ISSN 1689-9024

# YEARBOOK of ANTITRUST and REGULATORY STUDIES

Vol. 2022, 15(26)

CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw

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# YEARBOOK *of* ANTITRUST *and* REGULATORY STUDIES

Volume Editors:

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Vol. 2022, 15(26)

CENTRE FOR ANTITRUST AND REGULATORY STUDIES University of Warsaw


**Centre for Antitrust and Regulatory Studies**
**University of Warsaw, Faculty of Management**

**One hundred and thirty-seventh Publication**
**of the Publishing Programme**



Language editor: Ewelina D. Sage (English);
Jérôme de Cooman (French)

Statistic editor: Prof. Jerzy Wierzbiński

Cover: Dariusz Kondefer

ISSN 1689-9024

The original (reference) version of the journal is printed.

**PUBLISHER**


University of Warsaw
PL – 00-927 Warsaw,
26/28 Krakowskie Przedmieście St.
Tel. (+48-22) 55-34-164

**LAYOUT**


ELIPSA Publishing House
PL – 00-189 Warszawa, 15/198 Inflancka St.
Tel. (+48-22) 635-03-01
E-mail: elipsa@elipsa.pl; www.elipsa.pl

**PRINTING AND BINDING**

Sowa Sp. z o.o.
ul. Raszyńska 13
05-500 Piaseczno
www.sowadruk.pl

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# VOL. 2022, 15(26)

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**BOOK REVIEW**



**CONFERENCE REPORTS**

# Editorial foreword

Almost 60 years ago, on 26 June 1963, President John F. Kennedy gave the following speech at St. Paul's Church in Frankfurt:

> Goethe tells us in his greatest poem that Faust lost the liberty of his soul when he said to the passing moment: "Stay, thou art so fair." And our liberty, too, is endangered if we pause for the passing moment, if we rest on our achievements, if we resist the pace of progress. For time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future.

Likewise, for antitrust law to keep serving the purposes for which it was adopted – one being the protection of *liberty* against anticompetitive practices – it cannot ignore the challenges of the present and those of the foreseeable future. In this vein, this issue of the Yearbook of Antitrust and Regulatory Studies, 2022 15(26), features a number of contributions dealing with challenges confronting competition and regulation at present and future.

In doing so, the issue takes part in the debate on the interface between competition law and sectoral regulation in Europe – a debate that has become fashionable once again in view of the challenges posed by the application of competition law notions and remedies to digital markets. More specifically, the issue contributes to the advancement of the relevant doctrinal debate, particularly with regard to the specific complexities tackled by competition law in the digital realm and the coexistence of competition law enforcement with ex ante regulatory tools.

Jeanne Mouton, from the University of Nice Côte d'Azur, leads on with an article on digital economy and its threats to private competition law enforcement. In order to address those threats, the author explores the idea extending the presumption of harm also to abuse of dominance in digital markets, as well as making private parties aware of cease-and-desist injunctions or filing for private enforcement remedies.

Isabella Lorenzoni, from the University of Luxembourg, follows suit with a contribution on how Artificial Intelligence (AI) tools may assist antitrust authorities in curbing anticompetitive algorithmic practices, notably by reverse

engineering the companies' algorithms in order to better understand their impact on market performance. The Author also examines the potential challenges associated with the introduction of AI enforcement tools and argues that fundamental rights, notably the right of defense and the right to a reasoned decision, should not be undermined by the introduction of innovative enforcement tools.

In contrast, Anzhelika Gerasymenko and Nataliia Mazaraki, from the State Trade and Economic University of Kyiv, authored a paper describing how antitrust in Ukraine has been so far unable to address the challenges arising from on-line platforms. They argue that the existing enforcement tools are ineffective, and the current legal framework is incapable of dealing with on-line giants. Thus, the Authors call for a recalibration of Ukraine's approach to the regulation of digital markets and examine a number of options to that end.

Tabea Bauermeister, from the University of Hamburg, provides a critical assessment of the German's regulatory initiative on digital platforms, the so-called 'Lex GAFA', set out in Section 19a of the German Competition Act. The Author analyzes that provision, compares it to Article 102 TFEU, and contrasts it with the EU Digital Markets Act (DMA). On that basis, the Author concludes that the German initiative was neither a 'lighthouse project' nor a 'superfluous solo run', but 'a useful bridge for the time gap before the DMA comes into force'.

The DMA is the subject of another article featured in this issue, by Claudia Massa, from the University of Naples Federico II. Unlike other antitrust scholars, the Author does not seek to engage with the practical aspects of the DMA but wishes to investigate its theoretical implications against the background of EU Economic Constitutionalism. To this end, the Author examines the DMA's legal context, its underlying values, its objectives, and its conceptual underpinnings.

The following paper was written by three Hungarian Authors: Judit Firniksz and Borbála Tünde Dömötörfy, from Pázmány Péter Catholic University, and Péter Mezei, partner at Baker & McKenzie (Budapest). In the wake of the lessons arising from the *Google Shopping* case, the Authors focus on 'enabling and discovery tools', which they examine from the perspective of antitrust, consumer protection and sector regulation. They also discuss the role that national competition authorities and advocacy can play in the promotion of a competitive environment.

This issue also features a case comment by Kamil Dobosz, from the Cracow University of Economics, to the European Court of Justice's recent ruling in *Nordzucker*, dealing with the thorny issue of *ne bis in idem* in the context of competition law, notably when antitrust authorities from different EU Member States are involved.

Turning to book reviews, Baskaran Balasingham, from Utrecht University, reviewed the book by YARS' Editor-in-Chief Maciej Bernatt "Populism and Antitrust", published by Cambridge University Press in 2022. The commentator highlights that this monograph is the first one to investigate how populism affects the institutional characteristics and practices of competition authorities and courts, notably in Hungary and Poland, but also in other countries such as Greece, India, South Africa, and Venezuela.

The conference reports section in this issue features two contributions. One, by Eduardo Molan Gaban and Vinicius Klein, from the Brazilian Institute of Competition and Innovation, concerns the international conference organized by that Institute from 9 to 11 November 2021. That conference consisted of a series of webinars covering a range of topics related to competition law, innovation and data, rights, and law enforcement, with a Brazilian and global perspective.

Finally, Walter Bruno, from the University of Luxembourg, reported on the Memorial Conference devoted to the Neapolitan Jurist Giuseppe Tesauro, held at the University of Naples Federico II and at the Alfredo De Marsico Law Library on 1 and 2 July 2022. Tesauro held various positions during his life, from Professor of European Union Law to President of the Italian Constitutional Court, from Advocate General at the European Court of Justice to President of the Italian Competition Authority, and in the latter capacity he played a major role in the early days of International Competition Network, whose first annual conference was held in Naples in September 2002.

We are very grateful for their crucial contribution to the publication of this issue to Maciej Bernatt, YARS Editor-in-Chief, Marta Sznajder, YARS editorial process coordinator, and YARS junior editors Veronica Piccolo, Johannes Persch, Szymon Cyban, Lauren Murray, Maciej Gorazdowski, Jérôme De Cooman, Magdalena Knapp. Moreover, the authors of the contributions to the issue as well as all peer-reviewers deserve our gratitude. Hopefully the readers will find this joint effort useful.

Naples and Warsaw, December 2022

***Prof. Amedeo Arena*** (Volume Editor)
***Dr. Laura Zoboli*** (Volume Editor)

A R T I C L E S

# The challenges for private competition law enforcement concerning anticompetitive conducts in digital markets

by

Jeanne Mouton*

**CONTENTS**



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Article received: 22 June 2022, accepted: 29 August 2022.

### *Abstract*

The paper reviews literature on theories of harm in digital markets, and the specific difficulties in quantifying the damage in private enforcement of competition law. The development of a tentative case-law on private enforcement in digital markets in the European Union is studied next, in comparison to the US antitrust practice, differentiating between businesses or consumers filing damages claims. Finally, the paper raises the specific issues posed by the digital economy for competition law claims for damages, and explores the idea of extending the presumption of harm also to abuse of dominance in digital markets, as well as making private parties aware of cease and desist injunctions or filing for private enforcement remedies.

### *Résumé*

L'article examine la littérature sur les théories du préjudice dans les marchés numériques ainsi que les difficultés spécifiques liées à la quantification du dommage dans le cadre d'une action en dommage concurrentiel. Ensuite, le développement timide d'une jurisprudence des actions privées sur les marchés numériques dans l'Union Européenne est étudié en comparaison avec la pratique antitrust américaine, en faisant la distinction entre les plaintes introduites par des entreprises ou des consommateurs. Enfin, le document soulève les problématiques spécifiques à l'introduction d'actions en dommages et intérêts concurrentiels sur les marchés numériques, et explore les propositions suivantes : étendre la présomption du dommage aux abus de positions dominantes sur les marchés numériques, inciter les parties privées à requérir des injonctions et encourager la mise en œuvre de remèdes dans le cadre d'actions privées.



**Key words:** Competition law; private enforcement; damages; digital markets; presumption of harm; remedies.

**JEL:** K21, K42


## I. Introduction

As for any legal area, assuming the rationality of criminals, an enforcement system is only a deterrent when the risk of being sanctioned is higher than the expected utility of infringing the law.[1] There is some literature on designing optimal enforcement systems, with both public and private enforcement,

[1] Gary S. Becker, 'Crime And Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 13–68.

though less related to European competition law,[2] where the debate was on 'over' *vs*. 'under' enforcement of competition law[3]. Public and private enforcement of competition law differ by their objectives, means and methods. Public enforcers aim to maximize total welfare, recognize global damage, and consider the potential effects of the infringement in computing the fine. By contrast, the goal of private enforcement is to compensate for individual damage, that is, to make up for a real and individual effect of the infringement. If public enforcers pursue a deterrence goal, private parties do not integrate the objective of deterrence in their choice to start, or not a damages action – they are only motivated by the compensation of their own harm. This does not mean that private enforcement does not have a deterrent effect; on the contrary, it participates in an overall deterrence system. However, the deterrent effect is *ex post*, unless private parties purposely decide to claim for damages based on a perceived injustice.

Directive 2014/104/EU (hereinafter: Damages Directive) sets a framework for damages that compensate breaches of Articles 101 and 102 of the TFEU as 'one element of an effective system of private enforcement of infringements of competition law.'[4]

In December 2020, the European Commission published a working document on the implementation of the Damages Directive,[5] drawing attention to the first findings of its impact. Among them, the working document highlighted an increase in the number of cases related to cartel infringements. Actions for damages are indeed more frequently observed and studied in the framework of cartel infringements[6], with an under-representation of private enforcement when it comes to an abuse of a dominance position. The aforementioned study took into account 239 cases, 57% of those followed a decision of a Competition Authority and 40% a decision from the Commission. Quoting it, stand-alone

[2] A. Mitchell Polinsky, 'Private Versus Public Enforcement Of Fines' (1980) 9 The Journal of Legal Studies 105–127.

[3] Emmanuel Combe and Constance Monnier, 'Fines Against Hard Core Cartels In Europe: The Myth Of Overenforcement' (2011) 56 The Antitrust Bulletin; Marcel Boyer and others, 'The Determination Of Optimal Fines In Cartel Cases: The Myth Of Underdeterrence' [2011] SSRN Electronic Journal.

[4] 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 (Damages Directive) [2014] OJ L 349/1, recital (5).

[5] EU Commission, SWD (2020) 338 final, on the implementation of 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 [2020].

[6] Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2019 ed.)', (2019), Concurrences.

private enforcement, that is, damages claims not following a decision from a Competition Authority, hardly exist. This lack of private enforcement cases in terms of abuse of dominance might be explained by several factors. The relative success of private enforcement concerning cartels might be traced back to the fact that cartel damages are partially favoured by the presumption, contained in Article 17 of the Damages Directive, that cartel infringements cause harm.

Keeping in mind that damages actions are still under-represented in relation to abuse of dominance, how should the characteristics of digital markets be approached to incentivize businesses and consumers to file private damages actions in digital markets?

Jullien and Sand-Zantman question whether platform competition leads to monopolization. The authors focus on demand-driven network effects, as the most striking aspect of digital markets, favouring large firms.[7] Each platform has incentives to reach a critical mass, for which they need to attract more buyers in order to be attractive to the sellers' side. These incentives result in very concentrated markets, with a few big players holding significant market power, increasing the risk of anticompetitive conducts taking the form of an abuse of dominance.[8]

Therefore, it is relevant to look at the business models of the players in digital markets, how they make profits and what incentivises them, to then link their incentives to the potentiality of an anticompetitive conduct, or rather, to the theories of harm affecting private parties.

Theories of harm are as varied as the business models of online platforms, and the severity of the damage differs and depends on the place of the private parties inside the ecosystem of the platform. Moreover, when considering all the users and trading partners in digital markets, one can expect that damages tend to be diffused. Taking the example of 'attention brokers', where an online platform is defined by the ability to obtain information about the individual preferences of their users, and to then target advertisements displayed on their

[7] Bruno Jullien and Wilfried Sand-Zantman, 'The Economics Of Platforms: A Theory Guide For Competition Policy' (2021) 54 Information Economics and Policy.

[8] There is also a more than ever growing literature on the risks of algorithmic collusion, both its legal and economic challenges and the theoretical possibility to detect these cartels with algorithmic evidence. *Inter alia*: Ariel Ezrachi, Maurice E. Stucke. 'Artificial intelligence & collusion: When computers inhibit competition' (2017) U. Ill. L. Rev. 1775–1810; Ulrich Schwalbe, 'Algorithms, machine learning, and collusion' (2018) 14 Journal of Competition Law & Economics 568–607; Axel Gautier, Ashwin Ittoo, Pieter Van Cleynenbreugel, 'AI algorithms, price discrimination and collusion: a technological, economic and legal perspective' (2020) 50 European Journal of Law and Economics 405–435; Nathalie de Marcellis-Warin, Frédéric Marty and Thierry Warin, 'Vers Un Virage Algorithmique De La Lutte Anticartels?' [2021] Éthique publique. However, this paper focuses on abuse of dominance in digital markets.

platform, this business model may lead to abuse by way of exploitation with an excessive data collection on the consumers' side.[9] Loss of quality, loss of chance, loss of innovation, self-preferencing, are examples of theories of harm in digital markets that could be considered.

We are then faced with the challenge of compensating hardly imputable, spread damages, causing harm to various types of private parties under different theories of harm, the quantification of which may require thinking outside the current legal toolbox.

Even when the fact was widely publicized that public enforcement authorities have sanctioned online platforms for various abuses, very few follow-on damages cases started later on; this may be surprising since private parties would have benefited from the establishment of the infringement by relevant authorities.[10]

This paper aims to reflect on whether the digital economy adds extra challenges to private enforcement of competition law. First, the paper opens with a theoretical section reviewing theories of harm in digital markets. Second, the tentative private enforcement case-law in digital markets is discussed, categorized between damages actions filed by businesses or consumers. Finally, the paper lists (non-exhaustive) issues arising in the digital economy for private enforcement of competition law, and considers some proposals to tackle two specific problems: the characterization and the compensation of harm.

## II. Theories of harm in digital markets

The definition of digital markets has been approached by academic literature, competition authorities and institutions with a list of common characteristics. As an example, the Crémer report[11] identifies some key characteristics of the digital economy including network externalities, extreme return to scale, and the role of data. These characteristics favour high market concentration levels that benefit a handful of players, so increasing the risk of abuse of dominance.

[9] Andrea Prat and Tommaso Valletti, 'Attention Oligopoly' (2022) 14 American Economic Journal: Microeconomics 530–557.

[10] As opposed to stand-alone actions; this also raises the question of the optimal sequentiality, are follow-on actions more efficient than stand-alone actions?

[11] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer 'Competition Policy for the digital era' (2019) EU Commission.

The digitalisation of the economy makes it impossible to reach a one-definition-fits-all. On the contrary, it seems that the understanding of digital markets is only possible with the recognition of the heterogeneity of the players.

For this reason, Caffarra proposes to 'follow the money', meaning starting from the business models of the platforms or aggregators, to map resulting competitive issues.[12] This idea of 'framing' business models in the digital economy was researched by Brousseau and Pénard in 2007.[13] The authors define a digital business model by a combination of three roles played by platforms, which can be either: a pure market intermediary, a pure assembler, a pure knowledge manager. In actuality, it can also combine two or three of these identified roles. In 2017, Bock and Wiener conducted a review of literature on digital business models, with a sample of 56 studies from 25 journals and four conference proceedings. The aim of their review was to categorize digital business models.[14] From their research, the authors identified five key dimensions: digital offering, digital experience, digital platforms, data analytics and digital pricing. Caffarra focuses on monetization strategies in digital markets which incentivises platforms.[15] She relies on the distinction between platforms and aggregators, as well as lists what incentives play a role in advertising-funded and platform models. The author then argues that all the competitive issues raised can be tackled with existing theories of harm, such as foreclosure, exploitation, misinformation and self-preferencing.

A document issued in 2020 by the OECD also reviews types of abuses of dominance in the digital market[16], from the observed conduct to the matching theory of harm. This report linked traditional theories of harms to seven specific anticompetitive conducts or market outcomes observed in digital markets. Identified among those are, for example, a dominant, vertically integrated entity charging its downstream rivals higher prices, or offering them less advantageous contractual terms or lower quality of services, which can all be analysed under the margin squeeze theory of harm. In the end, the report relies on several well known theories of harm in antitrust case-law: refusal to deal, exclusive dealing, loyalty rebates, bundling or tying, and predatory pricing. To this list, one could also add the difficult case of

[12] Cristina Caffarra, '"Follow the Money" – Mapping issues with digital platforms into actionable theories of harm' (2019) e-Competitions Platforms.

[13] Eric Brousseau and Thierry Penard, 'The Economics Of Digital Business Models: A Framework For Analyzing The Economics Of Platforms' (2007) 6 Review of Network Economics.

[14] Maximilian Bock and Martin Wiener, 'Towards a Taxonomy of Digital Business Models-Conceptual Dimensions and Empirical Illustrations.' (2017).

[15] Caffarra (n 12).

[16] OECD, 'Abuse of dominance in digital markets' (2020).

a competitor or complementor being 'eliminated' even before entering the market (which would be analysed as 'a loss of chance' for quantification purposes).

Specifically with respect to exploitative abuses, where there is less case-law, Botta and Wiedmann analyse in depth three categories of exploitative abuses committed by dominant platforms that have the potential to directly harm consumers: excessing pricing (taking the form of an excessive data collection), discriminatory pricing facilitated via algorithms, and unfair trading conditions where data protection terms and privacy policies could be seen as unfair from a competition law standpoint.[17] Additionally, Bougette, Budzinski and Marty propose to address the self-preferencing theory of harm, as an exploitative abuse, where marketplace providers have the ability to engage in self-preferencing strategies, and where they experience incentives to profitably employ self-preferencing.[18]

However, if anticompetitive behaviours in digital markets can be approached with traditional theories of harm, there is one significant difference between public and private enforcement once the infringement is established, namely that damages actions aim to compensate for individual harm which must first be quantified – and that can be particularly difficult in digital markets.

The Practical Guide (hereinafter: Guide) on the quantification of harm in damages action published in 2013 by the EU Commission[19] distinguishes two broad categories of harmful effects following infringements of Article 101 or 102 TFEU: an increase in the price paid by customers of the infringing undertakings (an overcharge), and exclusion from the market or reduction of market shares by other market players. The Guide does not aim to exhaustively cover all possible theories of harm, and their quantification, but rather to offer some guidance on the two categories raised above. Nonetheless, the Guide confirms the flexibility of the Damages Directive with respect to the various theories of harm, confirming that infringements to Article 101 and 102 TFEU may result in 'further harmful effects, for example adverse impacts on product quality and innovation'.

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[17] Marco Botta and Klaus Wiedemann, 'Exploitative conducts in digital markets: Time for a discussion after the Facebook Decision' (2019) Journal of European Competition Law & Practice (2019) 465.

[18] Patrice Bougette, Oliver Budzinski and Frédéric Marty, 'Self-Preferencing And Competitive Damages: A Focus On Exploitative Abuses' (2022) 67 The Antitrust Bulletin 190–207.

[19] EU Commission, SWD(2013) 205, Practical guide quantifying harm in actions for damages based on breaches of article 101 and 102 of the Treaty of the functioning of the European Union [2013].

Private enforcement of competition law in digital markets raises broader issues too. Looking at transatlantic literature, Newman (2016) stresses the increasing complexity of proofs needed by customers seeking damages for 'attentional' or 'informational' overcharges. While reviewing several approaches to the quantification of damages in zero-priced markets, only the stated 'preferences approach' (and its limits) seems transposable to EU practice. The author, quoted by the OECD in its 2018 publication on quality considerations in digital zero-price markets[20], insists on the importance of public enforcement in these markets, to deter anticompetitive conduct, because of the difficulties in proving damages in cases involving zero-priced products.

