawsuits based on the DMA, as far as possible, to specialised courts[80]. That being said, the importance of interim measures in a context like digital markets should not be underestimated.

In light of the above, it is positive that the EU co-legislators did not take up the suggestion, put forward during the legislative procedure of

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[76] See, also for references, *supra*, para 2.

[77] See, for instance, H. ULLRICH, *Private Enforcement of the EU Rules on Competition – Nullity Neglected*, in *IIC - International Review of Intellectual Property and Competition Law*, 2021, Vol. 52, Iss. 5, p. 606.

[78] R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, cit., p. 5.

[79] It should be noted that, from the perspective of public enforcement, Article 24 of the DMA entrusts the Commission with the power to adopt interim measures. However, at least in theory, it may be easier for private parties to request this kind of measures to national courts and/or national courts may be quicker than the Commission in taking a decision on such kind of measures.

[80] In Italy, the national legislator has not (yet?) provided any indications on the issue of the identification of the national courts which are competent for the private enforcement of the DMA. Therefore, it will not be possible to apply the rules on judicial competence concerning the private enforcement of competition law (Articles 101 and 102 TFEU, as well as Articles 2 and 3 of Law No 287/90, the national antitrust law) to actions brought before national courts on the basis of the DMA. More specifically, the current national rules on judicial competence for the private enforcement of competition law, amended through Legislative Decree No 3/2017 transposing Directive 2014/104/EU, cit., into the Italian legal order, concentrate the relevant competence on three courts only: namely, the Chambers specialised in business matters of the Courts (and Courts of Appeal) of Milan, Rome, and Naples. Notwithstanding the proposal – put forward, for instance, by the *Associazione Italiana Giuristi Europei* (AIGE) – to extend the applicability of these rules to the private enforcement of the DMA, Article 18 of Law No 214/2023 (Annual Law on Market and Competition 2022), laying down measures for the "implementation" of the DMA, does not mention the issue of judicial competence at all.

the DMA, to limit private enforcement of the DMA to follow-on actions, while excluding stand-alone actions (potentially, only for some years) [81]. As is well known, the expression follow-on actions designates the actions that are based on a previous decision of the Commission (and, in case of competition law, also of the NCAs) ascertaining a breach of the relevant provisions. By contrast, stand-alone actions are lawsuits brought independently of any decision by the Commission.

The main reason for the abovementioned proposed limitation (or, in the alternative, for introducing a "rule of precedence" favouring the public enforcement of the DMA [82]) is purportedly the need to reduce the risk of fragmentation among the different national systems (and national courts), especially on basic aspects of the DMA, which would be better interpreted and applied by national judges *following* a Commission's decision [83].

However, apart from the fact that such a limitation would have required an *ad hoc* provision in the DMA, which was not introduced, several arguments can be raised against the proposal at issue [84]. First, excluding stand-alone actions would have prevented private parties, notably, from being able to request interim measures before national courts in all cases where the Commission had not yet taken a final decision ascertaining a breach of the DMA. This would be highly problematic, considering that the objective of protecting the effectiveness of the rights arising from the DMA should prevail over the need to avoid the risk of fragmentation. Second, limiting the scope of private enforcement may reduce the number of references for a preliminary ruling to the Court of Justice, thus diminishing the potential of an instrument that has been essential for the development of private enforcement of EU competition law (and EU law

[81] See A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, cit., p. 437 ff. For some considerations on the proposal at issue, see, for instance, C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, cit., p. 56 ff.; R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, cit., pp. 4-5.

[82] A.P. KOMNINOS, *The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement*, cit., p. 438.

[83] *Ibidem*.

[84] In this perspective, see C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, cit., p. 57 ff.; R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, cit., pp. 4-5.

as a whole)[85]. Third, the proposed limitation would also run contrary to existing provisions of the DMA, namely Article 39(5) of the DMA, in particular where it provides for the duty of national courts to «avoid giving decisions which would conflict with a decision *contemplated* by the Commission in proceedings it has initiated»[86] under the DMA. Mentioning contemplated (but not yet adopted) decisions of the Commission can only be based on the assumption that a lawsuit may well be started at a national level before the Commission has concluded an investigation into the same conduct.

As regards the operative aspects of private enforcement actions based on the DMA, in the absence of specific rules in the text of the Regulation, the general principles apply. Therefore, proceedings before national courts will be governed by national procedural rules, in accordance with the principle of procedural autonomy, with the "classic" limits represented by the principles of effectiveness and equivalence.

As a general rule, plaintiffs and defendants before national courts will not be able to rely on the mechanisms and provisions laid down in Directive 2014/104/EU on actions for damages based on EU competition law, notably including the disclosure of evidence, limitation periods, potential passing-on of overcharges, and quantification of harm[87]. This may result in significant obstacles to the development of private enforcement of the DMA, considering that, usually, a significant portion of the information and evidentiary elements needed to substantiate a claim are likely to be in the hands of the gatekeeper[88].

At the same time, some advantages for claimants invoking breaches of the DMA can also be identified, as compared, for instance, to actions based on Articles 101 and 102 TFEU. In particular, the designation of gatekeepers on the part of the Commission will relieve plaintiffs from the

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[85] In this regard, suffice it to mention the huge impact of two preliminary rulings of the Court of Justice: case C-453/99, *Courage and Crehan*, cit., and joined cases C-295/04 to C-298/04, *Manfredi*, cit.