To add to these hurdles, an infringement of competition law in a digital market has the potential to impact an entire ecosystem, from business partners, complementors, clients to consumers. Hence, market players face the risk of widespread damage that can be diffused but also future, as well as difficult to attribute and compensate. The damage would be 'future', if there are no remedies that can alter the behaviour of the digital entity; it would be 'difficult to attribute', if the technology is advanced or involves many intermediaries; and 'difficult to compensate', in the event of non-monetary damages. Furthermore, one could question the role of private enforcement in digital markets, if a player was to be excluded from the market and then compensated for such exclusion. Can damages enable harmed parties to 'return' to the situation that would have prevailed without the infringement, or are damages playing a role of 'distributive justice' only? Finally, an additional two-fold difficulty needs to be added. First, consumers are unaware of the business models of the online platforms they are using, and suffer from different cognitive biases that prevent them from even detecting the infringement[21]. By contrast, business partners and complementors may have spotted an infringement, but are exposed to a retaliation risk taking the form of their exclusion from the eco-system on a very concentrated market[22]. To sum up, business partners have the ability to detect damage, while the consumers have not, but at the same time, business partners have no incentives to bring a claim for damages.

[20] OECD, 'Quality considerations in the zero-price economy' (2018).

[21] Pinar Akman, 'A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets' (2022) 16 Va L & Bus Rev 217–292; Alessandro Acquisti, 'The economics of personal data and the economics of privacy' (2010) OECD Working paper on the information economy.

[22] Hence, the lack of private enforcement actions, but public enforcement launched following formal complaints by complementors and competitors (AT. 39740 *Google Shopping*; AT.40437 *App Store*).

## III. Private competition law enforcement case-law in digital markets

Private parties can file a private enforcement action following an infringement to Article 101 or 102 TFEU, with the aim to be fully compensated for the damage they suffered from that infringement. Full compensation shall 'return' private parties to the situation that would have prevailed should the infringement have not occurred. An action for damages can either 'stand-alone', or 'follow-on' public enforcement that established and sanctioned the said infringement. Follow-on actions are reputed to be more attractive for private parties since the infringement has already been established by the 'public' hand.

Public enforcers, in particular the EU Commission, made the digital market one of their key enforcement priorities, leading to numerous heavy sanctions in this field. In some of these cases, formal complaints were submitted by competitors, raising the expectation of follow-on private enforcement. Then, one must ask, how could we explain the fact that there was, in practice, no 'boom' of private enforcement actions in digital markets? This suggests that there are no incentives for private parties to file an action for damages; or, should we blame it on unobserved data?

The following sub-section reviews the tentative antitrust enforcement case-law in digital markets, subdividing the analysis between businesses making a claim for damages and consumers claiming for damages.

### 1. Businesses claiming damages following an anticompetitive conduct by a dominant platform

Businesses can claim competitive damages following an anticompetitive conduct of a dominant platform on different grounds – from exclusion, to dealing with unfair terms or competing on an adjacent market. The following section reviews the theories of harm raised in the latest private enforcement case-law in digital markets.

US antitrust practice, which is more litigation based then in Europe, tackled damages actions in the digital sector. In May 2019, the US Supreme Court, in the *Apple vs. Pepper* case, ruled that iPhone users could file a claim for overcharges as direct buyers, and that they have standing to file an action against the platform distributing their phones. The ruling clarified the Illinois Brick rule as regards to litigations in digital markets. In this case, iPhone users contested the monopolization by Apple of the after-market of iPhone software applications, allowing the dominant platform to charge a 30% fee to independent developers, eventually causing higher prices to consumers purchasing these apps. The *Amicus Curiae* by Alden F. Abbott

provides guidance on the application of the Illinois Brick rule by stating that Apple 'acts as an agent for the developers, completing sales on the developers' behalf at prices the developers set', Apple has then contractual relationships with both the developers and consumers[23]. The key point of the Illinois Brick rule is that 'Section 4 cases should not conduct what this Court deemed to be unacceptably complicated inquiries about how to "apportion the recovery" among the various parties in the chain of distribution'. The *Apple vs. Pepper* case makes it clear that final consumers can seek damages whenever they are bound by a contract with the dominant platforms in digital markets.

Google and Facebook are also facing private enforcement actions for their anticompetitive practices in the US. In 2020, private publishers filed antitrust lawsuits against Google after experiencing decreases in their revenues. The publishers accused Google of making it impossible for them to make business deals with smaller advertisers, which compete with Google, because Google's position allows the platform to represent buyers and sellers, as well as controlling the exchange, by setting the auction and pricing rules. These antitrust allegations are also followed by complaints from the State Attorney General and the Justice Department. The proceedings are still ongoing with a trial date set for autumn 2023.

With a slight delay, and in spite of the forthcoming entry into force of the Digital Services Act and the Digital Markets Act that confirm EU public enforcement practice (since neither of these EU Regulations includes specific provisions encouraging actions for damages), the European Union may catch up to the US on private antitrust enforcement in digital markets.

The price parity clauses, which restrict sellers' ability to set prices in the market of online booking, led to several public antitrust enforcement interventions. Relating specifically to the Booking.com platform, the Competition Authorities of France[24], Sweden[25], Germany[26], Russia[27], Hong-Kong[28],

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[23] Brief for the United States as Amicus Curia, Apple Inc. v Pepper, Alden F. Abbott, n°17–204, [2018].

[24] European Competition Network Brief, 'The French Competition Authority accepts the commitments made by an online travel agency (Booking.com)' (2019) e-Competitions.

[25] Viktor Wahlqvist, 'The Swedish Competition Authority approves the voluntary commitments of an online hotel booking company subject to a *fine* (Booking.com)' (2015) e-Competitions.

[26] Andrzej Kmiecik and Laura Lehoczky-Deckers, 'The German Federal Court of Justice finds narrow price parity clauses anticompetitive (Booking.com)' (2021) e-Competitions.

[27] Russian Competition Authority, 'The Russian Competition Authority imposes a fine on an online travel agency for abuse of its dominant position (Booking.com)' (2021) e-Competitions.

[28] Hong Kong Competition Commission, 'The Hong Kong Competition Authority accepts voluntary commitments by three major online travel agents (Booking.com / Expedia / Trip.com)' (2020) e-Competitions.

and Czech Republic[29], to name but a few, opened public competition law enforcement proceedings against Booking.com's price parity clauses. In Germany, following a global debate on this anticompetitive issue, about 2000 hotels could have filed damages actions against the Booking.com platform's use of wide price parity clauses[30]. Furthermore, the EU Court of Justice, in the context of a preliminary ruling, provided a clarification on actions for damages following anticompetitive behaviours of online booking platform. Following a request from the German Federal Court of Justice, the EU Court of Justice clarified jurisdiction rules related to actions for damages.[31] To measure the impact of this ruling, we could quote the Hungarian Competition Authority, which titled its press release following this preliminary ruling: 'Amazon, Facebook, Google, Apple, Booking.com – domestic undertakings can also sue foreign "giants" in Hungarian courts.'[32] The clarification of procedural rules relating to competition law actions for damages definitely acts in favour of private parties.

Recently, Google has been the target of damages actions following the *Google Shopping* case[33]. In Italy, 7 Pixel, active in the Italian market for e-merchant product comparison services, submitted a request to the Court of Milan for 'preventive technical expertise', an amicable method of settling disputes, which is an alternative for an action for damages. 7 Pixel claims between 811 million and 906 million EUR of damages for the harm it suffered, which took the form of a decrease of the visibility of the website which 7 Pixel uses for its product comparison service. The request was rejected by the Court of Milan in January 2021, on the ground of Google's argument that the decision from the Commission was not final[34]. These recent case law' developments remain to be monitored.

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[29] Barbora Cejkova Vickers and Vojtech Chloupek, 'The Czech Competition Authority rejects the appeal brought by an online travel agency company and confirms the fine imposed for entering into prohibited vertical agreements (Booking.com)' (2019) e-Competitions.

[30] Klara Janiec, Sebastian Plötz and Sinziana Lanc, 'Germany's Federal Court of Justice on price parity clauses: rechtswidrig!', (Linking Competition Blog, 8 June 2021) <Germany's Federal Court of Justice on price parity clauses: rechtswidrig! | LinkingCompetition | Blog | Insights | Linklaters> accessed 8 May 2022.

[31] Hannah Lesley, 'The EU Court of Justice clarifies the application of the special jurisdiction rules in the Brussels recast regulation regarding an action based on an abuse of dominant position (Wikingerhof / Booking.com)' (2020) e-Competitions.

[32] Hungarian Competition Authority, Press release, 'Amazon, Facebook, Google, Booking.com – domestic undertakings can also sue foreign 'giants' in Hungarian courts', (2020) e-competitions.

[33] AT.39740 *Google Shopping*; Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:T:2021:763.

[34] Silvia Pietrini, 'Italy: The Court of Milan rejects request for technical expertise to end competition dispute through conciliation (7 Pixel / Google)' (2021) Concurrences.

Even more recently, as a follow-on action to the same *Google Shopping* case, Price Runner (a price comparison service) commenced a private enforcement case against Google for 2.1 billion EUR at the Patent and Market Court in Stockholm[35], for diverting its traffic, and so profits, because of Google giving an unfair advantage to its own product comparison service. Price Runner published a press release containing two strong statements, first 'since the violation is still ongoing the amount of damages increases every day', and second, 'Price Runner […] is expecting the process to take several years'. It is also interesting to note that the company's press release includes an estimation of the harm sustained by consumers, which would, according to Price Runner, account for an overcharge of 12–14% in the prices of the offers shown in Google's own shopping-comparison services.

In France, two additional damages cases targeted Google's practices. In *Google/Oxone*, a telephone services company alleged that Google illegally suspended its Ads account. Interestingly, this case is considered a 'stand-alone' action, where the claimant obtained 1.2 million EUR of damages from Google.[36] The platform announced that they will appeal the decision. In *Google/Leguide*, the Paris Court of Appeal focused on the question of jurisdiction in a follow-on damages claim also related to the *Google Shopping* case. The Paris Court of Appeal confirmed French jurisdiction over Google's liability for damages suffered by Leguide (price comparison engine editor).[37]

## 2. Consumers of online platforms suffering from anticompetitive conducts

Competitors and sellers in digital markets are closely followed in these new developments by consumers.

The Portuguese consumer group 'Ius Omnibus' announced on the 22nd of March 2022 that they have submitted two actions for consumer compensation to the Portuguese Competition, Regulation and Supervision Authority. First, they claim that Portuguese consumers suffered from a passed-on 30% fee, set anticompetitively by Apple to app developers[38] (sounds familiar?). Second, consumers also faced a passed-on 30% commission set anticompetitively by

[35] Price Runner, Press release, (07 February 2022) 'PriceRunner sues Google for 2.1 billion', <PriceRunner sues Google for 2.1 billion euros>, accessed 08 May 2022.

[36] Michaël Cousin, 'The Paris Commercial Court imposes a €1.2 million fine on a Big Tech company for abuse of dominant position against a telephone directory services company (Oxone Technologies/Google)' (2021) e-Competitions.

[37] Rafael P. Amaro, Malik Idri and Bastien Thomas, 'Private Enforcement of Antitrust Law in France' (Apr. 2021 – Nov. 2021) (2022) Concurrences.

[38] Press release, Ius Omnibus, 'Popular action for the compensation of consumers following Apple's anticompetitive practices' (2022).

Google when entering into contracts with Android equipment manufacturers and app developers.[39] In both cases, Apple and Google, would have been able to set anticompetitive terms and conditions with the developers while their 'excessive value' was then passed on to consumers.

On another side of GAFAM (Google/Apple/Facebook/Amazon/Microsoft), a class action was filed in the US against Facebook in December 2020, following antitrust lawsuits brought by the FTC and 48 attorneys general. The class action seeks treble damages to compensate for Facebook's abuse of its dominant position, which allegedly allowed the company to implement dark patterns causing 'consumers to pay a higher price than they would freely choose' as well as allowing Facebook to 'sell its ads at higher prices than they would otherwise garner'.

In the UK, Dr Liza Lovdhal Gormsen made headlines when she announced the launch of an opt-out class action in January 2022 to the Competition Appeal Tribunal for a minimum of 2.2 million pounds directed against Meta.[40] The class action is brought in order to compensate for Meta's exploitative abuse of imposing unfair trading practices and unfair prices to consumers. The Competition Appeal Tribunal, by an order dated 15 March 2022, allowed the class representative to file a case against Meta.[41] The stand-alone claim for damages may go forward.

Finally, we should not forget the unobserved data: how many private settlements have in actual fact been reached instead of engaging in judicial litigations? How many undertakings forced out of the market were in a situation where monetary compensation would not allow them to re-enter the market? How many consumers are unaware that they are being exploited in their use of platforms? How many undertakings, dependent on an ecosystem in a concentrated market, expect retaliation should they come forward with a competition law claim?

## IV. Specific challenges raised by digital markets for businesses and consumers claiming damages

The issues raised by digital markets could be classified in three categories:

– Transversal issues when it comes to regulating digital markets, not specific to competition law nor to private enforcement – here one could

[39] Press release, Ius Omnibus, 'Popular action for the compensation of consumers following Google's anticompetitive practice' (2022).

[40] BBC News, 'Meta faces billion-pound class-action case' (2022).

[41] Competition Appeal Tribunal *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others* Case No: 1433/7/7/22, [2022].

think of the online architecture and exploitation of consumer's cognitive biases, which can impede consumers in detecting an infringement and so to file a claim for damages;
- Well-known gaps in the Damages Directive, which are not specific to digital markets, but where digital markets might pose an extra challenge, as an example, the fact that there is no harmonized class actions in the EU;
- And finally, the specific challenges raised by digital markets for businesses and consumers claiming damages following an abuse of dominance, which is the focus of the following section.

As a reminder, the two main specificities of private enforcement are that, one, private parties file a damages action only if they are incentivized to do so, and two, they claim for the full compensation of the harm they suffered following an anticompetitive conduct on the market. Then, could the characteristics of the digital economy be a challenge to the private enforcement of competition law?

When claiming damages, private parties must prove that an anticompetitive conduct existed/exists; establish the resulting harm; as well as the causal link between the harm and the anticompetitive conduct that resulted in a loss; and finally, they must quantify the specific damages they claim.

This section demonstrates that abuse of dominance in digital market adds extra challenges for private parties when it comes to characterizing and compensating the damages they sustained. Proposals on how to alleviate these extra hurdles are also provided.

## 1. Characterizing damages, should the presumption of harm caused by cartels be extended to abuse of dominance in digital markets?

Follow-on damages actions should be more attractive for private parties, with the infringement being established already. Indeed, Article 9 of the Damages Directive states that 'Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.'

If the infringement is established beforehand, the claimant still needs to demonstrate that they suffered from a loss resulting from that anticompetitive infringement. To this aim, the Damages Directive provides in Article 17(2)) a rebuttable presumption of harm, that is, that cartel infringements cause harm. Although this presumption is under Article 17, which is related to the quantification of harm, per the Directive, cartel claimants still need to quantify

the harm; indeed, per recital 47, the 'presumption should not cover the concrete amount of harm'.

Importantly, the Damages Directive only sets a minimum level of protection against anticompetitive behaviours that cause harm to customers and consumers. Hence, some Member States decided to go further and to expand the presumption, either in relation to the amount of harm, or by making it applicable also to non-cartel anticompetitive conducts. Lena Hornkohl makes a comparative analysis of the different Member States' approaches.[42] The author differentiates between altering the definition of cartels; extending the presumption of harm to any violation of competition law (rather than just cartels); extending the cartel affectedness; or introducing a presumption relating to a concrete amount of harm.

While it is legally possible, why would we specifically need to extend this presumption of harm to also cover the abuse of dominance in digital markets?

To answer this question, let's take a step back and reflect on the reasons behind Article 17(2). The presumption of harm for cartels was introduced on two main grounds: the secret nature of cartels which increases the information asymmetry, and, per experience, cartels result in overcharges.

First, are not all anticompetitive conducts secret by default? This thought put aside, Cyril Ritter discusses four alternative, good reasons to apply such a presumption that include 'effectiveness'[43]. This rationale is understood by the author as when 'there is a policy interest in increasing the effectiveness of enforcement, or strengthening the claimant's position', when, for example, there is an overly strong information asymmetry.

Recital 47 of the Damages Directive states that it is 'appropriate' to limit this presumption to cartels, 'given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.' Should the appropriateness of the limitation of the presumption be challenged now?

When it comes to abuse of dominance in digital markets, the information asymmetry is more than ever present. With consumers unaware of the business model of the platform they are using, consumers may be unaware of the harm caused to them when their cognitive biases are being exploited. Regarding the collection of evidence necessary to prove the harm, the length of the public enforcement cases in digital markets speaks volumes. The information asymmetry is even stronger in abuse cases in digital markets for consumers because they do not have the full understanding of the mechanisms behind

[42] Lena Hornkohl, 'The presumption of harm in EU private enforcement of competition law – effectiveness vs overcompensation' (2021) 6 ECLIC 29–59.

[43] Cyril Ritter, 'Presumptions In EU Competition Law' (2018) 6 Journal of Antitrust Enforcement 198–212.

the 'price' they pay for the service they use or the goods they are purchasing. Whether consumers pay with their data, or their choice is being influenced by the online architecture of the platform, they cannot detect if the platform increased their data collected. Nor can they tell if they are paying a higher price on an online booking platform, because of the data collected by the platform on their behaviour, or, in fact, because they made the choice that the online architect led them to. The damages are less visible.

Secondly, the presumption of harm for cartels was introduced under the experience rules[44], following a study on cartels conducted by Connor and Lande, where they found overcharges in 93% of the cases in their sample.

As seen in the previous sections, companies operating in digital markets do not have a 'uniform' business model. When they engage in an anticompetitive conduct taking the form of an abuse of dominance, the resulting harm can take many shapes (loss of profits, loss of quality, exclusion from the market, decrease of innovation, loss of choice), potentially suffered by either or both businesses and consumers. It is then not possible to replicate the same study as the one provided by Connor and Lande for the Oxera report, which would identify the occurrence of a harmonized theory of harm that was an overcharge following cartels.

However, we could think of two proxy variables as indicators of whether abuse of dominance cases in digital markets do result in harming consumers or businesses namely, whether the public enforcement case was opened following a complaint[45] (as an indicator of a potential harm for businesses) and, for consumers, whether the decision from the Commission mentioned the occurrence of a harm specifically affecting consumers.

Schweitzer and Gutman provide an overview of case-law on unilateral practices in the digital sector[46], one of their sections focuses on the public enforcement at EU level, where they review 15 cases that were initiated, completed or partially completed. Among these 15 cases, which were already a very limited sample, there are only four decisions[47] and one statement of closure of the relevant proceedings[48]. This can be explained by two reasons: the cases are very recent and take a very long time. Indeed, in this sample, the European Commission opened proceedings in 8 cases since 2019[49], without delivering a decision yet.

[44] Hornkohl (n 42).

[45] In this section, a complaint is understood as a formal or informal complaint brought to the attention of the EU Commission before the initiation of the proceedings.

[46] Heike Schweitzer and Frederik Gutmann, 'Unilateral Practices in the digital market: An overview of EU and national case law', (2021) e-Competitions.

[47] AT.39530 *Microsoft*; AT.39740 *Google Search (Shopping)*; AT.40099 *Google Android*; AT.*40411 Google Search (AdSense)*.

[48] AT.39154 *iTunes*.

[49] AT.40670; AT.40462; AT.40703; AT.40452; AT.40437; AT.40652; AT.40716; AT.40684.

The sample is too small to try to infer significant results from it, so the aim here is rather to tentatively hint at the following observations. First, in 6 cases the proceedings were opened following a complaint from a customer or a business partner[50], and there is no information on 7 cases[51]. Secondly, for the 4 decisions rendered by the Commission, there is either a section or several paragraphs in the commitment or prohibition decision specifying the potentiality of harm to consumers because of the anticompetitive conduct at stake.

Again, this analysis would need a larger and more comprehensive case sample. However, a certain trend can be observed in relation to complaints from customers or business partners, which makes sense since there are no incentives for them to file an extremely costly stand-alone damages action. Instead, they can provide valuable information to the Commission and, as seen before, we might then expect follow-on private enforcement. It would be interesting to see if this trend is to be confirmed for the decisions that will follow the 8 ongoing proceedings opened by the Commission in the digital sector since 2019. These decisions are also expected to confirm the practice of the Commission to dedicate several paragraph points of its decision to the potentiality of harm for consumers because of the abuse of dominance.

The introduction of a presumption of harm for abuse of dominance in the digital market might be justified by an effectiveness rationale, and confirmed by experience rules. If so, it would only be useful paired with the following proposal, namely to allow for private enforcement remedies and injunctions to be seen as an alternative to monetary damages, for which the burden of proof in quantifying the loss suffered is excessive.

## 2. Compensatory damages or protecting private parties: remedies and injunctions

Is the monetary compensation of anticompetitive conduct relevant in digital markets? In a paper questioning the expectations of claims for damages following the General Court ruling in the *Google Shopping* case, we argued with Reed[52] that in fast-moving, innovative and concentrated markets, if competitors or sellers exited the market, monetary compensation would not allow them to

[50] AT.39530 *Microsoft*; AT.39740 *Google Search (Shopping)*; AT.40099 *Google Android*; AT.40411 *Google Search (AdSense)*; AT.40437 *Apple*; AT.40652 *Apple*.

[51] AT.40670 *Google – Adtech and Data-related practices*; AT.40153 *Amazon*; AT.40462 *Amazon*; AT.40703 *Amazon*; AT.40452 *Apple*; AT.40716 *Apple*; AT.40684 *Facebook*.

[52] Jeanne Mouton and Lewis Reed, Following the Google Shopping Judgment, 'Should We Expect a Private Enforcement Action?' (2022) 13 Journal of European Competition Law & Practice 154–163.

'return' to the situation that would have prevailed should the infringement have not occurred. In this situation, one should consider the aim of remedies, with their potential to achieve a structural change on the market.

Public enforcement of competition law allows for remedies and injunctions, so the aim of this section is to balance the advantages of private enforcement remedies and injunctions *vs.* all the difficulties that can arise from compensatory damages following abuse of dominance in digital markets.

Gal and Petit considered recently three proposals of radical restorative remedies for digital markets.[53] Cauffman investigated the possibilities of private parties bringing injunctions over a decade ago.[54] Hence, the approach of revisiting the idea of traditional antitrust tools because of the specificities of private enforcement or digital markets is not new. Here, however, we are considering how remedies and injunctions could solve the 'quantification' obstacle of damages in digital markets.

The added complexity of quantifying damages differs according to the various theories of harm and the type of victims. Even before computing damages, businesses have low incentives to file damages claims in a very concentrated market, where they could expect retaliation. If a business was excluded from the market, they could file a claim for lost profits, but it would not resolve the competitive issue on the market itself, which would be even more concentrated with a competitor, or complementor gone and not able to re-enter the market even if they obtain monetary compensation. On the other hand, businesses can also be exploited or face unfair terms when dealing with platforms. In such cases, the quantification of damages can be even trickier, because it would not amount to a comparison of a situation 'with profits' and 'without profits', but of a situation 'with profits that suffer from exploitation or unfair contractual terms' and 'a situation that would have prevailed should the platform have not been abusing its dominant position'.

Even so, the quantification complexity really reaches its peak when it comes to consumers. Taking the example of a zero-priced market, where consumers have access to a service for 'free', in exchange for their data being collected. How could the loss caused by excessive data collection be quantified? Competition on online platforms can also concern innovation, quality, relevance of results, where there is no identifiable monetary overcharge before, and after the infringement, while the Damages Directive only foresees monetary damages.

Article 3 of the Damages Directive states that 'Full compensation shall place a person who has suffered harm in the position in which that person would have

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[53] Michal Gal and Nicolas Petit, 'Radical restorative remedies for digital markets' (2021) 37 Berkeley Technology Law Journal 37.

[54] Caroline Cauffman, 'Injunctions at the request of third parties in EU Competition law' (2010) 17 Maastricht Journal of European and Comparative Law 58–86.

been had the infringement of competition law not been committed.' However, when it comes to abuse of dominance on digital markets, full compensation cannot achieve this goal, which leaves the question open, should we make remedies and injunctions available to private parties?

Remedies and injunctions would not fulfil a compensatory goal, but instead a goal of deterring anticompetitive infringements and restoring a level playing field. Both structural remedies and injunctions (to cease the abuse of dominance) would ultimately add to the protection of the interests of private parties. They would prevent harm from continuing, in a situation where private parties are not incentivised to file a claim for damages – when they actually realise that they sustained damages – and where the quantification of the harm is extremely difficult.

As Cauffman stresses, private enforcement of competition law aims to prevent antitrust infringements, but this goal became less visible in the White paper[55] issued during the Damages Directive's preparatory process, and then in the Directive itself. While acknowledging that damages actions help ensure the full effectiveness of Articles 101 and 102 TFEU, the Directive puts the emphasis on 'compensation'.

Bringing the attention of private parties to cease and desist injunctions, or calling for private enforcement remedies, would for the reasons stated above be more efficient in protecting private parties than an unenforceable right to full compensation.

## V. Conclusion

If literature reviews the theories of harm according to the specificities of digital markets, private enforcement is not about sanctioning a potential effect, but about compensating real damage to private parties. For example, it is theoretically possible for public enforcement to sanction a risk of market eviction, but in a claim for damages the private parties would need to prove causality and quantify their loss. Public enforcement sanctions a hypothetical damage to competition while private enforcement focuses on actual damage. If one thinks that public enforcement is struggling in digital markets, the obstacle is even higher for claims for damages.

The difficulties posed by private enforcement in digital markets explain the sparse case-law observed in the European Union. However, one, there may be unobserved data (private settlements) in this context, and two, should recent

[55] Cauffman (n 54).

cases succeed, we might observe more claims for damages where the harm is widespread and can affect the entire ecosystem of a platform.

In the last section, the paper suggests some methods that could increase incentives and effectively strengthen private enforcement in digital markets. They include, first, to extend the presumption of harm, currently foreseen only for cartels, to abuse of dominance in digital markets. Such approach could be justified on the basis of efficiency, and confirmed by experience rules, the very same reason the presumption of harm was included in the Damages Directive with respect to cartels. Second, since this presumption of harm only means a shift of the burden of proof concerning the competitive harm, this paper suggests bringing the attention to private parties to injunctions and calls for private remedies in order to solve the quantification and compensation issue.

A following step would be to extend a proposition made by Benjamin Lehaire who suggested awarding a lump-sum for competitive damages.[56] The author suggests sharpening the concept of competitive damages by distinguishing competitive consumer harm and competitive business harm. Competitive consumer harm would be 'the harm suffered by the purchaser of a good and the user of a massively available service which has been the object of an anti-competitive practice'; by encompassing a multitude of victims, the latter has a collective character. The competitive business loss would be the consequence of 'operations of any kind related to the exercise of an industrial, commercial or financial activity in connection with anti-competitive practices.' The advantage of this distinction would be to open up a lump-sum award for consumer competition damages, which would not only circumvent the obstacle of small amounts of often diffused harm, but it would also alleviate the evidentiary difficulties that consumers must overcome. A lump-sum award would also incentivise consumers to seek redress. In such a procedure, the judge would still have a role to play, since lump-sum assessment implies an overall assessment at the discretion of the judges, based on evidence. Benjamin Lehaire draws a parallel between his proposal and nominal damages awarded under Quebec law for victims of anticompetitive actions. The latter is a lump-sum award made when the assessment of the harm is so complex that it is 'almost impossible to attach an exact figure' to even 'roughly cover the harm'. The lump-sum assessment, as proposed by Benjamin Lehaire[57], inspired by solutions adopted in the context of unfair competition litigations in France and in Quebec civil law, would make it possible to replace an economic assessment of the competitive loss with a legal assessment for the competitive loss of

[56] Benjamin Lehaire, 'Réparer le préjudice concurrentiel : pour une évaluation forfaitaire du préjudice concurrentiel de « consommation »' (2018) n°78 Revue Lamy de la concurrence 43–50.

[57] Lehaire (n 56).

'consumption'. Although Benjamin Lehaire does not specifically suggest the application of his proposition to digital markets, it would certainly compensate for both the issue of quantifying and compensating harm in digital market, as characterized in this paper.

Finally, it would be interesting to update the 2013 Guidance document from the EU Commission on the quantification of harm with the aim to answer the following question: how to construct a counterfactual in fast innovative digital markets? Updating the guidance document would be a call answering the growing need of experts from different backgrounds, not only economists in microeconomics and industrial organisation, but also behavioural economists and data scientists, when it comes to private competition law enforcement in digital markets.

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# Why do Competition Authorities need Artificial Intelligence?

by

Isabella Lorenzoni*

**CONTENTS**



## *Abstract*

Recent technological developments are transforming the way antitrust is enforced as well as the way market players are infringing competition law. As a result, enforcers are starting to equip themselves with sophisticated digital investigation tools. This paper explores this interest in building an Artificial Intelligence (AI) arsenal for the fight against algorithmic infringements. What are the key factors motivating regulators to develop their own technological tools to enforce competition law? Building on interviews with a number of competition authorities, this paper finds that changes in digital markets, the need for enforcers to reverse-engineer companies' algorithms in order to better understand their implications for competition law, the need to enhance efficiency and keep pace with the fast

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Article received: 15 June 2022, accepted: 6 August 2022.

evolution of the digital economy, and, finally, the decrease in leniency applications, are all reasons for which competition authorities should strive for more innovative and alternative means to boost their *ex officio* investigations.

***Résumé***

Les récents développements technologiques transforment la manière dont les règles de la concurrence sont appliquées et la manière dont les acteurs du marché enfreignent le droit de la concurrence. En conséquence, les autorités ont commencé à se doter d'outils d'investigation numériques sophistiqués. Cet article explore cet intérêt à construire un arsenal basé sur l'Intelligence Artificielle pour lutter contre les infractions algorithmiques. Quels sont les principaux facteurs qui motivent les autorités à développer leur propre équipement technologique pour faire respecter le droit de la concurrence ? En s'appuyant sur des entretiens avec certaines autorités de la concurrence, cet article constate que les changements survenus sur les marchés numériques, la nécessité d'appliquer la rétro-ingénierie aux algorithmes des entreprises afin de mieux comprendre leurs implications pour le droit de la concurrence, la nécessité d'améliorer l'efficacité et de suivre le rythme de l'évolution rapide de l'économie numérique, et enfin la diminution des demandes de clémence, sont autant de raisons pour lesquelles les autorités de concurrence devraient rechercher des moyens plus innovants et alternatifs pour dynamiser leurs enquêtes.

**Key words:** Artificial Intelligence; Competition law; enforcement; digital economy; digital market.

**JEL:** K21, K29

## I. Introduction

Competition law is not immune to the so-called 'fourth industrial revolution' (or AI revolution),[1] as developments in technology are transforming the way antitrust is enforced and the way market players are infringing competition law. In fact, antitrust is not a static domain but changes within the evolution of society and its economy.[2] An economy which is, nowadays, a digital economy

[1] Garikai Chimuka, 'Impact of Artificial Intelligence on Patent Law. Towards a New Analytical Framework – [the Multi-Level Model]' (2019) 59 World Patent Information 101926.

[2] Schrepel Thibault is referring for example to 'Antitrust 3.0' which 'appeared in the early 2010s when antitrust agencies have shifted their focus on the issues related to the digital economy'. Thibault Schrepel, 'Computational Antitrust: An Introduction and Research Agenda' (2021) 1 Stanford Journal of Computational Antitrust, 1 2.

because of the relevance that Big Data, AI and technology in general play in our daily lives.[3]

Competition law needs to be adapted and shaped according to the changes in economic dynamics[4] as 'the digitalization of markets requires the adaptation of some rules and mechanisms.'[5] An example of how digitalization affects competition can be seen in the recent debate about the standard that should be used to enforce antitrust. In the U.S., the dominant Chicago School advocates for 'consumer welfare' as the standard for enforcing competition rules. It focuses on 'consumer surplus', understood as the benefits gained from consumption of goods and services.[6] However, this standard has lately been criticised for being anachronistic, as it does not represent the dynamics and evolution of the modern digital market. Some courts have used the 'consumer welfare' standard to assess an infringement of competition law only when there is 'an increase in price or reduction in quality'[7], which does not necessarily mirror the reality of the digital market, in which goods and services are often provided to consumers free of charges.[8] An emerging current called the 'new Brandeis School'[9] advocates for a different standard which does not focus only on the outcomes (low prices and efficiency) but also on other aspects.[10] In the digital economy, where the 'zero-price' policy applies to consumers, it

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[3] Digital revolution affects economy <https://ec.europa.eu/jrc/en/research-topic/digital-economy> accessed 7 March 2022. See also Pınar Akman, 'Competition Policy in a Globalized, Digitalized Economy' (World Economic Forum White paper 2019), according to which a 'truly 'digital economy' is one in which businesses from across the industrial spectrum invest in digital capabilities and make the most productive use of them. As digitalization continues to transform the economy, and the line between offline and online businesses further blurs […]" 5.

[4] Michael L. Katz and A. Douglas Melamed, 'Competition law as common law: American express and the evolution of antitrust' (2020) 168 University of Pennsylvania Law Review 2061 citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) "As the Supreme Court explained in *Leegin*, '[j]ust as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions.' 2064.

[5] Thibault Schrepel, 'Antitrust Without Romance' (2020) New York University Journal of Law & Liberty 326.

[6] Marshall Steinbaum and Maurice E. Stucke, 'The Effective Competition Standard A New Standard for Antitrust' (2018) Roosevelt Institute, 15.

[7] 'A "prototypical example of antitrust injury" is that consumers "had to pay higher prices (or experienced a reduction in the quality of service) as a result of a defendant's anticompetitive conduct".' *Mathias v. Daily News*, L.P., 152 F. Supp. 2d 465, 478 (S.D.N.Y. 2001) in Steinbaum and Stucke (n 6) 16.

[8] Akman (n 3).

[9] <https://www.pbwt.com/antitrust-update-blog/a-brief-overview-of-the-new-brandeis-school-of-antitrust-law> accessed 28 March 2022.

[10] Akman (n 3) 7.

is difficult to measure their 'surplus' in terms of monetary transactions.[11] If it is true that consumers do not spend money on certain online items,[12] they nevertheless 'pay' with their attention and data.[13] Hence, only focusing on the increase in price does not give justice to the real dynamics of our digital economy where data, innovation, and quality should be the new consumer surplus.[14] At the European Union (EU) level, consumer welfare is not the only paradigm used to enforce competition law; European Competition Authorities use it in a broader way to also include innovation, quality, and choice – not only price.[15]

Traditionally, competition authorities had several tools they can rely on to enforce competition law. They are commonly known as 'reactive' and 'proactive' tools. Whistle-blower and leniency programmes fall into the first category. Screening tools, market studies and empirical economic analysis are used to flag potential abnormal behaviours in industries and companies, where resources should mostly focus on starting *ex officio* investigations.[16] In this digital world, competition authorities are now facing new challenges, as the market structure becomes more complex, undertakings interact with each other in the cyberspace in a way that can hurt consumers and other competitors, and a few big tech giants, also known under the name of 'GAFA', hold an 'ultra-dominant' position.[17] In this new scenario, competition authorities seem to be aware of the need to reinforce the pool of 'pro-active' enforcement tools, as computer science and data engineering expertise is needed as well as sophisticated digital investigation tools which have now started to be acquired. Interviews with a number of competition authorities have revealed that the use of AI for enforcement purposes is still in its infancy, but more and more regulators are looking into expanding their units to develop and acquire digital expertise. This paper analyses the key factors motivating regulators to develop their own technological equipment to enforce competition law. It also considers

[11] Akman (n 3).

[12] For instance, consumers do not pay to use WhatsApp or other applications. Steinbaum and Stucke (n 6).

[13] Akman (n 3).

[14] '[…] to provide courts and agencies greater guidance, we first propose the following effective competition standard: Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws' Steinbaum and Stucke (n 6) 29.

[15] Akman (n 3) 7.

[16] OECD, 'Roundtable on ex officio cartel investigations and the use of screens to detect cartels' (2013).

[17] For instance, the General Court defined Google has holding un "undisputed ultra-dominant position […] on the market for general search services", case T-612/17 *Google LLC, and Alphabet, Inc. v. European Commission* [2021] EU:T:2021:763 [180].

whether new tools are needed in order to fight competition infringements in the digital era, and which challenges might arise in this context.

This paper is divided as follows: Section II analyses recent projects of a number of competition authorities that involve the use of AI and other sophisticated enforcement tools. Section III analyses the key factors for developing AI enforcement tools. In particular, enhancing efficiency to keep up with evolving technologies; understanding the structure of the digital market and of companies' algorithms; as well as the decrease of leniency applications are among the reasons why competition authorities should develop their own digital tools for enforcement purposes. Section IV provides an overview of the main legal procedural challenges that competition authorities might have to face when (and if) they fully develop AI systems to enforce competition law. Problems related to transparency, reasoning of decisions, as well as the 'equality of arms' issue are among the main problems that arise when AI is involved. Section V concludes with some final remarks.

## II. A glance inside Competition Authorities and their AI projects

Competition authorities are starting to look into developing their own in-house digital investigation tools. Some have already developed digital units with AI systems applied to real cases. Others have started to hire IT experts to bring digital knowledge into the competition agency and help case handlers to understand how competition law enforcement can benefit from digitalisation. Other competition authorities have projects underway that they hope to extend to real cases in the near future.

The Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*) has put in place a pilot project based on data analysis, AI, and machine learning (ML) techniques (for example classification, clustering and reinforcement learning) to investigate online platforms such as Amazon, as well as their ranking algorithms, in order to detect potential competition issues such as price discrimination and collusion. The software used is able to investigate the parameters for Amazon's algorithm to decide the winner of the 'Buy Box'. A web-scraping method was used on a daily basis for a month to collect data of some products in order to create a database. Subsequently, a supervised ML algorithm, 'Random Forest', was implemented and the classification model made it possible to identify some of the parameters used by Amazon's algorithm to decide the winner of the Buy Box.[18]

[18] Antonio Buttà, Andrea Pezzoli, Manuel Razza and Emanuel Weitschek, 'Inferire il funzionamento degli algoritmi nelle piattaforme di e-commerce con il machine learning –

The Greek Competition Authority (Hellenic Competition Commission, hereinafter: HCC) has set a Forensic Investigation Detection Unit, which has developed its own data collection platform (Data Analytics & Economic Intelligence Platform) that gathers publicly available data from different sources (retail, fuel, vegetables, fruits prices, and public procurement data).[19] An algorithmic screening tool with linear regression is also used to compare prices between products on a daily basis, observe important changes in the prices, and monitor whether the prices of the same product of different firms rise simultaneously over a time series. Both the screening tool and the platform are mainly used for cartel detection and help the HCC to conduct a first screening of the market and to identify suspicious industries, which will be prioritised when opening an *ex officio* investigation.[20]

In 2018, the Spanish Competition Authority created an Economic Intelligent Unit, which is in charge of strengthening *ex officio* investigations and detect anticompetitive behaviours by developing new tools based on data mining, quantitative techniques, and forensic analysis that help to identify collusive patterns in the data.[21] '[M]ore complex statistical and econometric techniques, network analysis and machine learning methods, both supervised and unsupervised, are beginning to be applied.'[22] In particular, due to the possibility of accessing large amounts of data, 'automated detection tools'[23] are particularly prominent in cases of bid rigging cartels in public procurement.[24] The Unit is also in charge of providing investigation tools designed to face new challenges of the digital reality, as well as for the analysis and detection of behaviours such as algorithmic collusion.[25]

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aspetti di tutela della concorrenza e del consumatore' (Ital-IA 2022 – Workshop AI per la Pubblica Amministrazione, February 2022).

[19] Ioannis Lianos, 'Computational Competition Law and Economics: Issues, Prospects – An Inception Report' (2021) Hellenic Competition Commission.

[20] Ibid.

[21] <https://www.cnmc.es/en/ambitos-de-actuacion/competencia/unidad-de-inteligencia-economica> accessed 27 March 2022.

[22] Lynn Robertson, 'Latin American and Caribbean Competition Forum – Session I: Digital Evidence Gathering in Cartel Investigations – Contribution from Spain' (OECD 28–29 September 2020).

[23] Competition Policy International 'CPI Talks…with Cani Fernández' (*CPI* 27 September 2020) <https://www.competitionpolicyinternational.com/cpi-talks-with-cani-fernandez/> accessed 27 March 2022.

[24] Kyriakos Fountoukakos, 'Interview with María Luisa Tierno Centella (CNMC) by Kyriakos Fountoukakos (Herbert Smith Freehills)' (3rd Cartels Workshop: An advanced seminar on substantive and procedural EU developments Workshop I – Substantive Issues, Wednesday 19 January 2022 – Concurrences).

[25] <https://www.cnmc.es/en/ambitos-de-actuacion/competencia/unidad-de-inteligencia-economica> accessed 27 March 2022.