[86] Emphasis added.

[87] See C. SCHEPISI, *L'*enforcement *del* Digital Markets Act*: perché anche i giudici nazionali dovrebbero avere un ruolo fondamentale*, cit., p. 62, who notes that, however, some of the provisions of Directive 2014/104/EU, cit., reflect principles that had already been established by the Court of Justice in its case law, for instance with regard to the power of the court to order the production of evidence from third parties (see, by analogy, Court of Justice, case C-526/04, *Laboraitores Boiron* [2006] ECLI:EU:C:2006:528), as well as to some aspects of the limitation period (joined cases C-295/04 to C-298/04, *Manfredi*, cit.).

[88] A.C. WITT, *The Digital Markets Act – Regulating the Wild West*, cit., p. 658.

burden of proof to define the relevant market and establish the dominant position of the defendant digital platform, as they must do where Article 102 TFEU is invoked [89]. Furthermore, the *ex ante* and *per se* nature of the obligations and prohibitions set out by the DMA will probably help plaintiffs in substantiating their claims before national courts, without engaging in complex effects-based analyses [90]. Clearly, in the case of actions for damages, it will always be necessary to demonstrate the existence of a harm and the causal link between the conduct at stake and the harm. This demonstration will likely be particularly complex, especially (but not exclusively) for end users and consumers, in light of the kind of services envisaged by the DMA, which can concern personal data, profiling, portability, and more. This may result in substantial difficulties in quantifying the alleged harm. However, for the purposes of interim measures and injunctions, the position of plaintiffs may be, to some extent and despite the lack of clear provisions, even more favourable than in the field of competition law, due to the structural features of the DMA.

One final point is the possibility that plaintiffs before national courts invoke alleged breaches of the DMA and EU competition law at the same time [91], particularly in reference to Article 102 TFEU, considering that many obligations and prohibitions laid down in the DMA correspond to conduct that is already covered, in principle, by Article 102 TFEU [92]. Once again, the DMA does not regulate such a scenario, and simply states, in general terms that «[t]his Regulation is without prejudice to the application of Articles 101 and 102 TFEU». One might well expect, therefore, that the two sets of provisions will usually be relied on simultaneously before national courts, sometimes even in an instrumental manner, in an attempt to exploit the respective advantages for the purposes of private enforcement concurrently.

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[89] G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 97. It bears noting that, in the event of a procedure for the designation of a gatekeeper pending before the Commission, the national court should stay the proceedings and/or request the Commission to take part in the proceedings in the form of *amicus curiae*, as explicitly admitted by Article 39 of the DMA (see para 3.1 above).

[90] R. AMARO, *Weaving Penelope's Shroud… Some Comments on the Private Enforcement of the DMA*, cit., p. 3.

[91] For brief remarks on this issue, see, for instance, G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 100.

[92] For a thorough analysis in this respect, see, *ex multis*, P. MANZINI, *Il Digital Market Act decodificato*, cit.

More generally, with regard to the prospects for judicial application of the DMA, it is not easy to make predictions at this stage, in light of the fact that the Regulation is not yet fully applicable to the conduct of gatekeepers and, consequently, the practice before national courts has not started to develop.

5. Concluding remarks

As shown in the previous paragraphs, the surprising (and deafening) silence of the DMA proposal on the role of national courts was remedied only to a limited extent in the final version of the Regulation.

National courts will have to grapple with a large number of open questions without clear indications available in the DMA. In this respect, while the Commission may possibly shed light on some aspects by adopting guidelines, the laconic text of the DMA regarding its private enforcement is disappointing.

This is all the more true if one considers that, in the field of EU competition law – which appears to be, at least in part, a source of inspiration for the rules introduced by the DMA – principles and rules have been developed over an extended time. The applicability of this framework to the private enforcement of the DMA will likely be controversial, giving rise to doubts and complications. For example, it is far from clear to what extent the principles laid down by the Court of Justice with respect to the private enforcement of competition law can be applied, by analogy, to the enforcement of the DMA before national courts.

Of course, it may well be argued that the DMA is structurally different from EU competition law, both in general terms and under a private enforcement perspective. However, if that were the position of the Commission and the co-legislators, they might have provided greater clarity on such a choice and its consequences for the protection of the rights of private parties aiming to rely on the DMA before national courts.

Moreover, the absence of clear provisions on several aspects of private enforcement of the DMA seems to be in contrast with one of the main objectives of the DMA, that is – as recalled above [93] – reducing the fragmentation of the internal market with reference to the approach to

[93] See *supra*, para 1.

core platform services provided by gatekeepers [94]. Indeed, from the private enforcement standpoint, the regulatory gaps left by the DMA are likely to lead to different solutions in the Member States [95]. The variability of national approaches to the DMA's private enforcement may, in turn, encourage forum shopping [96], thus further undermining the objectives of harmonisation pursued by the DMA in line with its legal basis, Article 114 TFEU.

It bears pointing out that a greater attention to private enforcement would also likely increase the effectiveness of the DMA as a whole, considering the fundamental role played by private parties in detecting breaches committed by digital platforms [97].