Furthermore, since 2018, the UK Competition and Markets Authority (hereinafter: CMA) has built what is now a fully developed Data, Technology and Analytics (hereinafter: DaTA) Unit with a team of around 50 people including data scientists, lawyers and economists.[26] The unit works with data engineering, Machine Learning (ML) and Artificial Intelligence (AI) solutions in consumer, merger and antitrust cases to detect clusters of suspicious market movements through a network analysis, or use natural language processing to review internal documents received from companies. Moreover, this Unit helps the CMA to understand how companies' algorithms work, and for which purpose they use AI and ML, as well as how they use the data they collect, in order to infer whether or not the CMA should intervene and if a breach of competition or consumer law can be foreseen.[27]

Finally, it is worth mentioning that the Polish Office of Competition and Consumer Protection (hereinafter: UOKiK)[28] has launched a project in the field of consumer protection with the aim to encourage the use of AI to detect unfair contract terms, before a violation actually takes place. AI technologies will then be employed to automatically analyse online contract templates, and to look for potential unfair terms and conditions, facilitating consumer protection enforcement.[29] The Polish government has put in place a service called 'GovTech Polska'[30] in order to develop innovative digital solutions for the public sector[31] by connecting 'public administration with entrepreneurs, start-ups, the scientific community, and citizens'[32], and to contribute to the 'technological revolution'.[33]

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[26] Helena Quinn, Kate Brand and Stephan Hunt, 'Algorithms: helping competition authorities be cognisant of the harms, build their capabilities and act' (2021) 3 Artificial Intelligence and Competition Law – Concurrences 5.

[27] Ibid; <https://competitionandmarkets.blog.gov.uk/2018/10/24/cmas-new-data-unit-exciting-opportunities-for-data-scientists/> accessed 10 March 2022. Competition & Markets Authority, 'Algorithms: How they can reduce competition and harm consumers' (2021) 50–51.

[28] <https://uokik.gov.pl/consumer_protection_in_poland.php> accessed 1 September 2022.

[29] <https://www.gov.pl/web/govtech/specjalisci-od-ai-poszukiwani-konkurs-GovTech> accessed 31 August 2022. Translated by the author.

[30] <https://www.gov.pl/web/govtech-en> accessed 1 September 2022.

[31] 'The direct recipient of GovTech services is the broadly understood local and central administration, as well as other entities performing public tasks, such as hospitals, schools, or transport companies. However, the effects of technology services always affect citizens: service recipients of administration' <https://www.gov.pl/web/govtech-en> accessed 1 September 2022.

[32] <https://www.gov.pl/web/govtech-en/administracja> accessed 1 September 2022; 'The main objective of the program is to increase the efficiency of implementing innovations by the public sector in dialogue with the society, private and foreign sectors. It is connected with the implementation of best practices and coordination of the state policy in the field of innovation.'

[33] <https://www.gov.pl/web/govtech-en/misja> accessed 1 September 2022.

From interviews conducted in this field, it emerged that the aim of most competition authorities is to expand their digital enforcement tools, but this process would take time in many cases. Among the problems that have been flagged, not having enough data is by far the most challenging one, as it makes AI impossible to use. Also, some competition authorities do not have enough resources to dedicate to the development of in-house AI systems, or not enough cases that would require the use of AI.

## III. Key factors for developing AI enforcement tools

As seen in the previous section, we can grasp a general trend and an interest among competition authorities to invest in digital technologies and participate in the debate about enforcing competition law in the digital era. Even smaller agencies, which have not (yet) developed any digital tools, are already participating in working groups within the European Competition Network to learn from the most technologically advanced competition authorities and exchange best practices.[34] From the interviews conducted so far, it clearly emerges that most of the competition authorities aim to expand their own technological capability in the near future. But why does the 'AI race' exist among competition authorities? Which are the factors motivating enforcers to invest in AI? The following section is dedicated to highlighting some of the reasons why enforcers are, and should explore and take advantage of the new opportunities provided by AI for the enforcement of competition law.

### 1. Enhancing efficiency

One obvious reason that may incentivise competition authorities to invest in digital tools is to enhance efficiency, in terms of accuracy of case analysis and in terms of time. Enforcers are often criticised for their time-consuming investigations,[35] which does not go hand in hand with the fast pace at which the digital market moves. In fact, after a competition authority has reached a decision and before a remedy is ordered, it may be needed to re-examine

[34] See for instance the 'Working group on Digital Investigations and Artificial Intelligence' in Conseil de la Concurrence of Luxembourg, 'Annual report 2020' (2020) 19.

[35] Javier Espinoza, 'EU Struggles to Build Antitrust Case against Amazon' *Financial Times* (2021) <https://www.ft.com/content/d5bb5ebb-87ef-4968-8ff5-76b3a215eefc> accessed 28 March 2022.

the market and the case, in order to see if the economic dynamics of the digital market have in fact already changed.[36]

Given their increasing computational power, and thus high speed of analysing vast amounts of data, AI systems are well suited to replace and be even better at some administrative tasks.[37] AI can enhance efficiency and it is for this reason that governments use it already in many different sectors.[38] Competition law enforcement should not be left behind.

Efficiency can be obtained by implementing tools that can help to analyse data faster and to respond to different requests.[39] For instance, interviews with law firms and competition agencies have revealed that sophisticated document management software, with pattern recognition features (ML solutions), had already been employed to identify documents covered by legal professional privilege, and to handle more efficiently huge amounts of data gathered during dawn raids. Furthermore, the Swedish Competition Authority (*Konkurrensverket*) is working on a project that uses AI solutions, such as natural language processing systems, to identify names and anonymize texts, and subsequently, to identify those covered by confidentiality before giving out the documents. These processes would likely help authorities to be more efficient and save time.

## 2. Changes in the market structure: online markets

Another reason for competition authorities to acquire digital skills is to better understand the modern 'digital ecosystem'[40] and its competition dynamics. Understanding and being able to efficiently monitor the digital market is a key element to enforce competition law.

[36] D. Daniel Sokol and Jingyuan Ma, 'Understanding Online Markets and Antitrust Analysis' (2017) 15 Northwestern Journal of Technology and Intellectual Property 43, 52.

[37] Vivienne Brand, 'Corporate Whistleblowing, Smart Regulation and Regtech: The Coming of the Whistlebot?' (2020) 43(3) University of New South Wales Law Journal 1. See also Jennifer Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' (2019) 39 Legal Studies 636; Herwig C.H. Hofmann, 'An Introduction to Automated Decision-making (ADM) and Cyber-Delegation in the Scope of EU Public Law' (2021) Indigo Working Paper.

[38] Cary Coglianese and Alicia Lai, 'Antitrust by Algorithm' (2022) 2 Stanford Journal of Computational Antitrust 1 10–11; AlgorithmWatch, 'Automating Society: Taking Stock of Automated Decision-Making in the EU' (2019).

[39] Marcela Mattiuzzo and Henrique Felix Machado, 'Algorithmic Governance in Computational Antitrust – a Brief Outline of Alternatives for Policymakers' (2022) 2 Stanford Journal of Computational Antitrust 23, 27; Schrepel (n 2).

[40] Viktoria H. S. E. Robertson, 'Antitrust market definition for digital ecosystems' (2021) 2 Competition policy in the digital economy – Concurrences 3.

Nowadays, one of the most popular digital business models is the 'multi-sided platform model'.[41] Multi-sided markets are not exclusive to the online world only, as they can be found also in other offline traditional markets.[42] The difference here is the way in which digital platforms operate and how they generate income.[43] In a multi-sided market, digital platforms work as an 'orchestrator' of at least two groups of customers, each of them at one side of the market, interacting with each other, and creating network effects.[44] Several elements that differ from traditional antitrust analysis should be considered.

Firstly, multi-sided platforms often charge only one group of customers and offer free services to the other group.[45] 'Zero-price' markets mean that platforms generate revenues by attracting advertising services. In order to target ads to consumers' needs, platforms have to know what they like, their habits and their preferences.[46] Here is where data becomes vital for this business model, as data is in fact what users 'pay' for enjoying free services.[47] It has also been suggested to consider 'data' as a currency in order to assign monetary value to free services.[48] Hence, at one side of the platform, consumers provide their personal data (collected through their online search history, client email and the like) in exchange for free products, which the platform uses for its 'customers' on the other side of the market.[49] AI data analytics is usually employed to extract information from users' data in order to improve services offered and enable advertisers to best target ads to consumers.[50] Free-of-charge services should be considered within the dynamics of competition as collecting and analysing data has become 'a common strategy in order to compete' with more offline companies breaking into the digital market also 'becoming avid collectors and users of data'.[51]

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[41] Akman (n 3) 5. See also <https://businessmodelanalyst.com/multisided-platform-business-model/> accessed 28 March 2022.

[42] Sebastian Wismer and Arno Rasek, 'Market definition in multi-sided markets' (OECD 21–23 June 2017).

[43] Akman (n 3) 5.

[44] Ibid; Sokol and Ma (n 36); Wismer and Rasek (n 42).

[45] Wismer and Rasek (n 42).

[46] Robertson (n 40).

[47] Ibid.

[48] Wismer and Rasek (n 42) 8.

[49] John E. Villafranco et al., 'Competition Implications of Big Data and Artificial Intelligence/Machine Learning' (White Paper 2/2021 'Artificial Intelligence & Machine Learning: Emerging Legal and Self-Regulatory Considerations' American Bar Association Antitrust Law Section Big Data Task Force <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/feb-21/aba-big-data-task-force-white-paper-part-two-final-215.pdf> accessed 10 March 2022) 11.

[50] Ibid 11.

[51] Ibid 12.

Secondly, another important element to consider is whether a multi-sided market is characterised by 'multi-homing' or 'single-homing'; the former referrers to customers having the choice to easily switch, or simultaneously use, services of competitors' platforms[52]; the latter refers to customers staying with only one platform.[53] This is relevant for competition dynamics, as customers on one side of a 'single-home' market will not change platforms, and so competition to attract them will be fiercer. On the opposite side, competition will be less intense when multi-homing.[54]

Lastly, in multi-sided markets groups of users interact with each other and the more one group uses the platform the more it creates value for the other group.[55] This phenomenon is known as the network effect and online markets can display direct or indirect network effects.[56] Social networks, such as Facebook or Sky, are an example of direct network effects where 'more' users increase the benefits of the service.[57] By contrast, indirect network effects exist when 'more' users on a platform helps to improve the quality of the service by understanding customers' needs.[58] Interactions between users are important to understand the structure of digital markets, as network effects have an impact on prices.[59] '[N]etwork effects transform digital markets into imperfect markets, meaning that the utility one user gives to a good derives not from the good itself, but from the number of other users who are part of the same network.'[60]

In this scenario, antitrust's traditional analytical tools may fail when applied to digital platform models.[61] For instance, market definition becomes more complex and the traditional SSNIP test may not apply.[62] There are also those who suggest using deep learning systems to identify the 'product-market boundaries'

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[52] Akman (n 3) 6.

[53] Wismer and Rasek (n 42) 9.

[54] Ibid 4, 9–11; Villafranco et al. (n 49) 22–23.

[55] Sokol and Ma (n 36) 51.

[56] Ibid.

[57] A social network works better when more people use it. Ibid 51; Akman (n 3) 6; Villafranco et al. (n 49) 15–16.

[58] Sokol and Ma (n 36); Villafranco et al. (n 49) 16.

[59] Akman (n 3) 6.

[60] Virginia Pavel Dobre, 'Old rules for new practices: Tying in the digital era' (2021) 2 Competition policy in the digital economy – Concurrences 35, 39.

[61] Sokol and Ma (n 36) 46.

[62] 'The original SSNIP test does not account for interdependencies between distinct customer groups. In a two-sided market, for example, a price increase for one customer group (side A) leads to changes in demand not only on this side, A, but also on the other side, B. Ignoring such volume changes that emanate from indirect network effects may distort the result of the SSNIP test.' Wismer and Rasek (n 42) 12. Sokol and Ma (n 36) 46.

and to 'understand the dynamics of market structure'.[63] Given the complexity of multi-sided markets, and the challenges to define the relevant market according to traditional competition tools, it is not going too far to speculate on the use of AI as a tool that can help competition authorities to define the relevant 'digital' market. In fact, econometric tools are usually applied and encouraged by the Commission for the definition of the relevant market for antitrust analysis.[64] Since experimentations with ML solutions for market screening are ongoing, which will substitute or at least help the economic analysis traditionally carried out with econometric tools,[65] a parallel conclusion could be drawn for using ML for market definition. It remains to be seen how far competition authorities are willing to go to develop AI tools as well as the evidentiary value in case such systems would actually be implemented.[66]

### 3. The need to reverse-engineer companies' algorithms

Interviews conducted with some competition authorities revealed that the main reason why they are starting to develop in-house technologies is to be able to reverse-engineer and understand how companies' algorithms work, and make sure that they do not distort competition.[67] Enforcers need to develop new tools to be able to better protect consumers and competition from anti-competitive behaviours, especially in the digital world.[68] These tools should put agencies in a better position to understand companies' algorithms, given the fact that '[g]overnments and regulators are at an 'enormous informational disadvantage' relative to technology companies.'[69]

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[63] Yi Yang, Kunpeng Zhang and P.K. Kannan, 'Identifying Market Structure: A Deep Network Representation Learning of Social Engagement' (2021) Journal of Marketing 1.

[64] Commission, 'Commission Notice on the definition of relevant market for the purposes of Community competition law' (97/C 372/03); European Economic & Marketing Consultants, 'Application of econometric methods in market definition' (2005) <https://www.ee-mc.com/fileadmin/user_upload/Market_Definition.pdf>; <https://www.ee-mc.com/expertise/digital-economy/market-definition-digital-economy.html> accessed 28 March 2022.

[65] Rosa M. Abrantes-Metz, 'Proactive vs Reactive Anti-Cartel Policy: The Role of Empirical Screens' (8th European Summer School and Conference in Competition and Regulation, Corfu, Greece, July 2013); Rosa M. Abrantes-Metz and Albert D. Metz, 'Can Machine Learning aid in Cartel Detection?' (2018) CPI Antitrust Chronicle 1.

[66] 'In many cases, authorities refrain from applying complex econometric methods, in particular due to time constraints, lack of proper data or methodical complexity which often comes along with limited robustness and difficulties in interpreting and communicating results.' Wismer and Rasek (n 42) 14.

[67] Buttà et al. (n 18).

[68] Ibid.

[69] Akman (n 3) 16 citing Furman Jason, et al., 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (2019).

This is the idea of 'fight[ing] technology with technology' as '[t]hese intelligent devices will be based on the idea of reverse-engineering algorithms in the hand of antitrust enforcers, with the purpose of understanding the decision-making process functions of their counter-actors […] and also for officials to gain inside expertise on how price software works and are implemented by undertakings.'[70] In fact, business strategies are often delegated to algorithms in the digital economy. Among others, price is often 'decided' by an AI algorithm.[71] Not only undertakings, but also consumers benefit from technological innovations.[72] However, regulators and scholars have raised awareness on how algorithms can also represent a threat for competition law by way of, for example, discrimination or collusion.[73]

Firstly, algorithmic discrimination can occur when different prices are applied to consumers for the same product, without costs being an influencing factor, but only based on their willingness to pay (price discrimination).[74] Preferencing practices involving the use of algorithms are also a case of discrimination, when online platforms favour their own products, as in the *Google Shopping* case[75]; or when they favour products of a company that pays higher commissions by placing its items in a better position than those of its competitors[76], as in the *Trivago* case[77].

Secondly, algorithms can infringe competition law by implementing and facilitating more stable cartels, which would increase the attractiveness of

[70] Niccolò Colombo, 'Virtual Competition: Human Liability Vis-À-Vis Artificial Intelligence's Anticompetitive Behaviours' (2018) 1 CoRe 11.

[71] OECD, 'Algorithms and Collusion: Competition Policy in the Digital Age' (2017).

[72] Ibid. 11 ss, the use of algorithms by businesses and governments and how they may create pro-competitive effects.

[73] Ariel Ezrachi and Maurice E. Stucke, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' (2017) 5 University of Illinois Law Review 1775; OECD (n 63); Bundeskartellamt & Autorité de la concurrence, 'Algorithms and Competition' (2019) Working Paper; Justin Johnson and Daniel D. Sokol, 'Understanding AI Collusion and Compliance' in D. Daniel Sokol and Benjamin van Rooij (eds), *Cambridge Handbook of Compliance* (SSRN 2020); Competition & Markets Authority (n 27); Stefano Azzolina, Manuel Razza, Kevin Sartiano and Emanuel Weitschek, 'Price Discrimination in the Online Airline Market: An Empirical Study' (2021) 16 Journal of Theoretical and Applied Electronic Commerce Research, 2282.

[74] Also known as personalised pricing, Competition & Markets Authority (n 27) 10 ss; Bundeskartellamt & Autorité de la concurrence (n 73) 6; Azzolina et al. (n 73).

[75] Commission Case AT.39740 *Google Search (Shopping)*, 27.06.2017 and case T-612/17 *Google LLC, and Alphabet, Inc. v. European Commission* [2021] EU:T:2021:763. See also Competition & Markets Authority (n 27) 25 ss.

[76] This is the case of so-called 'ranking algorithms'. Competition & Markets Authority (n 27); Bundeskartellamt & Autorité de la concurrence (n 73). See also Buttà et al. (n 18).

[77] Competition & Markets Authority (n 27) 23 and 'Trivago misled consumers about hotel room rates' 2020, in ACCC <https://www.accc.gov.au/media-release/trivago-misled-consumers-about-hotel-room-rates> accessed 22 March 2022.

collusion. For example, the same pricing algorithms could be shared by competitors and be programmed to collude and set higher prices[78] (as in the *Topkins* case[79]) or a third party, that is, a consultancy or an IT company could provide the same software to all its clients and have an interest in generating collusion when their remuneration depends on its clients' revenues[80] (as in the *Eturas* case[81]). Another scenario that is heavily discussed is 'algorithmic collusion', which could occur when (*and if*) autonomous self-learning algorithms learn that the best strategy to maximise their company's profit is to collude with its competitors.[82] This is not yet a real-life scenario, but several experiments have demonstrated the feasibility of this hypothesis.[83] Therefore, enforcers might soon be called to deal with such a situation, and having the right set of tools will help analysing companies' algorithms faster and in a more efficient way. And even if this could be considered a case of tacit collusion, the more companies use AI, the more these practices may become frequent, leading to undesired consequences for competition.[84]

## 4. The decline of leniency applications

Another reason why competition authorities should invest in AI technologies to boost their *ex officio* investigations is the decline in leniency applications, the enforcement tool on which agencies mostly rely to uncover cartels. Leniency programmes have been implemented worldwide since the earlier 90s when

[78] Ibid; OECD (n 71).

[79] OECD (n 71) 28; Johnson and Sokol (n 73); Ezrachi and Stucke (n 73) 1786.

[80] This is the so-called 'hub-and-spoke' scenario. OECD (n 71) calls this category 'parallel algorithms'. See also Ezrachi and Stucke (n 73); Johnson and Sokol (n 73); Bundeskartellamt & Autorité de la concurrence (n 73) 31 ss.

[81] Case C-74/14 *'Eturas' UAB et al., v Lietuvos Respublikos konkurencijos taryba* [2016], EU:C:2016:42.

[82] OECD (n 71); Bundeskartellamt & Autorité de la concurrence (n 73); Johnson and Sokol (n 73); Ezrachi and Stucke (n 73) 1795.

[83] Bundeskartellamt & Autorité de la concurrence (n 73) 45. See also Ai Deng, 'From the Dark Side to the Bright Side: Exploring Algorithmic Antitrust Compliance' (2019 NERA Economic Consulting and Johns Hopkins University); Thomas Fetzer, Damaris Kosack, Heiko Paulheim and Michael Schlechtinger, 'How algorithms work and play together' (2021) 3 Artificial Intelligence and Competition Law – Concurrences 19.

[84] OECD (n 71) 33 ss. according to which '[a]lgorithms can amplify the so called "oligopoly problem" and make tacit collusion a more frequent market outcome.' Ezrachi and Stucke (n 73) 1795 stated that 'conscious parallelism is legal. The question is whether such practices, when implemented by smart machines in a predictable digitalized environment, ought to be condemned.'

the U.S. first adopted its antitrust amnesty programme in 1993.[85] The EU Commission followed with its leniency programme implemented in 1996 and revised in 2002 and 2006.[86]

Under the EU leniency programme, companies participating in a cartel may be granted full immunity from the fines, which would have been eventually imposed on them, if 'sufficient added value' as they can be rewarded for their cooperation by granting partial immunity from fines of up to 50%.[87] The aim of this programme is to detect cartels and obtain direct evidence by the participants, and work as a deterrent and 'a destabilising instrument for the cartels'[88], as it creates distrust among cartelists who may have to race to be the first to seek leniency and have the chance to benefit from 'full' immunity.[89]

According to a study, many of the cartels detected by the Commission in recent years come from immunity applicants.[90] The leniency programme is considered the most effective tool the Commission relies on to uncover secret cartels.[91] However, some scholars have questioned this reactive behaviour of the Commission[92], which seems to 'over-rely' on its leniency programme as the sole methodology to uncover cartels.[93]

Applying for immunity is not an immediate consequence of a weak cartel, as taking such a decision implies a complicated risk analysis, where benefits and disadvantages need to be accurately weighted.[94] Among the disadvantages, besides the most obvious one – the risk of facing private damage actions[95], the uncertainties around the concept of a cartel are considered a factor able to keep away a potential leniency applicant.[96] For instance, the concept of a 'secret cartel' becomes blurry in hypothesis of information exchange, price

[85] OECD (n 16).