In light of the above, the scant attention paid to national courts and private enforcement even in the final version of the DMA represents a missed opportunity, which requires supplementary interpretative efforts, to the detriment of legal certainty.

It is likely that the Court of Justice will bring clarity to many points through the preliminary ruling procedure. In this regard, but also more generally, the role of national courts will be essential. Indeed, particularly in light of the fact that the resources of the Commission are not unlimited, the application of the DMA by national courts will surely contribute to the protection of the rights of private parties, as well as to the achievement of the fundamental objective of ensuring contestable and fair markets in the digital sector across the EU.

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[94] See, in that specific regard, Recitals 6 and 7 of the DMA.

[95] In this sense, it seems significant that, for instance, Germany has already adopted provisions at national level substantially extending the applicability of some principles and rules of competition law to the DMA's private enforcement, in the framework of the 11th Amendment to the national Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* - GWB): see, for instance, the amended Articles 33b (on the binding effect of decisions issued by a NCA), 33g (on Right to Have Evidence Surrendered and Information Provided) and 33h (on limitation periods) of the GWB (the English translation of the GWB is available at: https://www.gesetze-im-internet.de/)

[96] On this issue, see T. MARGVELASHVILI, *Tracing Forum Shopping within the DMA's Private Enforcement: Seeking Equitable Solutions*, in *Kluwer Competition Law Blog*, 14 December 2023, available at www.competitionlawblog.kluwercompetitionlaw.com/.

[97] G. MONTI, *The Digital Markets Act: Improving Its Institutional Design*, cit., p. 100; R. PODSZUN, *Private enforcement and the Digital Markets Act*, cit.

Personal Data: Damages Actions between EU Competition Law and the GDPR

Chiara Cellerino [*]

1. Introduction

This chapter looks at the synergies between EU data protection law and EU competition law [1]. While the role of the European Commission (the "Commission") and the Member States' Competition Authorities ("NCAs") will be taken into account, the main aim is to verify if, and to what extent, private enforcement of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal da-

[*] Associate Professor of EU law at the University of Genoa, Italy. LL.M (Columbia University).

[1] For some references in the literature, see P. MANZINI, *Antitrust e privacy: la strana coppia*, in P. MANZINI (a cura di), *I confini dell'antitrust, diseguaglianze sociali, diritti individuali, concorrenza*, Giappichelli, Torino, 2023, p. 123; the contributions of A. COLAPS, *Garantire la protezione dei diritti fondamentali nel mercato unico digitale: verso un approccio sinergico tra diritto della concorrenza e la protezione dei dati* and A. PALLOTTA, *Regolamento europeo n. 679/2016: profili di continuità e aspetti innovativi*, in F. ROSSI DAL POZZO (a cura di), *Mercato unico digitale, dati personali e diritti fondamentali*, *Eurojus*, 2020, Special Issue, p. 71 and 95; G. CONTALDI, *Il DMA (Digital Markets Act) può contribuire alla protezione dei dati degli utenti online?*, in *Diritti umani e diritto internazionale*, 2023, Vol. 17, Iss. 1, p. 77.

ta and on the free movement of such data (the "GDPR")[2] may contribute to address at least some of the problems competition law enforcement is facing *vis-à-vis* unlawful conducts of digital markets operators, in particular those perpetrated, *inter alia*, through the violation of data protection rules.

In this perspective, and in the first place, the chapter discusses the interaction between data protection law and Articles 101 and 102 TFEU, taking stock from existing practice, and as acknowledged by the Court of Justice in the recent *Meta* judgement[3] (paragraph 2). Then, the remedy of damages under competition law (paragraph 3) and GDPR (paragraphs 4) respectively is analysed. A special attention is paid to the requirements for a right to compensation under the GDPR, also as resulting from two recent judgements of the Court of Justice in *Österreiche Post*[4] and *BV*[5] (paragraphs 5 and 6). Some conclusions are drawn on the contribution data protection law can bring to the preservation of competitive process in digital markets (paragraph 7).

2. The interaction between competition law and data protection law: examples from the practice

The pivotal role of personal data for the functioning of digital markets business models has been brilliantly analysed in other chapters in this volume[6]. Suffice here to provide a couple of examples in which a conduct in violation of GDPR provisions may have an impact on competition among digital markets operators.

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

[3] Court of Justice, case C-252/21, *Meta* [2023] ECLI:EU:C:2023:537.

[4] Court of Justice, case C-300/21, *Österreiche Post AG* [2023] ECLI: EU:C: 2023:370.

[5] Court of Justice, Case C-340/21, *BV* [2023] ECLI:EU:C:2023:986.

[6] See F. MUNARI, *Competition on Digital Markets: An Introduction*, in this *Book*, p. 7 and V. CAFORIO, L. ZOBOLI, *Decoding Antitrust: Market Definition and Market Power within the Data Value Chain*, in this *Book*, p. 35.

As it is well-known, controllers have strong incentives to collect, use, store consumer data, to optimize their services and products or to trade them. For example, personal data relating to commercial preferences of individuals allow digital markets operators to strengthen their services in the targeted advertising industry or in the industry of trade of data sets.