[86] Ibid; Peter T. Dijkstra and Jonathan Frisch, 'Sanctions and Leniency to Individuals, and its Impact on Cartel Discoveries: Evidence from the Netherlands' (2018) 166 De Economist 111 112.

[87] Ibid.

[88] Joan-Ramon Borrell, Juan Luis Jiménez and José Manuel Ordóñez-de-Haro, 'The Leniency Program: Obstacles on the way to collude' (2015) 3 Journal of Antitrust Enforcement 149.

[89] Ibid; OECD (n 16).

[90] Johan Ysewyn and Siobhan Kahmann, 'The decline and fall of the leniency programme in Europe' (2018) 1 Concurrences 44.

[91] Ibid; Abrantes-Metz 2013 (n 65).

[92] Abrantes-Metz 2013 (n 65).

[93] Ysewyn and Kahmann (n 90) 45.

[94] Ibid.

[95] See for instance International Competition Network, 'Good practices for incentivising leniency applications (Subgroup 1 of the Cartel Working Group, 30 April 2019).

[96] Ysewyn and Kahmann (n 90).

signalling and hub-and-spoke cases[97], without even involving any sophisticated technological means. It is stated that '[l]eniency may therefore be the right option for the classic 'smoke-filled room' hardcore cartels.'[98] Legal concepts may become even more blurry now in the digital era where new ways of infringing competition law are emerging, making collusion easier and far from traditional 'smoke-filled room' cartel agreements.

If companies are not sure whether their conduct can be considered a 'secret cartel', they might decide that it is better to let 'the regulator [deal] with legal concepts that are in flux and fighting the case.'[99] The chances to have a company coming forward with an immunity application is even reduced if they lack knowledge of the way their algorithms make certain decisions. In fact, they might not even be aware of any wrongdoing. This could be a case of tacit collusion or parallel behaviour and therefore not of interest for competition authorities. However, sooner or later, competition authorities should start thinking of dealing with such situations as the outcome is still undesirable for competition and consumer welfare.[100] If leniency applications have decreased by almost 50% in the last years (mostly because of the risk of facing long and expensive private actions, especially against the immunity applicant),[101] this instrument will not be of much help with unconventional ways of infringing competition law, such as some of those highlighted in the previous section. Therefore, given the lesser appeal that leniency programmes have due to the risk of follow-up damages claims, and the potential of being less effective and adapt for the digital market, it is desirable for competition authorities to develop new and alternative pro-active means to boost their *ex officio* investigations.

## IV. Legal challenges for developing AI enforcement tools

Advanced digital technologies have revolutionised our lives in many different ways: as consumers, by reducing search costs and enhancing market transparency that makes it possible to make better and more informed

[97] Ibid.
[98] Ibid 51.
[99] Ibid 52.
[100] OECD (n 70).
[101] Ysewyn and Kahmann (n 90) 45 citing the Global Competition Review's Rating Enforcement Reports 2017, 2016 and 2015.

choices;[102] and also as recipients of administrative services, when smart technologies enable public bodies to make decisions faster and more efficiently and improve the provision of services.[103] Therefore, digital transformation is responsible for countless benefits when compared to the previous 'analogue society'. However, not everything is as positive as it looks – when technologies such as AI are involved, which can make autonomous decisions and affect human beings, challenges arise and they need to be scrutinised also through a legal lens.[104]

Competition law enforcement reflects this reality: AI and innovative enforcement tools would eventually enhance competition authorities' efficiency to better detect potential algorithmic infringements in an increasingly digitalised society; at the same time, legal challenges cannot be disregarded, as procedural rights might be undermined. As it is for any other fields that make use of sophisticated algorithmic systems, competition authorities that aim to implement their own digital investigation tools, might have to deal, sooner or later, with problems concerning bias, transparency and the need to deliver a reasoned decision in accordance with procedural rules and rulings of the Court of Justice, which would become more difficult if (and when) most of the decision-making process relies on AI.

As a matter of fact, one of the main concerns when AI is used in the decision-making process, to determine an outcome that might have a negative (or positive) impact on human beings, is the problem of bias. Machines, just like humans, can be exposed to bias.[105] However, this fact is not a prerogative of data collection only. Indeed, when humans are required to make a final

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[102] Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-driven Economy* (Cambridge Mass. London: Harvard U, 2016).

[103] See for instance AlgorithmWatch (n 38).

[104] Ezrachi and Stucke (n 102). In this regard see also the European Commission, 'Proposal for a Regulation Laying down Harmonised Rules on Artificial Intelligence' Brussels, 21.4.2021 COM(2021) 206 final, 2021/0106 (COD).

[105] It has been demonstrated that algorithms fed with data by a programmer can provide results not less biased than a human being. See for instance Hofmann (n 37) 14–15. 'Data collections, on which ADM [Automated-Decision Making] technology is based, might equally suffer from biases. These are frequently referred to with the terms of "sample bias, feature bias and label bias." "Sample bias" arises from data used by an ADM system to train software algorithms. If training data used has certain inbuilt biases the outcome of computer-based calculations can reflect or even accentuate that same bias. "Feature bias" is particularly problematic in interoperative or composite databases and relates to different labeling or categorization of data across the data samples used by ADM systems. A particular feature assigned to the data might translate into systematically erroneous outcomes in other contexts. Errors can consist of mislabeling data or arise from simple differences in categorization of certain data points. Finally, "label bias" may arise if a variable contains too many elements each

decision, after an AI has already (and autonomously) made its own assessment, the intended use of discretionary powers of a decision-making body could be compromised, as it is assumed that AI might dangerously 'shape, constrain, or remove human discretion by structuring information intake.'[106] This is known as the problem of 'automation bias'.[107] In competition law enforcement at the EU level, the Commission has a great level of discretion in its decision-making process, and the use of AI, at different stages of this process, might influence the final decision. Case-handlers (who most likely are not computer scientists) might tend to trust the outcome provided by an AI system, and in any case, they might not be able to contradict it, due to their lack of understanding.[108]

This is strictly related to another issue that competition authorities, that is, those willing to develop and implement new digital investigation tools, might need to deal with: the black box character that certain types of AI systems display.[109] Problems related to transparency and the ability to explain the process would likely arise and collide with the right of a reasoned decision, on which the principle of effective judicial review is based.[110] In fact, '[a]n inadequately reasoned decision will be understood as a breach of the "duty of care" and can thus justify annulment of the contested measure. Reasons must demonstrate that the decision was taken on the basis of "the most complete

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having an effect on output. Together the biases result in poor quality input data and therefore faulty data processing, which in itself might disqualify an entire ADM system.'

[106] Hofmann (n 37) 14.

[107] Cobbe (n 37) 641, 'automation bias, […] means that humans are more likely to trust decisions made by machines than by other people and less likely to exercise meaningful review of or identify problems with automated decisions.'

[108] Hofmann (n 37) 14.

[109] For instance, some types of AI systems, such as deep neural networks, present a structure of hidden layers that make it difficult to explain the process of reaching a certain output, as well as understand the reasons behind that specific result. Rembrandt Devillé, Nico Sergeyssels and Catherine Middag, 'Basic Concepts of AI for Legal Scholars', in Jan De Bruyne and Cedric Vanleenhove (eds), *Artificial Intelligence and the Law* (Intersentia 2021), 8 ss. 'This lack of interpretability and explainability makes it sometimes ethically impossible to use these methods. The only information that can be retrieved is a mathematical formula consisting of non-linear combinations of the different inputs, which cannot be converted into an explanation a human would understand', 10.

[110] Hofmann (n 37), 37 'Generally speaking, reasoning is a concept requiring the administration to document having reflected on all matters which may be subject to later judicial review' and note 142: 'The right to a reasoned decision is a right guaranteed under the right to good administration, there also explicitly recognised in Article 41(1)b) CFR, as well as under the right to an effective judicial remedy, as also recognised in Article 47(1) CFR.'. Furthermore, '[t]he right of an effective judicial review in general, as well as the right to compliance with the duty of care and reasoning obligations will also have the effect that an ADM [Automated-decision making] system will need to give detailed explanations as to the input taken into account and the decision-making process and outcome resulting therefrom' 34.

factually accurate, reliable and consistent information possible"'.[111] Since the use of AI systems in one phase of competition law enforcement would influence measures adopted in a final decision, the outcome of an AI should be intelligible and explainable. Therefore, by solely relying on AI systems, which cannot be explained or understood even by experts in the field, the tasks of case-handlers would become more complicated (or even impossible), as they would have to understand an AI output, and to translate it into a reasoned decision. In fact, case-handlers need to justify their decisions[112], explain the methodology employed to reach a certain outcome, and allow the counterpart to understand how the decision was adopted and what it is based on; all this, in order for the recipients of such decision to be able to defend themselves, by putting forwards proof of the contrary, in respect with the principle of equality of arms.[113]

In this intertwined area of law and technology, it is debated what should be disclosed in order to make such computational tools understandable[114], and mechanisms for accountable AI have been discussed.[115] Further research is needed in the field of competition law enforcement, in order to find mechanisms and solutions that are capable of combining, on the one hand, the need for competition authorities to develop and rely on the most advanced digital tools, in order to better understand the dynamics of the digital economy and the challenges of an algorithm-driven society; and, on the other hand, to ensure that procedural rights in competition law enforcement are complied with.

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[111] Ibid., 36–37.

[112] For example, according to Article 20 (4) Regulation (EC) No 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, '[t]he decision shall specify the subject matter and purpose of the inspection […]'. In this regard the CJEU has laid down that 'the statement of reasons required under Article 296 TFEU for measures of the institutions of the European Union must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. […]' Case T-249/17 *Casino, Guichard-Perrachon, Achats Marchandises Casino SAS (AMC) v European Commission* [2020], EU:T:2020:458 [107–114].

[113] In this regard, see for instance Andreas Von Bonin and Sharon Malhi 'The Use of Artificial Intelligence in the Future of Competition Law Enforcement' (2020) 11 Journal of European Competition Law & Practice 468.

[114] See for instance Cary Coglianese and David Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era' (2017) 105 Georgetown Law Journal 1147.

[115] See for instance, Jennifer Cobbe, Michelle Seng Ah Lee, and Jatinder Singh 'Reviewable Automated Decision-Making: A Framework for Accountable Algorithmic Systems' (ACM Conference on Fairness, Accountability, and Transparency (FAccT '21), March 1–10, 2021, Virtual Event, Canada. ACM New York, USA); Hofmann (n 37).

## V. Conclusion

Technology plays an important role in shaping market structure, economic dynamics, the way businesses make decisions and interact with each other, as well as, ultimately, the way companies can infringe competition law. Competition authorities have just started to take their first steps into the digital world of AI and ML for competition enforcement, by building in-house digital platforms, digital screening tools and pilot projects to study the functioning of algorithms used by companies.

'Fight[ing] technology with technology'[116] could be the most powerful means to efficiently react and detect digital infringements of competition law, which needs to be adapted and shaped according to the evolution of the economy – enforcement tools need to follow the same trend. By solely relying on reactive tools, such as leniency programmes, which have already suffered a major decrease, competition authorities may be unable to detect harmful and insidious anticompetitive practices that involve the use of technology. Without the right set of digital enforcement tools, competition authorities may, in fact, risk being left behind. They might fail to understand companies' algorithms that may infringe competition law, or to understand how market players interact with each other in a way that is relevant for competition analysis. AI could help competition authorities to enhance efficiency, accuracy and facilitate time-savings, avoiding long investigations that may arrive at a positive decision – at this point, it is already too late and a particular remedy would not be useful anymore.[117]

This paper has highlighted some of the reasons why competition authorities have started to develop their own digital investigation tools, according to interviews conducted with some of them, such as the need to reverse-engineer companies' algorithms. Other reasons for investing in new technologies for the enforcement of competition law have also been considered, such as the need to enhance efficiency, understand the new digital market structure, and the declining use of leniency programmes. Therefore, it seems reasonable to advocate for competition authorities to assume a more pro-active enforcement role that should use technology to meet the new challenges of 'digital' competition law. Finally, competition authorities should also be aware of the numerous challenges and difficulties when implementing AI systems in their decision-making process; fundamental rights, such as the right of a reasoned decision and defence rights, must be ensured and should not be compromised by the use of disruptive technologies.

[116] Colombo (n 70).
[117] Sokol and Ma (n 36).

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# Competition law enforcement in Ukraine: challenges from on-line giants

by

Anzhelika Gerasymenko* and Nataliia Mazaraki**

**CONTENTS**



## *Abstract*

Competition law, economics and policy are facing a regulatory metamorphosis due to the rise of the digital economy. US, China and EU jurisdictions have announced and partially introduced systemic changes to their competition law frameworks to keep pace with technological developments. The Antimonopoly Committee of Ukraine is following the principle of 'three monkeys', it *sees* no on-line platforms, *hears* no on-line platforms, *speaks* of no on-line platforms, so nothing has been undertaken or even announced.

The paper is twofold. Firstly, it analyses the economic background and features of the digital economy and shows why the available instruments of competition

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Article received: 24 May 2022, accepted: 22 August 2022.

enforcement are ineffective. The second part of the paper shows why the current Ukrainian competition law framework is (in)capable of dealing with challenges posed by on-line giants. Regarding the need for a recalibration of regulatory approaches in digital markets, Ukraine faces the dilemma of a proper combination of *ex ante* and *ex post* measures.

***Résumé***

Le droit de la concurrence, l'économie et la politique sont confrontés à une métamorphose réglementaire due à l'essor de l'économie numérique. Les juridictions des États-Unis, de la Chine et de l'UE ont annoncé et introduit partiellement des changements systémiques dans leurs cadres juridiques de la concurrence pour suivre le rythme des développements technologiques. Le Comité anti-monopole de l'Ukraine suit le principe des 'trois singes', il ne voit aucune plate-forme en ligne, n'entend aucune plate-forme en ligne, ne parle d'aucune plate-forme en ligne. En conséquence, rien n'a été entrepris, ni même annoncé.
La structure du papier est double. Premièrement, il analyse le contexte économique et les caractéristiques de l'économie numérique et montre pourquoi les instruments disponibles d'application de la concurrence sont inefficaces. La deuxième partie de l'article montre pourquoi le cadre juridique ukrainien actuel de la concurrence est (in)capable de faire face aux défis des géants en ligne. En ce qui concerne la nécessité de recalibrer les approches réglementaires sur les marchés numériques, l'Ukraine est confrontée au dilemme de la bonne combinaison ex ante et ex post.

**Key words:** digitalisation; on-line platform; market definition; gatekeeper; competition enforcement.

**JEL:** K21, L14, L40, L86

## I. Introduction

The term digital revolution refers to a critical change of the technological and social environment under digitalisation. Usually, entrepreneurs are the first to adapt to changes, while state bodies are much less flexible. In the competitive field, current economies are situated within the gap between these two milestones: business actors have already readjusted their business processes in order not only to meet the digital challenges, but to make it profitable; meanwhile competition agencies have, at best, just realised the risks of unregulated digitalisation. The Antimonopoly Committee of Ukraine (hereinafter: AMCU) has not yet reached even this milestone. The AMCU's list of priorities for 2022 focuses on markets of electricity, natural gas, freight

transportation, financial services, construction materials – with no mention of digital challenges even though the Ukraine is a regional leader of offshore software developments,[1] where exports of IT services increased more than 4 times for 2015–2021 and has reached $ 6.8 billion.[2]

The paper consists of 5 sections, two of which provide an introduction and conclusions. The second section describes the changes of the competition environment under digitalisation. The third one presents the downsides of conventional tools of antitrust analysis in meeting digital challenges to the competition law enforcement both in Ukraine and worldwide. The fourth part provides a legal analysis of Ukrainian competition law and its capability to meet the challenges of on-line giants. The article shows the necessity to recalibrate regulatory provisions, adopt a new methodology of market definition and choose a proper combination of *ex ante* and *ex post* measures towards on-line giants.

## II. Digital coordinates of competition

In recent years, many socio-humanitarian studies have acquired a technical flavour. Such terms as fin-tech, leg-tech, etc. have become part of the lexicon of both academics and practitioners due to digitalisation that is making large waves across the planet.

The Gartner Glossary defines digitalisation as the use of digital technologies to change a business model and provide new revenue and a value-producing opportunity.[3] It is not so much about the production of digital technologies or digital content, but mostly about the changes that are taking place in other fields of business due to the use of digital technologies. The list of the Top 10 'digitally-disrupted'[4] determined by the OECD is presented in Table 1.

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[1] Amcu.gov.ua. 2022. *АМКУ затвердив Пріоритети на 2022 рік*. <https://amcu.gov.ua/news/amku-zatverdiv-prioriteti-na-2022-rik> accessed 20 May 2022.

[2] Daxx Software Development Teams. 2022. *Global Offshore Developer Rates By Country in 2021* <https://www.daxx.com/blog/development-trends/average-rates-offshore-developers> accessed 20 May 2022.

[3] Gartner. 2022. *Definition of Digitalization – Gartner Information Technology Glossary*. <https://www.gartner.com/en/information-technology/glossary/digitalization> accessed 20 May 2022.

[4] Digital disruption is an effect that changes the fundamental expectations and behaviors in a culture, market, industry or process that is caused by, or expressed through, digital capabilities, channels or assets. [Gartner. 2022 *Definition of Digital Disruption – Gartner Information Technology Glossary*. <https://www.gartner.com/en/information-technology/glossary/digital-disruption> accessed 8 September 2022.

**Table 1.** Top-10 digitally-disrupted sectors

| SPA code | Name |
|---|---|
| 49 | Land transport services and transport services via pipelines |
| 55 | Accommodation services |
| 56 | Food and beverage serving services |
| 58 | Publishing services |
| 59 | Motion picture, video and television programme production services, sound recording and music publishing |
| K | Financial and insurance services |
| 73 | Advertising and market research services |
| 79 | Travel agency, tour operator and other reservation services |
| P | Education services |
| 92 | Gambling and betting services |

Source: OECD Guidelines for Supply-Use Tables for the Digital Economy[5].

In the land transport services sector, the most remarkable changes have affected the taxi market, where the introduction of digital technologies has actually pushed conventional taxi companies out of the market, resulting in the dominance of taxi-apps' operators such as Uber, Lyft, Bolt, Uklon and others. For example, the share of the whole set of conventional taxi services in the Ukrainian market takes 11%, while the market leader Uber controls 51% of the market.[6]

In the accommodation services sector, competition has changed significantly with the introduction of AirBnB. In its first 4 years, it accumulated the same amount of supply that took the Hilton hotel chain more than 90 years to achieve.[7] Distribution of other digital services such as booking.com, TripAdvisor, etc. is another way to increase competition in the sector. It is based on the effect of reducing information asymmetry on prices, assortment, quality characteristics of services (including consumer feedback). Now this information is available to consumers in a one-stop-shop form, simplifying the comparison of commercial offers and ensuring rational choices. It is a guarantee of concentration of

[5] OECD, 2019. Guidelines for Supply-Use tables for the Digital Economy. Paris, p. 13. <https://unstats.un.org/unsd/nationalaccount/aeg/2019/M13_2_3_2a_SA_Digital_Economy.pdf> accessed 20 May 2022.

[6] Економічна правда. 2019. *У компанії Bolt оцінили розмір тіньового ринку таксі в Україні* www.epravda.com.ua/news/2019/07/9/649486> accessed 20 May 2022.

[7] Pennington, J., 2017. *The numbers that make China the world's largest s haring economy*. World Economic Forum. <www.weforum.org/agenda/2017/06/china-sharing-economy-in-numbers/> accessed 20 May 2022.

consumer demand at the relevant on-line platforms, granting them enough market power to win in the context of vertical competition with hotels or other accommodators.

Publishing services and advertising markets belong to different sectors of the economy, but nowadays they are intermediated by the same e-platforms – Google, Facebook, etc. These platforms are the digital core of multisided markets that attracts both publishers and advertisers through: a) an effective digital mechanism of intermediation that significantly reduces their transaction costs compared to direct contracting or non-digital intermediation, b) this service tying to free placement. The latter is a key resource of the platforms that generates a network effect and leads to the demand's lock-in and the gatekeeping of the value-chain.

The analysis of competition changes in digitally-disrupted sectors may go on and on, but at least one more field should be mentioned in this context – the retail sector. It is absent in the abovementioned table 1, as it is 'digitally-benefited' rather than 'digitally-disrupted'. The retail sector was one of the first to start its active modification under digitalisation. As a result, today the share of e-commerce in the structure of the global retail sales is about 20%,[8] while geographical boundaries of retail markets have expanded from local to global. For example, in 2019, Ukrainians bought on-line goods worth $3 billion, 600 million of which – from foreign retailers, primarily – Chinese e-platform AliExpress (about 60% of cross-border turnover).[9] This looks like pure positive effects on competition, but it is in fact not so. Firstly, global competition in e-retail is available only for a limited list of goods – consumer electronics, clothing, cosmetics, etc. By contrast, perishable goods are not covered due to the relatively long time to deliver them and high transport costs. Secondly, e-commerce, like other types of digital intermediation, is driven by network effects, so supply remains very concentrated. For example, in Ukraine, the national leader of on-line sales – Rozetka (this company owns several popular marketplaces in the country – Rozetka, Prom.ua, Bigl.ua, Crafta, Shafa) controls more than 70% of the B2C segment of the domestic e-retail market. Considering this fact in addition to the rapid growth of digitalisation in the global (according to Statista, the share of on-line sales in total retail sales worldwide is expected to increase up to 24.5% in 2025[10]) and Ukrainian retail

[8] Coppola, D., 2022. *E-commerce share of total retail sales | Statista*. <https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide> accessed 20 May 2022.

[9] Ugniva, S., 2019. *За китайським рахунком. Як Україна стала для AliExpress другим у світі покупцем за зростанням замовлень*. Biz.nv.ua. <https://biz.nv.ua/ukr/tech/pokupki-na-aliexpress-ukrajinci-na-drugomu-misci-v-sviti-za-tempami-rostu-onlayn-zamovlen-novini-ukrajini-50061740.html> accessed 20 May 2022.

[10] Ibid 9.

(the share of on-line sales in the total retail sales in Ukraine increased from 3.3% to 8.8% in 2017–2020, and it is excepted to rise by 11% in 2025[11]) makes the risks to competition obvious.

Thus, the abovementioned issues show that digitalisation has had an ambiguous effect on competition in the markets. In some markets it has intensified competition; in others, it has weakened competition by blocking the most profitable (in terms of transaction costs) value chains and creating latent monopolists within them which are known as gatekeepers. They effectively exploit their market power, while remaining invisible to competition agencies due to the inefficiency of conventional tools of competition policy.

## III. Digital challenges to competition law enforcement

Why is the market power of gatekeepers invisible to current competition law? The fact is that conventional competition policy and the relevant competition law are based on the 'Structure-Conduct-Performance' paradigm (hereinafter: SCP paradigm). Only a small range of competitive practices may be *a priori* qualified as a violation of competition law. Most of them have a competitive or an anti-competitive effect, depending on the initial market position of the economic entity (group of economic entities) that conducts them. If a small firm (3% of a market) overcharges, it by itself suffers faster than consumers. The same done by a big firm (50% or 90% of a market) brings it a profit. If small firms (total market share less than 10%) agree to jointly purchase or sell goods, such concerted practice is likely to result in a level playing field in terms of vertical competition. The same done by dominant companies allows them to leverage their market power onto adjacent markets and facilitates abuse of their increased market power. Therefore, before interpreting the competitive behaviour of firms in the market, it is necessary to define the boundaries of such markets, their capacity and structure. However, this is where the problem arises.

Conventional methods of market definition are based either on the analysis of consumer price reactions or on the assessment of substitutability of goods. The use of the former is limited with respect to transactional on-line platforms, where prices are often set differently (for some platforms as a complex function of turnover, for others as royalties for the use of trademarks, etc.), complicating not only their comparison, but also their perception by counterparties. For

[11] Дніпропетровське Інвестиційне агенство. 2021. *Минулого року ринок e-commerce досяг $4 мільярдів*. <https://dia.dp.gov.ua/minulogo-roku-rinok-e-commerce-dosyag-4-milyardiv/> accessed 20 May 2022.

non-transactional on-line platforms, especially those that use the zero-price model, the application of a price response analysis for market definition is impossible.

An assessment of the substitutability of goods is the universal method of market definition, which can be very useful in investigating markets where on-line platforms work. However, the devil is in the details. For example, the relevant methodology in Ukraine contains 5 criteria of goods' substitutability: (1) similarity of functionality, consumer properties, way of consumption, etc.; (2) similarity of physical, technical, operational properties and characteristics, quality indicators, etc.; (3) common group of consumers; (4) no significant difference in prices; (5) the ability of producers to supply new goods in order to replace existing ones.[12] This list does not include the criterion of difference in transaction costs that is a source of competitive advantage of on-line platforms over other intermediaries. Let us compare the intermediation of a dominant e-marketplace and a non-digital trader. The methodology asks for a comparison of margins of each type of intermediation to merge/split the compared activities within a single/different markets. It does not compare transaction costs, which these intermediators incur trading via different channels to obtain the same effect. This is the same as comparing the price per 1 kg of goods with the price per 1 ton of its substitute. Thus, the AMCU does not see the difference between the channels, intermediated digitally and conventionally, which is obvious to their participants. Evidence of this is found in its decision from 2018 on the authorization of the merger of the two largest on-line retailers, which guaranteed the new entity control over more than 70% of e-commerce in Ukraine, while its share in total retail sales was about 6%.[13]

A no less difficult challenge to market definition is the need to consider network effects. If the difference in transaction costs creates a competitive advantage for on-line platforms, the network effect takes root. Contracting through a popular on-line platform is a guarantee of access to a significant and growing scope of customers. This means that measuring the capacity of a multisided market only by sales on one side of the core platform, is insufficient to assess its actual market power. Such an analysis should include the number of active users on each side of the on-line platform and the size of network effects multiplier. Unfortunately, economics has not yet developed an effective tool to estimate the latter. There is a lack of statistical data for its evaluation. However, this does not mean that competition agencies should abandon market

[12] AMCU, 2002. *Методика визначення монопольного (домінуючого) становища суб'єктів господарювання на ринку*, Art.5. <https://zakon.rada.gov.ua/laws/show/z0317-02#Text/> accessed 20 May 2022.

[13] AMCU, 2018. *Desicion #446-p.* <https://amcu.gov.ua/npas/rishennya-446-r-vid-07092018> accessed 20 May 2022.

definition, while this idea circulates in the antitrust community.[14] Today there is no adequate alternative to the SCP paradigm, so it is better to focus on developing methods of market definition in the area of digitalisation.

Nevertheless, it should be considered that not every network effect leads to a lock-in, as well as the fact that zero-pricing is not always a source of market power. Sometimes it is a way to overcome it. The latter was visible at the border line of the 20th and 21st century in the case of the leveraging – of the market power obtained by Microsoft Corporation in the market of operating systems – onto the market of Internet browsers.[15] The monopoly of Microsoft Explorer in the latter was overcome in the 2000s thanks to free distribution of alternative Internet browsers.

There was another case in Ukrainian practice. The players of the Ukrainian market of mobile communication introduced the tariff plan '0 in the network' (free communication of subscribers within one network). This resulted in the lock-in of consumers within the dominant networks, while the abandonment of the practice of zero-pricing (as a way of self-preferencing) has become a competitive advantage of Ukraine's smallest mobile operator and the prerequisite for its growth.[16] The introduction of free national roaming during the war in Ukraine in the spring of 2022, although being a necessary means to maintain communication in the war zone, was a testimony to the positive contribution of multi-homing to effective competition and the growth of public welfare.

The practice of multihoming in competition law does not always work as directly described. There is still no coherent theory of multi-homing, because it almost cannot be implemented in the markets of non-network goods that dominated the economy of the 20th century, where modern competition law originates from. Its antonym – exclusive dealing – is more common in competition law and practice. It refers to vertical restraint to competition, which may be prohibited if it is used by dominant companies.[17] Under Ukrainian competition law, certain types of exclusive dealings are even subject to block exemptions, and are not subject to notification to the AMCU.[18] It

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[14] The European Commission, 2019. *Competition policy for the digital era*, pp. 3–4. <http://doi/10.2763/407537> accessed 20 May 2022.

[15] *United States of America v. Microsoft Corporation* [2018] (US District Court for the District of Columbia), 98–1232.

[16] Євгенія Підгайна, «Велика трійка» в цифрах: як мобільні оператори збільшують оборот і пірнають у збитки'. (*Mind.ua*, 2020) <https://mind.ua/publications/20211288-velika-trijka-v-cifrah-yak-mobilni-operatori-zbilshuyut-oborot-i-pirnayut-u-zbitki> accessed 20 May 2022.

[17] Law of Ukraine On Protection of Economic Competition, 2001, art. 13 <https://zakon.rada.gov.ua/laws/show/2210-14#n416 > accessed 20 May 2022.

[18] AMCU. Типові вимоги до вертикальних узгоджених дій суб'єктів господарювання стосовно постачання та використання товарів, 2017, Art.2 <https://zakon.rada.gov.ua/laws/show/z1364-17#Text > accessed 20 May 2022.

brings us back to the open challenge of market definition – that is making exclusive dealing practices, which are quite common in digital intermediation markets,[19] unregulated.

Thus, no matter what competitive practice is undertaken – from overcharging to the leveraging of market power, various downsides of current instruments of competition enforcement have to be relied on, which significantly reduce the effectiveness of their application.

## IV. Ukrainian competition law and on-line platforms

While competition bodies across the world are intensively engaged in discussion and/or adoption of new competition rules within the area of the digital economy, the AMCU – the primary state body responsible for the protection of economic competition in Ukraine[20] – has remained silent on the need to recalibrate the national competition law framework. The latest amendment to the Law of Ukraine 'On protection of economic competition' took place in June 2021, but had not embraced specific concepts or enforcement tools directly addressing the peculiarities of the business models of digital platforms.

In order to 'tame the tech giants', foreign jurisdictions have taken different approaches, mostly implementing *ex ante* regulation and empowering competition authorities with additional functions. Enforcement of *ex post* rules is often too slow to sanction wrongdoings and to avert their negative implications. Moreover, dealing with abuse of a dominant position is preceded by market definition, which poses certain difficulties, caused by complications of multisided markets and the sluggishness of 'old-school' market definition terminology. At the same time, many data-related behavioural requirements need to be specified in advance and controlled *ex post*.[21]

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[19] Cristian Chica, Kenneth Chuk, and Jorge Tamayo, *Exclusive Dealing and Entry by Competing Two-Sided Platforms* Harvard Business School Working Paper 21-092; Elias Carroni, Leonardo Madio and Shiva Shekhar, *Superstars in two-sided markets: exclusives or not?* CESifo Working Paper No. 7535; Jet Deng and Ken Dai, 'Antitrust Enforcement Against Digital Platforms in China: Anatomy of "Choose One from Two" (*WWL*, 12 November 2020) <https://whoswholegal.com/features/antitrust-enforcement-against-digital-platforms-in-china-anatomy-of-choose-one-from-two> accessed 21 April 2022.

[20] Law of Ukraine On the Antimonopoly Committee of Ukraine, 1992, <https://zakon.rada.gov.ua/laws/show/z1364-17#Text > accessed 20 May 2022.

[21] Peter Georg Picht and Heiko Richter, 'EU Digital Regulation 2022: Data Desiderata' [2022] 71(5) GRUR International 395.

One of the directions to recalibrate competition law towards the challenges of the digital economy is to apply an asymmetric approach for defining rights and obligations of market players, that is, to actively 'designate' a *gatekeeper* status. The ways of assessing if a company holds a gatekeeper status vary across jurisdictions.

The Digital Markets Act applies both quantitative and qualitative criteria for designating a gatekeeper status. The latter (a significant impact in the internal market; an important gateway for business users to reach end-users; an entrenched and durable position in its operations) are presumed if quantitative thresholds are met (annual Union turnover of 57.5 billion in each of the last three financial years, at least 45 million monthly active end-users and at least 10 000 yearly active business users established in the Union in the last financial year[22]).

Andriychuk praises such a mechanism as it 'appears to be the most suitable for inter-platform competition, as it imposes a range of market limitations on the gatekeepers while allowing their potential competitors to scale up without being subject to DMA obligations.'[23]

The DMA sets the obligation for an on-line giant to notify the Commission that it 'meets all the thresholds within two months after those thresholds are satisfied and provide it with the relevant information…,'[24] failure to do so leads to an entitlement of the Commission 'to designate that undertaking as a gatekeeper based on information available to the Commission.'[25]

The discussion of the new British pro-competition regime for digital markets[26] has focused on the need for a range of quantitative and qualitative evidence to support a designation of the Strategic Market Status by a competition authority.

The German Competition Act puts forward the rights of the Bundeskartellamt to issue a decision declaring that an undertaking, which is to a significant extent active on multi-sided markets, is of paramount significance for

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[22] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector ('Digital Markets Act') [2022]. When referring to the DMA in the following text, reference is made to the version dated 11 May 2022.

[23] Andriychuk, Oles, '*Shaping the new modality of the digital markets: the impact of the DSA/DMA proposals on inter-platform competition'.* [2021] 44 (3) World Competition: Law and Economic Review 261–286.

[24] Digital Markets Act, Art. 3.3.

[25] Ibid 25.

[26] A new pro-competition regime for digital markets – government response to consultation (Updated 6 May 2022). <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation#part-3-strategic-market-status> accessed 20 May 2022.

competition across markets.[27] The next step the Bundeskartellamt may take is to prohibit specified conduct/practices listed in the Act.[28] The German decision that determined Google's paramount significance for competition across markets[29] has been a milestone in a new era of competition law enforcement on digital markets. It also promotes a research interest in the Bundeskartellamt's reasoning behind market power in general search engine services, search-based advertising, services with high user numbers, as well as the assessment of the various neighbouring and vertically related digital activities.

The Law of Ukraine on Protection of Economic Competition embraces a symmetric approach to undertakings – no further guidelines or methodology has been published regarding competition on digital markets. The only possible opportunity to 'tame a tech giant' is to determine that an abuse of its dominant position was committed.

The latter imposes a standard economic analysis mechanism: the market share threshold of 35% is established as well as the criterion of the absence of significant competition on the relevant market. The law defines this criterion as: 'does not experience significant competition due to limited access of other entities to purchase raw materials, commodities and sales of goods, the presence of barriers to market access for other entities, the availability of benefits or other circumstances.'[30]

The 'barriers to market access for other entities, the availability of benefits or other circumstances' imply that a relevant market is determined by the competition authority based on the relevant methodology. However, a debate has been underway in recent decades on whether market definition is required any longer when assessing potentially anti-competitive conduct, with market definition being a redundant step in the assessment process, given the availability of quantitative techniques capable of directly estimating the effects of such conduct.[31]

Nevertheless, under Ukrainian legislation, there is a requirement to define a relevant market, following the CJEU position that 'the proper definition of the relevant market is a necessary precondition for any judgment as to

[27] Art. 19a.1 Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p. 2506).

[28] Ibid 28, Art. 19a.2.

[29] Fallbericht vom 5. Januar 2022: Google – Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb (Entscheidung vom 30.12.2021). <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B7-61-21.html> accessed 20 May 2022

[30] Law of Ukraine on Protection of Economic Competition, 2001, Art 12.

[31] Rhonda L Smith, '*Market Definition: Going, going, gone? Developments in the United States*' (2010) 18(2) Competition and Consumer Law Journal 110.

allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.'[32]

Criteria for finding dominance are detailed in the Methodology on definition of monopoly (dominant) position of undertakings on the market (the Dominance Methodology), approved by the Order of the AMC dated 5 March 2002 No. 49-p. [33]

The AMCU has used this Methodology for digital markets only once to approve the merger of the Rozetka group and EVO group in 2018.[34] The AMCU decision defined the relevant market as 'the national market for the provision of services for the promotion of goods (works, services) on the Internet through on-line platforms (Internet platforms).'[35] The AMCU decision stated that:

> 'this market is open to entry/exit of new entrants and there are no significant regulatory barriers to entry, in particular the ability to enter the market of new competitors depends mainly on their financial capabilities and the success of marketing strategy. Competitors do not have exclusive rights to innovation, intellectual property, logistical support, etc. In addition, there are no regulatory barriers to market entry, for example, new market participants do not need to obtain licenses, permits, etc.'[36]

In 2017 a draft methodology on market definition was announced but it has not yet been approved.[37] The draft methodology suggests *inter alia* an analysis of the substitutability of goods, application of the SSNIP test, and the method of indicators of price elasticity of demand. However, it lacks terminological consistency beyond its methodological deficiencies. The application of

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[32] T-62/98 Volkswagen v Commission 2000.

[33] Ibid 13.

[34] Ibid 14. As the result of concentration, a number of Ukrainian marketplaces came under one umbrella: Prom.ua, Bigl.ua (on-line platforms for retail trade in consumer goods), Kabanchik.ua (an on-line service for finding contractors for ordering household chores and services as well as small commercial tasks), Crafta.ua (an on-line platform for the sale of handmade products as well as collectible and rare products), Shafa.ua (an on-line platform for the sale of women's and children's goods, which are usually second-hand), Zakupki.prom.ua (an on-line platform for the participation in public procurement, for the participation in the public e-procurement system Prozorro.sales, and the open system of commercial procurement RIALTO) and On time (an on-line service for exchanging, signing and storing any documents).

[35] Ibid part 67.

[36] AMCU, 'Annual Report' 2018 <https://amcu.gov.ua/storage/app/sites/1/Docs/zvity/2018/AMCU_2018.pdf> accessed 20 May 2022.

[37] AMCU, Methodology on Market Definition (Draft), 2017 <https://amcu.gov.ua/news/proekt-metodiki-viznachennya-rinku> accessed 20 May 2022.

the SSNIP test and the HMT to digital undertakings has received different opinions. The OECD has noted that the HMT could still be used when defining markets for transaction platform businesses, and that the existence of a zero price on one side of the platform does not prevent the use of the HMT[38]. However, Smith and Duke argue that the application of the HMT to a transaction platform is less straightforward than for a traditional, single-sided business. That is so because no single price to both sets of customers (to which to apply a SSNIP test and the effect of a SSNIP on the demand of one set of customers) can be intensified by indirect network effects.[39]

Mandrescu argues that the challenges posed by on-line platforms primarily concern changes to practical application that do not exceed the boundaries of current practice.[40] Smith and Duke conclude that there is no 'need to alter the traditional approach to market definition, that is, starting from the product of the business to which the conduct at issue relates. On the contrary, that approach seems likely to assist in "cutting through" the additional complexity which seems to arise when market definition is based on customer groups.'[41]

Nevertheless, it must be stated that neither the old nor the new methodology accounts for the current market tendencies; for example, the emphasis remains on products, not services, and on the price dimensions of competition. The legal definition of 'commodity' entails any object of economic turnover, including products, works, services, documents supporting obligations as well as rights (including securities). In fact, AMCU practice shows that instead of studying the commodity/product substitutability of services (in fuel and pharmacy retail) of intermediaries, it was the substitutability of commodities (gasoline and medicines respectively) that was examined.[42] Neither methodology has embraced the limitations to substitution due to switching costs, though they are vital for competition enforcement in digital markets.

For determining the abuse of dominance, Ukrainian competition law takes both a formalistic approach (such as 'setting prices or other conditions for the purchase or sale of goods that could not be set in the face of significant

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[38] OECD, 2019 *Rethinking Antitrust Tools for Multi-Sided Platforms* <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf> accessed 20 May 2022.

[39] Smith, R. L., & Duke 'Platform businesses and market definition'. European Competition Journal, (2020) 1–25. <doi:10.1080/17441056.2020.1851>

[40] Daniel Mandrescu, 'Applying (EU) Competition Law to Online Platforms: Reflections on the Definition of the Relevant Market(s)' (2018) 41 (3) World Competition: Law and Economics Review.

[41] Ibid 40.

[42] AMCU, Decision 680-p *AMCU v. Novo Nordisk A/C, Novo Nordisk Health Care AG, BaDM, BaDM-B, Apteka ZI, Ganza, Farmadix, Medfarm* (2020), 33–49; AMCU, Decision 329-p *AMCU v. WOG, OKKO-Retail, Socar Petroleum* (2019), 6–11.

competition in the market', 'creating barriers to market access (exit from the market) or elimination of sellers, buyers and other business entities from the market'); and an effects-based approach (for example 'restrictions on production, markets or technical development that have caused or may cause damage to other entities, buyers, sellers').[43]

Based on cases dealt with by foreign competition authorities and on academic research, the stance is taken in this paper that an effects-based approach should be a 'determinant' in handling anti-competitive behaviour in the digital economy.[44] However, practices constituting an abuse of dominance that are listed in Article 13 of the Law of Ukraine 'On Protection of Economic Competition' may be well suited to on-line platforms, for example:

- 'setting prices or other conditions for the purchase or sale of goods that could not be set in the face of significant competition in the market' – for self-preferencing of the products and services of the platform, imposing retail most-favoured-nation clauses (dictating that the seller may not offer better terms and conditions on its own website or other platforms);
- 'creating barriers to market access (exit from the market) or elimination of sellers, buyers and other business entities from the market' – for creating obstacles to users' multihoming. Yet the cornerstone of adapting current legislation remains the same – the market definition methodology.