However, controllers can only process personal data they collect from data subjects in compliance with the GDPR. Among other obligations, a legal basis for the processing needs to exist according to Article 6 of the GDPR and, most of the times, the only available legal basis for processing is «freely given, specific, informed and unambiguous consent» of the data subject [7].

Avoiding to request consent or providing inadequate or inaccurate information on the processing activity, thereby inducing the consumer to erroneously rely on a "privacy friendly" service, can be beneficial to controllers to the detriment of competitors, to the extent they carry out comparable processing activities in compliance with the GDPR. In other words, a violation of the GDPR can benefit a controller over its competitors. Furthermore, these conducts have a negative impact on consumers, lowering the "quality" of the digital services as regards their privacy law compliance. Lacking adequate remedies against the controllers, competi-

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[7] Article 6 GDPR provides as follows: «1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks. […]».

tors may be tempted to lower their own privacy standards, with a general degradation of consumer's protection environment as regards processing of personal data.

The already mentioned *Meta* judgement originates from a proceeding that the German NCA (the Bundeskartellamt) brought against Meta Platforms, Meta Platforms Ireland and Facebook Deutschland, for abuse of dominant position, in relation to the processing of users' personal data, as provided for in the general terms and as implemented by Meta Platforms Ireland. According to the German NCA, as such processing was, among other features, in violation of GDPR, it constituted an abuse of that company's dominant position on the market for online social networks for private users in Germany [8].

The national court, seized on the appeal of the above mentioned decision, referred a preliminary ruling to the Court of Justice, asking, *inter alia*, if a NCA, such as the Bundeskartellamt, which is not a supervisory authority within the meaning of Articles 51 ff. of the GDPR, and which examines a possible abuse of dominant position under Article 102 TFEU, can make findings, when assessing the balance of interests, as to whether the above mentioned data processing terms and their implementation comply with the GDPR.

On the point, the Court of Justice openly acknowledged that «the compliance or non-compliance […] with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers» [9].

Hence, according to the Court, because access to, and processing of, personal data is a significant parameter of competition between undertakings in the digital economy, «excluding the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union» [10]. The Court of Justice, therefore, admitted that violation of

[8] Bundeskartellamt decision of 6 February 2019 in case B6-22/16 – *Facebook*.

[9] Case C-252/21, *Meta*, cit., para 47.

[10] *Ivi*, para 51.

GDPR may be a constitutive element, together with other features, of an anti-competitive conduct under Article 102 TFEU.

For the sake of completeness, it should be kept in mind that Facebook's general terms and conditions on processing of personal data have been subject to scrutiny by several jurisdictions, including Italy, under different angles [11]. In Italy, for example, the same conduct was held in violation of EU (and national) consumer law, whose public enforcement is entrusted to the Italian NCA (the Autorità Garante della Concorrenza e del Mercato, the "AGCM"), in addition to its mission of enforcing competition rules [12]. An injunction similar to that adopted by the German NCA was indeed adopted by the Italian NCA based on a different set of rules, namely those relating to consumer protection/unfair commercial practices [13]. The above suggests that several set of rules can contribute to address the above-mentioned conducts of dominant digital market companies.

Another example of a GDPR violation having an (even more direct) impact on competition among operators is the violation of the individual's right to data portability, established under Article 20 of the GDPR [14].

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[11] For an account of the *Meta* case (case C-252/21, *Meta*, cit.) in the German, USA and Italian jurisdictions, see respectively, and among others, C. OSTI, R. PARDOLESI, *L'antitrust ai tempi di Facebook*, in *Mercato, Concorrenza, Regole*, 2019, Vol. 21, Iss. 2, p. 195; A. GIANNACCARI, *Facebook, tra privacy e antitrust: una storia (non solamente) americana*, in *Mercato, Concorrenza, Regole*, 2019, Vol. 21, Iss. 2, p. 273; F. BATTAGLIA, *La raccolta di dati da parte di Meta Platforms tra tutela dei dati personali, diritto della concorrenza e protezione dei consumatori*, in *Ordine internazionale e diritti umani*, 2022, Vol. 9, Iss. 4, p. 1048.

[12] See, more precisely, Articles 27, 37-*bis* and 66 of Decreto Legislativo No 206 of 6 September 2005, Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, No 229, and Article 8 of Decreto Legislativo No 145 of 2 August 2007, Attuazione dell'articolo 14 della direttiva 2005/29/CE che modifica la direttiva 84/450/CEE sulla pubblicità ingannevole.

[13] AGCM Decision of 17 February 2021 in case IP330 – *Meta Platform*.

[14] Article 20 of the GDPR provides as follows: «The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:

(a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and

This right entitles the data subject to a copy of its personal data in a structured, common and machine readable form. It is instrumental to ensure consumer's freedom to change data intensive service provider (such as, for example, banking providers, or telecommunication providers), without losing personal data. Failure to ensure data portability rights prevents or disincentives individuals from switching to a competitor of the controller.

An interesting case with regard to this issue is the investigation opened in 2022 by the AGCM in the *Weople* case, an innovative application developed by Hoda. Weople acts as an intermediary between the data subject and business using big data, with a view to exploit monetary value of personal data [15].

The application allows data subjects to transfer personal data relating to themselves, as collected and stored in the web by other platforms (such as for example Google, Apple, or Facebook) in a sort of "box" managed by the application. The use of personal data can then be traded to businesses for their commercial purposes, including advertisers, but not only. For Weople to gain a sufficient market share and compete with big data aggregators, such as Google, data subject must be able to access their personal data and transfer them to the new application. In other words, they must be enabled to exercise their portability rights under Article 20 of the GDPR.

Failure of Google to allow adequate interfaces to facilitate data portability may result in abuse of dominant position under Article 102 TFEU, taking the form of an excluding conduct [16]. The Italian proceeding ended up with a commitment decision in July 2023 [17].

(b) the processing is carried out by automated means.

In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible. […]».

[15] Case A552 – *Ostacoli alla Portabilità dei dati*.

[16] On these issues, C. CARLI, *Accesso ai dati tra GDPR, tutela della concorrenza e DMA: un gioco di specchi?*, in *Mercato, Concorrenza, Regole*, 2022, Vol. 24, Iss. 3, p. 639.

[17] AGCM Decision of 18 July 2023 in case A552 – *Ostacoli alla Portabilità dei dati*, cit.

3. Private enforcement of EU competition law in cases of GDPR violations

Having established the possible link between the GDPR violations and competition law infringements, it could be argued that private enforcement of competition law can be resorted to by both competitors and consumers. In principle, damage actions, in accordance with Directive (EU) 2014/104/EU, are available to seek compensation against entities liable of the above mentioned conducts [18].

As regards competitors, proof of damage would have to rely on a counter-factual scenario, based for example on the market share a company would have gained in a non-infringement case [19]. However, it should be mentioned that proceedings such as the one at hands often end up with commitment decisions. This bears some consequences in terms of burden of proof, as discussed in other chapters of this book [20]. Furthermore, as relevant conducts would in principle amount to Article 102 TFEU violations, no presumption would in any case apply as regards the existence of damage as per Article 17 of Directive 2014/104/EU. In addition, failing a consolidated practice on the side of NCA in these cases, follow on actions seem destined to remain quite rare, at least in the near future.

As regards consumers, a pecuniary damage as a consequence of the abuse may be envisaged, in cases such as *Weople* [21], for loss of profit deriving from the impossibility to monetize personal data, or in cases where the unlawful collection and processing of personal data has led the controller, for example, to apply discriminatory prices to different types of consumers. However, in many cases of GDPR violations, consumer/end

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

[19] Commission Guidelines of 13 June 2013 on the quantification of damages in actions based on breaches of Articles 101 and 102 of the TFEU and practical guide.

[20] See on these issues, extensively, the contribution of L. CALZOLARI, *Judicial Application of Commitment Decisions: From* Gasorba *to the Digital Markets Act*, in this *Book*, p. 193.

[21] Case A552 – *Ostacoli alla Portabilità dei dati*, cit.

user may not suffer any economic damage due, for example, to the fact that the digital service, despite being provided in violation of the GDPR, was a zero-price service.

Sometimes, users even gain benefits from these types of conducts: it may well be the case that a social network user, albeit inaccurately informed on the terms of the processing of its personal data, is eventually happy to receive target advertising. More often, GDPR violations may cause non-pecuniary types of damages. Yet, the legal status of non-pecuniary damages varies in different legal orders and, in general, they are not traditionally covered by private antitrust enforcement.

This is why, in the next paragraph, it is worth to take into consideration other remedies, which could probably complement, among other tools, the private enforcement of antitrust rules, while also protecting the (fundamental) rights of individuals.

4. GDPR: between public and private enforcement

The GDPR provides for both public and private enforcement of its provisions. Public enforcement of the GDPR is entrusted on the Member States' Data Protection Authorities ("DPAs")[22]. DPAs can address any type of GDPR violations, including those which do not necessarily determine a data breach, such as a violation of duty to inform data subjects[23]. Proceedings before a DPA can be initiated also following complaints lodged by the data subject, pursuant to Article 77 of the GDPR[24].

As regards private enforcement, data subjects are entitled to a right to

[22] See Articles 51 and ff of the GDPR.

[23] On the distinction between data breach and GDPR violation see J. KNETSH, *The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases*, in *Journal of European Tort Law*, 2022, Vol. 13, Iss. 2, p. 132 ff.

[24] Article 77 of the GDPR reads as follows: «1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation. 2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78».

effective judicial remedy both against the decisions, or omissions, of DPAs under Article 78 of the GDPR [25], and against controllers and processors under Article 79 of the GDPR [26].According to the latter provision, more precisely, «each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation». Accordingly, it seems that only infringements having an impact on the rights of the data subjects (hence, probably, not all GDPR violations), bestow a right to a legal remedy to the data subject.

5. Damages action under the GDPR: eligibility and nature of liability

With specific reference to damage actions, Article 82 of the GDPR expressly provides a right to receive compensation from controller or pro-

[25] Article 78 of the GDPR reads as follows: «1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them. 2.Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to an effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77. 3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established. 4. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court».