Setting aside the difficulties of merger control and vertical competition due to the limitations of the word count of this paper, it has been decided for the purpose of this paper to raise the issue of equipping the AMCU with enhanced capabilities in digital markets. The AMCU is expected to recalibrate the regulatory approach to anticompetitive conduct of on-line giants as well as to strengthen its investigative and enforcement functions – both goals can be accomplished with the involvement of a dedicated task-force. Foreign jurisdictions have mostly established additional departments for digital markets or hire additional digital specialists (for example, the Japan Fair Trade Commission has been reenforced with the Office of Policy Planning and Research for Digital Markets,[45] the UK authorities have established the Digital Markets Unit and are discussing its powers[46]). Beyond this, there is

[43] Ibid 31, Art 2.

[44] European Commission, 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', 2005; OECD, 'Abuse of Dominance in Digital Markets', 2020, 42; Payal Malik and others, 'Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approac*h*' (2019) 54(2) Review of Industrial Organization.

[45] Japan Fair Trade Commission Organization chart <https://www.jftc.go.jp/en/about_jftc/JFTCOrganizationChart22.04.pdf> accessed 20 May 2022.

[46] Ibid 27.

a need for competition authorities to cooperate with other public bodies to ensure a consistent approach on digital markets. The draft DMA presupposes the establishment of a High-Level Group for the DMA, to be composed of the representative of: (a) body of European telecoms regulators, (b) European Data Protection Supervisor and European Data Protection Board, (c) European Competition Network, (d) Consumer Protection Cooperation Network, and (e) European Regulatory Group of Audiovisual Media Regulators[47]

In Ukraine, there is the National Commission for the State Regulation of Electronic Communications, Radiofrequency Spectrum and the Provision of Postal Services (hereinafter: NCEC) that may effectively involve itself in constant monitoring of quantitative criteria once set by the AMCU.

However, the main question is still open that is, whether the AMCU should initiate a recalibration of the competition law framework towards *ex ante* or *ex post* measures, or both in combination. From one point of view (which is underpinned by the acknowledged 'tendency of the 'Europeanization' of competition law with the spreading of commitments on implementation of competition *acquis* in the Ukrainian legal order'[48]) Ukraine should implement the DMA framework and start negotiations with the EU on the amendments to the EU-Ukraine association agreement to set the rules for data communication. From the other point of view, the AMCU may follow the road of a procedure for notifying powerful operators of the digital economy of their dominant status, based on defining the boundaries of the information and intermediary services markets, and then set special obligations for intermediary, regulatory, and information-spreading functions of on-line platforms, alongside the Code of conduct.

## V. Conclusion

The Ukrainian competition law framework should undoubtedly be amended to, either, conform to the Europeanization direction, implementing the DMA cornerstones, or reform the *ex post* mechanism of economic competition protection. Both of these variants imply the necessity to develop a new methodology of market definition open to the challenges of multi-sided contracting, zero-pricing and network effects, as well as to other complications driven by the digitalisation of the economy.

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[47] Digital Markets Akt, Art. 31d.

[48] Kseniia Smyrnova, Natalia Fokina, The 'Europeanization' of Competition Law of Ukraine, *GRUR International*, Volume 71, Issue 1, January 2022.

The digital arsenal of the AMCU should be enhanced and involving the NCEC seems to be a viable solution because of the latter's expertise and experience in digital markets.

Due to the 'Brussels effect', the DMA would have an effect on Ukrainian competition law framework and foster the need for amendments to the EU-Ukraine Association agreement to enhance the cooperation in digital regulation and data exchange.

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# Section 19a GWB as the German 'Lex GAFA' – lighthouse project or superfluous national solo run?

by

Tabea Bauermeister*

**CONTENTS**



## *Abstract*

As the European Union kept on struggling with its Digital Markets Act, Germany forged ahead and implemented its own 'Lex GAFA' in early 2021. The paper will introduce this new Section 19a and explain its inner workings. Furthermore, Section 19a will be compared to classic Article 102 TFEU-procedure and contrasted

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Article received: 12 June 2022, accepted: 22 August 2022.

with the DMA. Thereby, the paper will present the advantages and disadvantages of Section 19a in comparison to existing and future European law to assess whether Section 19a is in fact the lighthouse project it was presented to be – or rather a superfluous national solo run.

***Resumé***

Alors que l'Union européenne continue de se débattre avec sa législation sur les marchés numériques (DMA), l'Allemagne est allée de l'avant en mettant en œuvre sa propre 'Lex GAFA' au début de l'année 2021. Cet article présente la nouvelle Section 19a et explique son fonctionnement interne. En outre, la Section 19a y est comparée à la procédure classique de l'article 102 TFUE et mis en contraste avec le DMA. Cet article présente les avantages et inconvénients de la Section 19a au regard du droit positif européen, ainsi que celui qui doit encore entrer en vigueur, afin de déterminer si la Section 19a est vraiment le projet phare qui a été promis, ou au contraire un solo national superflu.

**Keywords:** Section 19a; DMA; Digital Markets Act; undertaking of paramount significance; intermediary power; gatekeeper.

**JEL:** K20, K21, K23

## I. Introduction

In quite a lot of ways, the digital realm and the 'old', analogue world differ widely. Competition and markets are no exception.[1] This is why, all over the world, legal scholars and practitioners alike have been discussing new legislation specially designed to help control 'the big four', that is, *Google* (*Alphabet*), *Amazon*, *Facebook* (*Meta*), and *Apple*.[2]

As the European Union kept on struggling with its Digital Markets Act (hereinafter: DMA), Germany forged ahead and implemented its own 'Lex GAFA' in early 2021. Roughly one year later, on 30 December 2021, the German competition authority (*Bundeskartellamt*) issued a declaratory decision designating *Google* (*Alphabet*) as an addressee of the discussed norm (hereinafter: the norm's addressee).[3] In May and July 2022, *Facebook*

[1] In depth: Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition policy for the digital era* (2019).

[2] Some augment this circle to cover 'the big five', also including Microsoft (e.g. Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' [2021] Journal of European Competition Law & Practice 513, 515).

[3] *Google: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B7 – 61/21 3 (BKartA).

(*Meta*) and *Amazon* followed.[4] Supporters of the new Section 19a of the German Competition Act ('Gesetz gegen Wettbewerbsbeschränkungen'; hereinafter: *GWB*) rightfully point out that lasting between 12 and 18 months is quite a short time in comparison to past proceedings against Big Tech.[5] However, these decisions are only the first of (at least) two steps: first, the *Bundeskartellamt* must designate a company as the norm's addressee and second, it must issue a prohibition decision establishing that a certain form of conduct of the designated company is illegal. Moreover, by now, the European Parliament and the Council of the EU have given their final approval to the Digital Markets Acts.[6] The final version was published on 12 October 2022.[7] It will apply from 2 May 2023. Both the facts that until now, the *Bundeskartellamt* has not issued any prohibition decisions based on Section 19a, and that the common European solution start to apply in spring 2023, raise the question of whether Section 19a is indeed the lighthouse project it was presented to be[8] – or rather a superfluous national solo run.[9]

This paper will introduce Section 19a and its inner workings (II.). Afterwards, Section 19a will be compared to the classic Article 102 TFEU-procedure (III.) and contrasted with the Digital Markets Act (IV). Their solutions to current challenges will be compared, and thereby their differences, advantages, and disadvantages highlighted.

## II. Section 19a – its inner workings

Section 19a is based on a two-step approach: Paragraph 1 stipulates the conditions under which an undertaking falls within its scope; Paragraph 2 governs potential abusive conduct. However, both the norm's addressee

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[4] *Meta (vormals Facebook): Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B6 – 27/21 (BKartA); *Amazon.com, Inc.: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B2 – 55/21 (BKartA).

[5] See e.g. the *Google Shopping* case to which the Journal of European Competition Law & Practice recently dedicated an entire issue (Volume 13, Issue 2, March 2022).

[6] Council of the EU, *DMA: Council gives final approval to new rules for fair competition online* (Press Release: 2022).

[7] 2022 O.J. (L 265) 1.

[8] Compare Rupprecht Podszun and Fabian Brauckmann, 'GWB-Digitalisierungsgesetz: Der Referentenentwurf des BMWi zur 10. GWB-Novelle' [2020] GWR 436, 437: 'downright revolutionary' ('geradezu revolutionär').

[9] Compare Andreas Grünwald, '"Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' [2020] MMR 822, 826: 'Deutscher Sonderweg' (literally: 'German special path'; negative connotation).

and the prohibition do not operate *ipso iure.* Instead, the legal rule must be 'activated'[10] by the *Bundeskartellamt*. That is, the competition authority must first issue a declaratory decision designating an undertaking as an addressee (1), and afterwards, for a concrete form of behaviour to become illegal, a second decision, in this case, a prohibition decision, must follow (2).

## 1. Declaratory decision designating an undertaking the norm's addressee

Section 19a(1) stipulates two cumulative requirements under which the *Bundeskartellamt* may designate an undertaking which thereby will become liable to prohibition orders: First, the undertaking has to be active to a significant extent on multi-sided markets or networks (1.1.), and second, it must be of paramount significance for competition across markets (1.2.).

### 1.1. Significant activities on multi-sided markets or networks

The requirement regarding an undertaking's economic activities can be split into two components: Activities on multi-sided markets or networks and their significance.

The restriction to multi-sided markets or networks is not directly stipulated in Section 19a but results from its referral to Section 18(3a) *GWB*. Section 18 is a legal provision clarifying under which conditions an undertaking controls a market. Its Paragraph 3a is fairly new itself, as it just came into force with the 9th Amendment to the *GWB* in June 2017. It introduces additional criteria (such as consumer costs in switching platforms) to be considered when evaluating market dominance regarding 'multi-sided markets and networks'. According to the reasoning behind the law published by the government for the former 9th Amendment, multi-sided markets are characterised by having at least two different user groups to whom goods or services are offered. The explanatory notes further state that multisided markets exhibit indirect network effects. That is, the utility of one user group is linked to the existence and size of the other user group. In contrast, according to the communication from the government, networks are characterised by their direct network effects. That is, the utility of one user increases with the total number of users.[11] To give an

[10] Thomas Höppner, 'Plattform-Regulierung light' [2020] WuW 71, 77; Tobias Lettl, 'Der neue § 19a GWB' [2021] WRP 413, recital 4.

[11] Gesetzesentwurf der Bundesregierung, 9th Amendment 11 July 2016, BT-Drs. 18/10207 (Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen) 47.

example: According to Section 18(3a), social media platforms are networks, whereas sales platforms are multi-side markets. As the legal provision includes both terms, further clarification, especially regarding border cases (such as a social media platform with regards to advertising agencies) is not necessary for its practical application.[12]

It is currently rather controversial whether the scope of Section 19a is further restricted to digital markets.[13] This is because on the one hand, even though the explanatory notes published to Section 18(3a) indicate that it was especially introduced with regards to digital markets, credit card systems, and shopping malls are explicitly identified as real-world examples.[14] Thus, at least Section 18(3a) is not limited to digital markets.[15] By contrast, the reasoning behind the law published by the government for the the 10th Amendment states that Section 19a shall be restricted to digital markets.[16] Within the German legal system, the meaning of a law is determined by its wording, its (in general objectively determined)[17] purpose, its systematic position, and by the documents published during the legislation process.[18] Yet, regarding

[12] For further economic research see i.a. Lapo Filistrucchi and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10(2) Journal of Competition Law & Economics 293–329. With regards to competition law: Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization?' (2014) 11(1–2) International Economics and Economic Policy 49.

[13] In favour: Nothdurft, '§ 19a GWB' in Hermann-Josef Bunte (ed), *Kartellrecht: Bd. 1 Deutsches Kartrellrecht* (14th ed., 2022) 23; Florian C Haus and Lukas Rundel, 'Neue Missbrauchsaufsicht für digitale Ökosysteme' [2022] RDi 125, recital 10; Lena Mischau, 'Market Power Assessment in Digital Markets – A German Perspective' [2020] GRUR Int 233, 246. Against: Lettl (n 9), recital 9; Thorsten Mäger, 'Die 10. GWB-Novelle: Eine Plattform gegen Big Tech?' [2020] NZKart 101, 101; Torsten Körber, '"Digitalisierung" der Missbrauchsaufsicht durch die 10. GWB-Novelle: Macht im Netz IV: Maßvolle Antwort oder übertriebene Regulierung der Digitalwirtschaft?' [2020] MMR 290, 293 ff.; Stephan M Nagel and Katharina Hillmer, 'Die 10. GWB-Novelle – Update für die Missbrauchsaufsicht in der Digitalwirtschaft' [2021] DB 327, 329; Franck and Peitz (n 2), 516, 517.

[14] Gesetzesentwurf der Bundesregierung, 9th Amendment (n 10), 49.

[15] Töllner, '§ 18 GWB' in Hermann-Josef Bunte (ed), *Kartellrecht: Bd. 1 Deutsches Kartrellrecht* (14th ed., 2022) recital 171; Franz J Säcker and Peter Meier-Beck (eds), *Münchener Kommentar zum Wettbewerbsrecht: Band 2 Deutsches Wettbewerbsrecht* (3rd ed., Beck 2020) recital 47; Fuchs, '§ 18 GWB' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: Band 2.* GWB/Teil 1 (6th ed., Beck 2020) recital 140.

[16] Gesetzesentwurf der Bundesregierung, 10th Amendment 9 July 2020, BT-Drs. 19/23492 (GWB-Digitalisierungsgesetz) 74.

[17] Markus Würdinger, 'Das Ziel der Gesetzesauslegung – ein juristischer Klassiker und Kernstreit der Methodenlehre' [2016] JuS 1; Karl Larenz, *Methodenlehre der Rechswissenschaft* (3th ed., Springer 1995) 333.

[18] BVerfGE 133, 168, 205.

the latter, it must be taken into account that some of them, such as the aforementioned explanatory notes, are issued by the government, but it is the parliament that finally passes the law. On top of that, these documents are published at the very beginning of the legislative process, and it is not unusual for a legal provision to be altered during the legislative proceedings.[19] As neither the wording nor the systematic position supports a restriction to digital markets only, such delimitation is difficult to justify. Nonetheless, despite all academic discussions, it must not be forgotten that the most pressing addressees of Section 19a belong to a small circle of undertakings mainly operating on digital markets.[20] Therefore, at least in the near future, its actual scope of application will be limited to digital markets.[21]

The undertaking's activities on multi-sided markets or networks must be significant as to their extent. This criterion contrasts the 'relevant' activities of the enterprise with its other economic activities.[22] It is not yet clear whether the undertaking must realise the majority of its economic activities on markets addressed by Section 18(3a) – or whether it is sufficient that these activities are not entirely negligible.[23] This is why some legal scholars predict delimitation problems.[24] Still, currently, the *Bundeskartellamt* focuses its efforts on a handful of international groups active mostly on digital markets. Hence, delimitation problems will at least not occur in the near future – if ever.

Finally, it is worth noting that the 'significant extent' criterion is a dynamic one. An undertaking's activities may rapidly shift from the analogue to the digital world. One must only think of the swift changes realised during

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[19] See Thomas Spitzlei, 'Die Gesetzesbegründung und ihre Bedeutung für die Gesetzesauslegung' [2022] JuS 315, 316.

[20] Compare the reasoning behind the law published by the government (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15) 74, 75): 'targets a small circle of undertakings' ('zielt auf einen kleinen Kreis von Unternehmen'), 'only for a few undertakings' ('nur für wenige Unternehmen'), 'strictly limited circle of addressees' ('eng begrenzte[r] Adressatenkreis').

[21] See also, to this effect, Haus and Rundel (n 12), recital 10.

[22] See, however, the reasoning behind the law published by the government according to which the comparison of the scrutinised company to other undertakings present on the relevant market shall be taken into account as well (Gesetzesentwurf der Bundesregierung, 10th Amendment [n 15] 74). With regards to the 'paramount significance' criterion, this does not make sense. Nothdurft (n 12) recital 27 states that because of changes in the legislation process, this aspect has become obsolete and thus may be ignored.

[23] E.g. see the reasoning behind the law published by the government (Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15) 74): 'only undertakings with a focus on digital business models' ('nur Unternehmen mit Schwerpunkt im Bereich digitaler Geschäftsmodelle') – 'Therefore, undertakings are not encompassed for whom their activities as platform or network […] only play a very minor role' ('Nicht erfasst sind damit Unternehmen, bei denen die Tätigkeit als Plattform oder Netzwerk (…) nur eine vollkommen untergeordnete Rolle spielt').

[24] E.g. Haus and Rundel (n 12), recital 11.

the COVID-19 pandemic. Thus, undertakings currently not relevant may suddenly become the addressees of the norm.[25]

### 1.2. Paramount significance for competition across markets

In second place, Section 19a(1) only addresses undertakings of 'paramount significance for competition across markets'. This requirement shall guarantee the relative importance of an undertaking. Because of the wording 'across markets', some scholars argue that an undertaking has to be active on at least two different markets to become the norm's addressee.[26] Yet, the point of reference is competition itself. Moreover, according to the reasoning behind the law published by the government, this specific wording was chosen to highlight that the position of significance does not refer to one specific market, but to an overall picture of all the markets the undertaking operates on.[27] Therefore, no delimitation of the different markets is necessary,[28] and hence, the *Bundeskartellamt* is not obliged to make this distinction.[29]

Even though at first glance, 'paramount significance' looks like a hard criterion to fulfil, it intends the opposite. It was introduced as a requirement below the threshold of market dominance, yet still indicating a certain leading position.[30] The idea behind this difference is twofold. Firstly, the reasoning behind the law published by the government states that within the digital realm, 'importance' results from undertakings operating on various markets, in particular from realising network effects – possibly without being in a position of dominance on even one of them.[31] Secondly, there is the rather pragmatic thought that determining market power on digital markets is difficult and time-consuming. Though there have been cases against *Google*, *Amazon*, *Apple*, and *Facebook* in the past at both European and national level, the final decisions took several years to reach and were generally considered too late.[32] Therefore, speeding up the process is one of the most important goals of Section 19a(1).[33]

[25] Compare Nothdurft (n 12), recital 26.

[26] Lettl (n 9), recital 10.

[27] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 74 f.

[28] Marco Botta, 'Sector Regulation of Digital Platforms in Europe' [2021] Journal of European Competition Law & Practice 500, 503.

[29] Nothdurft (n 12), recital 28; Mischau (n 12), 246. See however Franck and Peitz (n 2), 517 still stressing the importance of defining markets.

[30] Lettl (n 9), recital 12.

[31] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 73.

[32] See i.a. Rupprecht Podszun, 'Die 10. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen (GWB)' (23 November 2020) Ausschussdrucksache 19(9)887 7, 8; Thorsten Käseberg, 'Kapitel 1' in Florian Bien and others (eds), *Die 10. GWB-Novelle* (2021) recital 174; Giorgio Monti, 'The Digital Markets Act: Improving Its Institutional Design' [2021] CoRe 90, 90.

[33] Compare Nothdurft (n 12), recitals 4, 5.

While the first sentence of Section 19a(1) only stipulates abstract criteria, its second sentence denominates various factors relevant to determining an undertaking's significance. As the term 'in particular' indicates, all of them are just examples – they do not have to be present at the same time, and are not to be considered exclusively. Moreover, according to the reasoning behind the law published by the government, the order in which they are named does not imply their quantification.[34]

Interestingly, the very first factor denominated is market dominance. Even though, as stated before, dominance is not necessary for finding a position of 'paramount significance', the *argumentum e contrario* shall be possible. Nonetheless, this highlighted position is rather unfortunate as – contrary to the idea of establishing a different approach – it instead invites scholars to point out that a decision based on market dominance is better justified than one based on the other criteria.[35]

Further aspects that are explicitly named are 'financial strength' and 'access to other resources'. The especially relevant 'access to data'[36] is denominated in a recital of its own. Finally, 'vertical integration' and its 'significance for third parties', that is, intermediary power,[37] are stipulated.