[26] Article 79 of the GDPR reads as follows: «1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation. 2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers».

cessor for «any person who has suffered material or non-material damage as a result of an infringement of this Regulation» [27]. As regards eligibility, the wording «any person» suggests that both data subjects and competitors may seek damages vis-à-vis the infringer. This interpretation could be supported by invoking the twofold nature of the GDPR as both a data protection tool and a tool to regulate (also) digital markets [28]. Yet, a systematic reading of the GDPR, including a comprehensive interpretation of its Article 82, supports a more restrictive construction, according to which only the data subject is entitled to ask for damages. This can be derived by the wording of Article 82(4) of the GDPR, according to which, when more than one controller or processors are involved, each of them is liable for the entire damage «in order to ensure effective compensation of the data subject». Furthermore, Recital 146 of the GDPR mentions only data subjects as persons entitled to «receive full and effective compensation for the damage they have suffered».

The interpretation purported above is without prejudice to the possibility for a competitor to address a GDPR violation based on a different cause of action, such as a claim for unfair commercial practices under national law. In this regard, it is worth recalling that, according to Article

[27] Article 82 of the GDPR provides as follows: «1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered. 2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller. 3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage. 4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject. 5. Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2. 6. Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79(2)».

[28] See T.F. WALREE, P.J. WOLTERS, *The Right to Compensation of a Competitor for a Violation of the GDPR*, in *International Data Privacy Law*, 2020, Vol. 10, Iss. 4, p. 346.

11 of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market[29], competitors are considered persons or organizations *«having a legitimate interest to combat unfair commercial practices»*, subject to national law.

Coming to the nature of liability, Article 82(3) of the GDPR provides for exemption of liability if the controller or the processor «proves that it is not in any way responsible for the event giving rise to the damage». In the above-mentioned *BV* judgement[30], the Court of Justice had the opportunity to clarify the liability regime deriving from such a provision, in a case of unauthorized access to personal data by third parties.

In this respect, it is worth recalling that Article 32 of the GDPR imposes on the controller and the processors the obligation to implement appropriate technical and organisational measures ("TOMs") to ensure a level of security of personal data appropriate to the risk[31]. Appropriateness is assessed taking into account «the state of the art, the costs of

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[29] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

[30] Case C-340/21, *BV*, cit.

[31] Article 32 of the GDPR provides as follows: «1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:

(a) the pseudonymisation and encryption of personal data

(b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;

(c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed. 3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article. 4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law».

implementation and the nature, scope, context and purposes of … processing».

According to the Court, in case of an action for damages, the controller bears the burden of proving that the security measures implemented by it are appropriate. The mere fact that unauthorized access to personal data occurred, is not *per se* sufficient to establish that TOMs were not appropriate. Rather, a national court must carry out an examination of the substance of those measures, in the light of all the criteria referred above, without however being sufficient for the defendant to give evidence of a mere *intent* to fulfil its obligations [32].

Having clarified the above, the Court acknowledges that, when the personal data breach is committed by cybercriminals, the infringement cannot be attributed to the controller, «unless the controller has made that infringement possible by failing to comply with an obligation laid down in the GDPR», including its obligation to establish appropriate TOMs. Had the defendant failed to fulfil its obligations under GDPR, it «may be exempt from liability, on the basis of Article 82(3) of the GDPR, by proving that there is no causal link between its possible breach of the data protection obligation and the damage suffered by the natural person». As a consequence, the controller cannot be exempted from its obligation to pay compensation for the damage suffered by a data subject solely because that damage is a result of unauthorised access to personal data by a third party. Rather «controller must prove that it is in no way responsible for the event that gave rise to the damage concerned» [33].

6. Damages action under the GDPR: the nature of damage

Another important aspect to be defined with regard to compensation under the GDPR is the nature of the damage. It is clear from the wording of Article 82 of the GDPR that non-pecuniary damage is included in the scope of the provision («*material and non-material damage*»). This has different impact on different domestic legal orders, depending on

[32] Court of Justice, case C-340/21, *BV*, cit. paras 42 ff. See also, on these and other connected issues, the request for a preliminary ruling in case C-741/21, *GP*.

[33] Court of Justice, case C-340/21, *VB* [2023] ECLI:EU:C:2023:986, paras 70 ff.

their attitude and legal traditions *vis-à-vis* compensation of non-material damage.

In this regard, it is often the case that, also in jurisdictions accepting the compensation of non-pecuniary damages, national courts tend to elaborate a gravity threshold, as a condition for awarding non pecuniary damages deriving from GDPR violations. This is the case, for example, for the Italian legal system [34]. The issue relates to the traditionally challenging question of whether a mere discomfort (what has been termed "a scratch in the soul") of the data subject gives rise to a right to compensation, and what would be the quantification of such a loss [35].

A clarification on this issue is provided by the Court of Justice in the above mentioned *Österreiche Post* judgement [36]. The case concerns the collection by a controller of personal data relating to political orientations of data subjects, extrapolated through an algorithm, with a view to selling them to various organizations interested in targeted advertising. In the specific case, no sale to third parties occurred. Yet, the data subject, learning about the unlawful processing, felt offended by the fact that the controller/defendant had elaborated and stored data relating to his political orientations, and had connected his identity to a specific Austrian political party. As a consequence, an action for damages was brought before Austrian courts by the data subject. The national judge referred a preliminary ruling to the Court of Justice on the following questions: (*i*) is the mere infringement of GDPR sufficient to confer a right to compensation or a specific harm needs to be proven? (*ii*) is the existence of a gravity threshold, as provided for under applicable national

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[34] Corte di Cassazione, n.16402, *G.F. c. Inps* [2021]; Corte di Cassazione, n.11020, *S.R. c. M.G.* [2021]; Corte di Cassazione, n.17383, *A.L. c. BNL* [2020].

[35] On these aspects, D. FLINT, *Does Non-material Damage Under GDPR Need to be Material or is That Immaterial?*, in *Business Law Review*, 2021, Vol. 42, Iss. 3, p. 159; J. KNETSH, *The Compensation of Non-Pecuniary Loss*, cit.; W. WURMNEST, M. GÖMANN, *Comparing Private Enforcement of EU Competition and Data Protection Law*, in *Journal of European Tort Law*, 2022, Vol. 13, Iss. 2, p. 154; S. LI, *Compensation for Non-Material Damage under Art. 82 GDPR: A Review of Case C-300/21*, in *Maastricht Journal of European and Comparative Law*, 2023, Vol. 30, Iss. 3, p. 1.

[36] Case C-300/21, *Österreiche Post AG* cit. For a comment, see S. LI, *Compensation for non-material damage under Art. 82 GDPR*, cit.; A. LOTTINI, *Risarcimento del danno immateriale a seguito della violazione del regolamento (UE) 2016/679: la sentenza Österreichische Post determina un cambio di paradigma?*, in *BlogDUE*, 7 luglio 2023, available at https://www.aisdue.eu/.

law, compatible with art. 82 GDPR? (*iii*) which rules apply to the quantification of damage? [37]

At the outset, the Court of Justice recalls that, lacking an express reference to national law of the Members States in GDPR, the notion of «damage» and «compensation for damage suffered» constitute autonomous concepts of EU law, to be applied uniformly in all the Member States [38]. This having clarified, the Court of Justice decided that the mere infringement of the GDPR is not sufficient to confer a right to compensation, although it may be sufficient to lodge a complaint before a national DPAs [39]; rather, for a right to compensation to arise, claimant has to provide evidence of infringement, damage and causal link [40]. In addition, Article 82 of the GDPR precludes a national rule or practice which makes compensation for non-material damage subject to the condition that the damage suffered by the data subject has reached a certain degree of seriousness [41]. Failing EU law rules on the issue, quantification of damages remains subject to domestic rules, provided that the principles of equivalence and effectiveness of EU law are complied with [42].

With particular reference to the gravity threshold, the Court of Justice explains that «making compensation for non-material damage subject to a certain threshold of seriousness would risk undermining the coherence of the rules established by the GDPR, since the graduation of such a threshold, on which the possibility or otherwise of obtaining that compensation would depend, would be liable to fluctuate according to the assessment of the courts seised» [43]. In other words, the Court of Justice rejects the compatibility with EU law of a gravity threshold to be assessed by national judges, based on an argument of uniform application of EU law. This does not mean, however, that claimant is relieved to demonstrate that the breach generated at least some damage.

Yet, it seems that room for different outcomes at domestic level may still exist, for example with reference to the notion of «damage». One of

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[37] Case C-300/21, *Österreiche Post AG*, cit., para 20.

[38] *Ivi*, para 30.

[39] *Ivi*, paras 33-42.

[40] *Ivi*, para 36.

[41] *Ivi*, paras 45-51.

[42] *Ivi*, para 54. The same is true also with regard to causation.

[43] *Ivi*, para 49.

the most challenging questions for national courts relates to whether the loss of control over personal data is to be considered itself a damage under the GDPR, or is instead part of the illicit conduct. In the latter case, additional harmful consequences (such as a damage to reputation, or a theft of identity) would have to be ascertained, in order for claimant to be entitled to compensation [44].

In this regard, Recital 85 of the GDPR seems to provide some guidance, although in connection with the different duty of controller to notify the breach to the data subject. In particular, it clarifies that «a personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned». According to such a wording, loss of control over personal data seems to be considered a damage in itself, separate from other consequences that may indeed flow from it, such as identity fraud.

This interpretation has been recently confirmed by the Court of Justice in the already mentioned *BV* case, where the Court relied on the tenet, enshrined in Recital 146 of the GDPR, that the «concept of damage should be broadly interpreted», in order to confirm that such concept includes «situations in which a data subject relies solely on the fear that his or her personal data will be misused by third parties», even if there had been no misuse of the data in question to the detriment of the data subject [45]. Failing such a broad interpretation, according to the Court, the «guarantee of a high level of protection of natural persons with regard to the processing of personal data within the European Union», would be undermined in the future [46].

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[44] See for example, UK Supreme Court, UKSC 50 ALL ER (D) 39, *Lloyds v. Google* [2021], where the UK Supreme Court denied that loss of control would allow damages under Data Protection Act. On UK case-law, V. JANEČEK, *Data Protection, the Value of Privacy and Compensable Damage*, in *The Cambridge Law Journal*, 2020, Vol. 79, Iss. 3, p. 417. On these issues, see also, again, S. LI, *Compensation for Non-Material Damage under Art. 82 GDPR*, cit.

[45] Case C-340/21, *BV* [2023], cit., para 83.

[46] *Ibidem*.

Provided that, according to *Österreiche Post*, damage cannot in any case be presumed in the GDPR violation [47], it is still up to the national court to ascertain that the alleged "fear" can be regarded as «well founded», in the specific circumstances of the case [48]. An assessment which seems to require a complex investigation of the so called *foro interno*, in the light of (hard to identify) objective factors. While the gravity threshold is to be abandoned by national courts of the Member States, some room of appreciation seem to flow back in their hands in this regard.

7. Conclusions

Damage actions under the GDPR may indeed increase the GDPR enforcement, and thus have, at least in principle, a deterrent effect on conducts of big digital operators that, behaving in violation of data protection law, undermine the competitive process within the internal market. The case-law of the Court of Justice analysed in the previous paragraphs, allowing a broad interpretation of the concept of "damage suffered" by the data-subject, seems aimed to boosting private GDPR enforcement, with a view to strengthen the high level of protection of personal data within the digital era. In this regard, it is not surprising that GDPR was the "funding" piece of legislation of the eco-systems of rules subsequently adopted by EU institutions in order to regulate digital economy in the last five years. Its effective enforcement may be the cure for several (though certainly not all) anti-competitive conducts of digital operators.

However, the small amount of damages claimed by consumers/data subjects in this type of cases seems to weaken the deterrent role that private (antitrust and GDPR) enforcement is supposed play, unless collective types of claims are available to interested parties. EU institutions seem well aware of this issue: Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers [49]

[47] Case C-300/21, *Österreiche Post AG*, cit., para 50.

[48] Case C-340/21, *BV* [2023], cit., para 85.

[49] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25

has been adopted in order to ensure that a representative action mechanism for the protection of the collective interests of consumers is implemented in all the Member States. Annex I to Directive (EU) 2020/1828 lists 66 pieces of EU legislation, including the GDPR (but not Articles 101 and 102 TFEU), for which collective remedies must be made available [50]. The intention to strengthen the role of individuals as controllers of digital markets is clear.

At the same time, several other sets of rules are destined to play a role in the difficult task to govern such markets. Among these, one could mention the Digital Services Act and the Data Act, addressing *inter alia* so called "dark patterns" [51]. In this regard, the plurality of instruments applicable to the unlawful conducts of dominant digital operators raises some doubt on the compatibility of such a "legislative harvest" with the principle of *ne bis in idem*, as protected *inter alia* by Article 50 of the Charter of Fundamental Rights of the European Union ("CFREU"). This is especially so in cases where simultaneously applicable bodies of law, such as the GDPR and competition law, are capable to impose upon infringers (quasi-criminal) administrative sanctions, or even allow for a mix of both administrative and (national) criminal sanctions [52]. Indeed,

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November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[50] Correspondingly, Article 42 of the DMA makes Directive (EU) 2020/1828, cit., applicable to the representative actions brought against infringements of DMA provisions that harm or may harm the collective interests of consumers. On the private enforcement of the DMA, see F. CROCI, *Judicial Application of the Digital Markets Act: The Role Of National Courts*, in this *Book*, p. 233.

[51] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single market for digital services and amending Directive 2000/31/EC (Digital Services Act); Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act).

[52] For a discussion of *ne bis in idem* issues relating to the sanctions system within the GDPR, see M. OROFINO, *Ne bis in idem e sistema sanzionatorio nella disciplina della protezione dei dati personali dopo l'adozione del GDPR*, in *Diritto pubblico comparato ed europeo*, Vol. 5, Iss. 4, 2019, p.1139. More generally, on the principle at stake, among many, C. AMALFITANO, *Dal ne bis in idem internazionale al ne bis in idem europeo*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2002, Vol. 38, Iss. 4, p. 929; B. NASCIMBENE, *Ne bis in idem, diritto internazionale e diritto europeo*, in *Diritto penale contemporaneo*, 2018, available at https://archiviodpc.dirittopenaleuomo.org.

the Court of Justice's case-law provides guidance to asses if relevant proceedings have a «sufficiently close connection in substance and time», as to determine a *bis in idem* [53]. But this topic surely deserves a different chapter, in a different book: no doubts that we have plenty of materials for more training and reflections on these issues.

[53] See Court of Justice, case C-524/15, *Menci* [2018] ECLI:EU:C:2018:197; Court of Justice, case C-537/16, *Garlsson Real Estate SA* [2018] ECLI:EU:C:2018:193; Court of Justice, Joined cases C-596/16 and C-597/16, *Di Piuma, Consob* [2018] ECLI:EU:C:2018:192, Court of Justice, case C-151/20, *Nordzucker* [2022] ECLI:EU:C:2022:203; Court of Justice, case C-117/20, *Bpost* [2022] ECLI:EU:C:2022:202 For a comment on the twin judgments, see M. CAPPAI, G. COLANGELO, *Applying ne bis in idem in the aftermath of BPost and Nordzucker: the case of EU competition policy in digital markets*, in *Common Market Law Review*, 2023, vol. 60, Iss. 2, p. 431. See also European Court of Human Rights, Application No 24130/11 and 29758/11, *A and B c. Norvegia* [2016], European Court of Human rights, Application No 18640/10, *Grande Stevens v. Italy* [2014].

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