### 2. Prohibition decision regarding a concrete form of behaviour

Section 19a(2) denominates a catalogue of potentially harmful acts. However, the legal provision only stipulates the option of prohibiting certain activities, but does not contain a prohibition in itself. Instead, the *Bundeskartellamt* must take further action. Consistently, the utilised terms are rather abstract. The underlying idea is that the *Bundeskartellamt* may assess the circumstances on a case-by-case basis, and thus concretise the course of action outlined by Section 19a(2).[38] Only after, first, being designated as an undertaking of paramount significance; and second, after receiving a prohibition decision, must the undertaking comply with the stipulated rules of conduct. Only then, third, and if the undertaking infringes the legal prohibition decision, an administrative fine may be imposed or a harmed party may sue for damages.[39]

[34] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[35] E.g. Haus and Rundel (n 12), recital 13. See, however Boris P Paal and Fabian Kieß, 'Digitale Plattformen im DSA-E, DMA-E und § 19a GWB' [2022] ZfDR 1, 12: 'argumentum e contrario' ('Umkehrschluss').

[36] Cf. Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[37] Ibid.

[38] Matthias Heider and Konstantin Kutscher, 'Die 10. GWB-Novelle und die Missbrauchsaufsicht digitaler Plattformunternehmen' [2022] WuW 134, 136.

[39] Cf. Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

It is worth noting that the title of the legal rule refers to 'abusive conduct' even though Paragraph 2 does not qualify the listed actions as abusive. The second sentence of Paragraph 2 provides a justification-opportunity for the addressed undertaking.[40] That is, the undertaking may outline why its conduct is compliant with competition. However, as Sentence 3 explicitly points out, the burden of proof lies with the undertaking.[41] That is, the legal provision does not state that the listed conducts are abusive, but contains a rebuttable presumption.[42] The President of the *Bundeskartellamt*, *Andreas Mundt*, explains this as follows: 'It describes "typically abusive" behaviour which may be prohibited by the *Bundeskartellamt* without the need of substantiating the abusiveness.'[43]

Moreover, the *Bundeskartellamt* does not have to elaborate on the harmfulness of the conduct in more detail. There is not even a defence of 'not being harmful'. Section 19a(2) simply implies that the behaviour will have negative consequences.[44]

In total, Section 19a(2) lists seven conducts. Section 19a(2)(1)(1) addresses the role of intermediaries and the problem of self-preferencing. Therefore, it only applies to vertically integrated intermediaries. This is why Number 2 deals with gatekeepers in general and with disparate conditions in different enterprises. Both Numbers 1 and 2 are special forms of exclusionary conduct.[45] Number 3 targets enrolment and leverage effects. The legal provision gives examples of linking the use of an offer to the automatic use of another offer, and making the use of an offer conditional on the use of another offer. Number 4 tackles data. Making the use of a service conditional on the user agreeing to the processing of data from other services is just one of the examples listed. According to Number 5, interoperability and data portability may be enforced. The underlying idea is to prevent lock-in effects because of missing interoperability and data portability.[46] Number 6 imposes an information duty as its shortage complicate comparability.[47] Finally, Number 7 contains a special form of exploitative abuse banning the undertaking from

[40] Compare Heider and Kutscher (n 37), 136, stressing its importance.

[41] In depth: Marcel Scholz, 'Regulierung nach § 19a GWB' [2022] WuW 128.

[42] Compare Botta (n 27), 505.

[43] Andreas Mundt, 'Wandel der kartellbehördlichen Aufsicht und die aktuellen Herausforderungen' [2021] WuW 418, 419: 'Sie benennt 'typischerweise missbräuchliche' Verhaltensweisen, die das Bundeskartellamt den betreffenden Digitalunternehmen untersagen kann, ohne die Missbräuchlichkeit des Verhaltens zusätzlich umfänglich begründen zu müssen.' (Translation TB).

[44] Compare Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 78.

[45] Compare ibid 75, 76.

[46] Ibid 76.

[47] Ibid 77.

demanding disproportionate benefits for the handling the offers of another undertaking. That is, the undertaking of paramount significance shall not be able to gain advantages simply because of its position.[48]

The listed actions are not intended to be mutually exclusive. On the contrary; to avoid regulatory gaps, they are specially designed to overlap.[49] At the beginning of the legislative process, the behaviour was outlined in rather vague terms. In reaction to the Commission's 2020 Proposal for the DMA[50] that stipulated concrete duties, the German draft list was augmented, and, additionally, specific examples were included.[51] These examples shall ensure effectivity and legal certainty, but shall not indicate that a certain behaviour that is not mentioned is in fact legal.[52] However, it is not far-fetched that undertakings concerned will use a similar line of defence, most likely highlighting the differences between their activities and the examples given.

In theory, the prohibition decision should implement an *ex ante* regulation. Yet, the reasoning behind the law published by the government states that such a decision may only be issued if there is 'Erstbegehungsgefahr' (hazard of first infringement) or 'Wiederholungsgefahr' (hazard of repetition).[53] These terms originate from civil proceedings; to obtain injunctive relief, a claimant must demonstrate that the respondent will soon engage in unlawful conduct, by presenting serious and tangible factual indications. If the respondent has previously committed infringements, there is a general presumption of repetition. As these are civil procedure terms and since there is no such indication in the wording of Section 19a(2), the statement in the reasoning behind the law published by the government is rather surprising.[54] Indeed, legal scholars have pointed out that the *Bundeskartellamt* may not act without sufficient cause, but that this is a question of 'pflichtgemäße Ermessensausübung' (reasonable discretion) resulting in a slightly different review standard.[55] Notwithstanding this academic dispute, in the end, it is important to highlight that the *Bundeskartellamt* may not issue a prohibition decision without due cause. In particular, it will not be possible to issue the very same prohibition decision to

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[48] Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie 13 January 2021, BT-Drs. 19/25868 117.

[49] Nothdurft (n 12), recital 50.

[50] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final).

[51] Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (n 47), 113.

[52] Ibid 114. Rightfully sceptical: Andreas Grünwald, '§ 19a GWB' in Wolfgang Jaeger and others (eds), *Frankfurter Kommentar zum Kartellrecht* (100th ed., 2021) recital 59.

[53] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[54] Haus and Rundel (n 12), recital 25.

[55] Compare Lettl (n 9), recital 22.

every undertaking of paramount significance under Section 19a(1) whenever a certain form of behaviour comes up. Section 19a(2) does not give to the *Bundeskartellamt* the authority to create quasi-laws. This is why in practice, Section 19a will most likely result in *ex post* control.

### 3. Norm inherent criticism

Section 19a polarises views. Several potential problems result from its vagueness, especially in Paragraph 1, but to a certain extent in Paragraph 2 as well. Regarding Paragraph 1, some legal scholars allege that because of being too imprecise, denominating an undertaking requires difficult, demanding, and thus time-consuming investigations.[56] Depending on one's point of view, the first three cases of *Google*, *Meta* and *Amazon* justify these fears – or disprove them. Though Section 19a was specially designed with regard to the big four, it took the *Bundeskartellamt* 12 to 18 months to issue a declaratory decision directed at them. However, the reasoning behind the law published by the government foresaw a process durations of two years[57] and, in comparison with past proceedings against Big Tech, 12 to 18 months is indeed an improvement.

In this context, it is worth noting that the highlighted position of market dominance, as the first listed factor for assessing the paramount significance across markets, is rather unfortunate. Contrary to the idea of establishing a different approach, it rather invites scholars to point out that a decision based on market dominance is better justified than one based on other criteria.[58] Consequently, or possibly only to be on the safe side, the *Bundeskartellamt* did indeed establish *Google*'s market dominance[59] – this careful approach might have played its part in the decision taking an entire year to be issued.

Those in favour of Section 19a respond that formulating a declaratory decision might be time-consuming, but has to be made only once.[60] Thereafter, prohibition decisions are alleviated. Moreover, even a declaratory decision in itself may have positive effects in making an undertaking aware of its

[56] Ibid recital 15. Regarding the government draft: Podszun (n 31), 9, 11; Wirtz in Philipp M Steinberg and Markus Wirtz, 'Der Referentenentwurf zur 10. GWB-Novelle: Ein Dialog zwischen dem BMWi und der anwaltlichen Praxis (Teil 1)' [2019] WuW 606, 611.

[57] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 61.

[58] E.g. Haus and Rundel (n 12), recital 13.

[59] *Google: Feststellung der überragenden marktübergreifenden Bedeutung für den Wettbewerb* (2022) B7 – 61/21 3 (BKartA).

[60] Haus and Rundel (n 12), recital 15. See Nothdurft (n 12), recital 129: 'Vorratscharakter' (storage nature).

position.[61] For instance, following the *Bundeskartellamt*'s decision, *Google* itself suggested remedies to remove competition concerns.[62] Yet, one cannot fail to notice that Section 19a generally requires two steps and that makes the proceedings cumbersome.

Regarding Paragraph 2, there are two opposing lines of criticism. On the one hand, some scholars state that it is too vague, and moreover names forms of behaviour such as self-preferencing which, in general, are perfectly acceptable in competitive markets.[63] On the other hand, one might allege that because examples were included, the legal provision ceased to be sufficiently abstract to fulfil its purpose of capturing yet unknown activities. Though the reasoning behind the law published by the government states that the *argumentum e contrario* shall not be admissible, the undertakings concerned will most likely try to utilise the examples in their favour. For instance, they might argue that their actions are so different from the examples given that they do not fall within the scope of a certain clause.

The norm's vagueness also leads to the accusation of legal uncertainty[64], and an unnecessary shift in power towards the executive.[65] By contrast, supporters argue that only this vagueness guarantees the necessary flexibility for such dynamic markets.[66] The reasoning behind the law published by the government states that the requirement of first designating an undertaking and, second, prohibiting concrete activities sufficiently mitigates the problem of legal uncertainty.[67] However, Section 19a(2)(1) allows for a joint decision incorporating both the designation and the prohibition.[68] Furthermore, the problem of a shift in power remains.

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[61] Yet, on the negative side, this may also lead to paralysis (Romina Polley and Rieke Kaup, 'Paradigmenwechsel in der deutschen Missbrauchsaufsicht' [2020] NZKart 113, 116).

[62] Haus and Rundel (n 12), recital 5 referring to BKartA, *Google News Showcase – Bundeskartellamt konsultiert Vorschläge Googles zum Ausräumen wettbewerblicher Bedenken* (Press Release: 2022).

[63] Lettl (n 9), recital 25; Torsten Körber, 'Datenzugang und Datennutzung in der Digitalwirtschaft im Fokus der 10. GWB-Novelle' in Tobias Klose, Martin Klusmann and Stefan Thomas (eds), *Das Unternehmen in der Wettbewerbsordnung: Festschrift für Gerhard Wiedemann zum 70. Geburtstag* (C.H. Beck 2020) 367 ff.

[64] Körber 2020 (n 12), 294; Paal and Kieß (n 34), 15; Polley and Kaup (n 59), 116. See, however, Höppner (n 9), 78 who rightfully points out that the legal provision was designed with regards to very few undertakings so 'a designation' should not come as a surprise to them.

[65] Bernhard Jakl, 'Jenseits des Datenschutzes' [2021] RDi 71, recital 42.

[66] Nothdurft (n 12), recital 51; Philipp Steinberg, Raphael L'Hoest and Thorsten Käseberg, 'Digitale Plattformen als Herausforderung für die Wettbewerbspolitik in der EU' [2021] WuW 414, 416.

[67] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 74.

[68] Compare Körber 2020 (n 12), 294.

Finally, Section 19a has the huge disadvantage of being limited to the German territory.[69] Of course, with the DMA being delayed at the beginning of the legislation process, the only alternative available to Germany was not acting at all.[70] Some argued that German endeavours could function as a lighthouse project convincing the rest of Europe of its necessity, and therefore paving the way for the DMA.[71] Yet, despite all good intentions, the risk of market fragmentation remains.[72] Perhaps, for simplicity's sake, an undertaking addressed by a prohibition decision will change its conduct in all (European) markets. In an ideal world, there could be a race to the top, or at least a race to be the first competition authority to issue a decision. Yet, a decision by the *Bundeskartellamt* would not impede another competition authority from issuing a second decision asking for slightly different remedies. Even taking into account the latest developments regarding *ne bis in idem*,[73] the possibility of various decisions remains, since Section 19a(2) does not involve any fines but only the prohibition of certain forms of conduct.[74] On top of that, economically speaking, the resulting duplication of efforts makes no sense. Therefore, at least when other member states introduce their own 'lex GAFA', there will be frictional losses and problems of alignment.

## III. Section 19a and Article 102 TFEU

After analysing Section 19a on its own, to gain further insights, this legal provision will now be compared to traditional antitrust law. However, first of all, it is important to note that even though Union law is applied primarily, according to Article 3(2)(2) of Regulation (EC) No 1/2003, Member States

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[69] Bernhard Jakl, 'Jenseits des Datenschutzes' [2021] RDi 71, recital 13; Paal and Kieß (n 34), 27.

[70] Therefore in favour of Section 19a: Torsten J Gerpott, 'Neue Pflichten für große Betreiber digitaler Plattformen: Vergleich von § 19a GWB und DMA-Kommissionsvorschlag' [2021] NZKart 273, 279.

[71] Ibid.

[72] European Commission, *Impact Assessment Report: accompanying the document Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)* (SWD[2020] 363 final 2020) recital 29. Further: Boris P Paal and Lea K Kumkar, 'Wettbewerbsschutz in der Digitalwirtschaft' [2021] NJW 809, recital 20; Scholz (n 40), 134.

[73] Case C-151/20 *Bundeswettbewerbsbehörde v. Nordzucker a.o.* EU:C:2022:203.

[74] In depth: Ranjana A Achleitner, 'Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden' [2022] NZKart 359, 364. Regarding conflicts resulting from the application of both, Article 102 TFEU and the DMA see Lukas Harta, 'Der Digital Markets Act und das Doppelverfolgungsverbot' [2022] NZKart 102; Monti (n 31), 98.

may adopt stricter national law which prohibits unilateral conduct. Hence, Article 102 does not precede Section 19a.[75]

Comparing Section 19a to controlling abuse of market power reveals various similarities – even up to identical parts – but great differences as well. The first difference manifests itself regarding the *modus operandi*: Article 102 directly prohibits certain forms of behaviour. By contrast, Section 19a requires two 'activations', and is thus more dependent on the actions of the *Bundeskartellamt*. Whereas under Article 102, private individuals may sue the infringers directly, Section 19a requires the *Bundeskartellamt* to take action first.[76] Still, as stand-alone actions rarely take place, this discrepancy will hardly ever manifest in real life.

Another modification can be seen with regards to the norm's addressees. Though both refer to a position of power, Article 102 requires market dominance, whereas, with Section 19a, a position of paramount significance suffices. This aspect should allow for more undertakings to be watched. Moreover, it is supposed to simplify the work of the *Bundeskartellamt*. Yet, especially considering that market dominance is a criterion for determining the position of paramount significance, there is reasonable doubt whether this intended simplification will work.

Section 19a's point of reference is not one single market but competition itself. Furthermore, only markets with special characteristics are to be considered. Still, scholars do not agree whether the restriction ends with multi-sided markets and networks, or whether on top of that, the undertaking must operate in the digital realm. Nonetheless, in the end, Section 19a's scope of application is narrower.

Finally, regarding the relevant behaviour, both Section 19a and Article 102 target abusive forms of conduct.[77] Though Article 102 does not denominate the problematic activities in much detail, the listed practices are similar. Scholars mostly agree that there is no abusive behaviour captured by Section 19a that could not be targeted by Article 102 or its German equivalent, Section 19 GWB.[78] Yet, by directly naming certain forms of conduct, and on top of that giving examples, Section 19a intends to lighten the burden of proof for the *Bundeskartellamt*. However, scholars doubt whether this really results

[75] Nothdurft (n 12), recital 136. However, there is some critical debate whether Section 19a differs so much from traditional competition law, that Article 3(2)2 does not even apply (see Grünwald, '"Big Tech"-Regulierung zwischen GWB-Novelle und Digital Markets Act' (n 7), 824; Paal and Kumkar (n 70), recital 18).

[76] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[77] Compare ibid referring to Section 19a as 'real abuse control' ('echte Missbrauchsaufsicht').

[78] Nothdurft (n 12), recital 4, 49; Körber 2020 (n 12), 295.

in a simplification of procedure in practice – or whether this concretisation rather leads to a different, yet comparable effort.[79]

Summing up, Section 19a and Article 102 both target abusive conduct by undertakings in a position of power. Regarding its scope, Section 19a is narrower, but within, both legal provisions could be applied to the very same case.[80] Hence, in the end, Section 19a can only have lasting importance if it allows for more effective control of abusive practices. At least its design is intended to be better suited to tackle GAFA. Yet, as its wording is rather vague, there is justifiable doubt about its manageability.[81]

## IV. Section 19a and the Digital Markets Act

### 1. The Digital Markets Act

On 25 March 2022, the rapporteur of the European Parliament *Andreas Schwab*, the French Secretary of State *Cédric O*, the Commission Executive Vice-President *Margrethe Vestager*, and the Commissioner for the Internal Market *Thierry Breton* held a joint press conference announcing that a deal on the European Digital Markets Act (hereinafter: DMA) had been reached.[82] On 5 July, the European Parliament, and on 18 July, the Council of the EU gave their final approval.[83] Thereafter, the DMA was published on 12 October 2022.[84] It will apply from 2 May 2023. The following statements are not intended as a full assessment of the DMA[85], but as a summary allowing for its comparison to Section 19a.

[79] See, however, Gerpott (n 68), 277 who forecasts problems regarding the DMA's vagueness as well.

[80] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[81] See Lettl (n 9), recital 51.

[82] Andreas Schwab and others, 'Press conference on the Digital Markets Act (DMA) – results of the trilogue' (25 March 2021) <https://multimedia.europarl.europa.eu/en/webstreaming/press-conference-by-andreas-schwab-rapporteur-on-digital-markets-act-dma-results-of-trilogue_20220325-1000-SPECIAL-PRESSER> accessed 12 April 2022.

[83] Council of the EU, *DMA: Council gives final approval to new rules for fair competition online* (Press Release: 2022).

[84] 2022 O.J. (L 265) 1.

[85] See i.a. Achleitner (n 72); Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' [2021] Journal of European Competition Law & Practice 493; Florian C Haus and Anna-Lena Weusthof, 'The Digital Markets Act – a Gatekeeper's Nightmare?' [2021] WuW 318; Björn Herbers, 'Der Digital Markets Act (DMA) kommt – neue Dos and Don'ts für Gatekeeper in der Digitalwirtschaft' [2022] RDi 252; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] Journal of European Competition Law & Practice

The most important term and nucleus of the DMA is that of a 'gatekeeper'. Article 2(1) defines them as undertakings 'providing core platform services', which according to Article 2(2) may refer to many services typical to the digital realm. However, some services such as streaming services are not included.[86] The list is exhaustive but, according to Article 19(1), the Commission may add new services following a market investigation.

An undertaking offering core platform services does not automatically become the norm's addressee. Article 3 introduces further criteria to safeguard that the undertaking at stake actually carries weight within the digital realm. On top of that, Article 3 establishes a designation procedure. Article 3(1) depicts a set of qualitative designation criteria, in particular the need for the core platform service to be an important gateway for business users to reach end-users. That is, gatekeepers are indirectly defined by their intermediary power.[87]

However, the Commission need not rely on a complicated qualitative assessment. Instead, Article 3(2) introduces certain quantitative thresholds regarding the number of active users, the number of EU Member States the undertaking is active on, and its turnover or market capitalisation/fair market value.[88] When reaching these thresholds, the undertaking shall be presumed a gatekeeper. However, Article 3(5) and (8) give leeway in both directions. On the one hand, the undertaking may present arguments to demonstrate that, due to special circumstances, it does not in fact satisfy the qualitative requirements

561; Lea K Kumkar, 'Der Digital Markets Act nach dem Trilog-Verfahren: Neue Impulse für den Wettbewerb auf digitalen Märkten' [2022] RDi 347; Jürgen Kühling and Thomas Weck, 'Der Digital Markets Act und die Regulierung von Ökosystemen' [2021] ZWeR 487; Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] Journal of European Competition Law & Practice 529; Rupprecht Podszun, Philipp Bongartz and Sarah Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' [2021] EuCML 60; Romina Polley and Friedrich A Konrad, 'Der Digital Markets Act – Brüssels neues Regulierungskonzept für Digitale Märkte' [2021] WuW 198; Fabian Seip and Matthias Berberich, 'Der Entwurf des Digital Markets Act' [2021] GRUR-Prax 44; Alexandre de Streel and Pierre Larouche, 'The European Digital Markets Act: A Revolution Grounded on Traditions' [2021] Journal of European Competition Law & Practice 542; Monti (n 31); Daniel Zimmer and Jan-Frederick Göhsl, 'Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper' [2021] ZWeR 29.

[86] Therefore, critical Podszun, Bongartz and Langenstein (n 83), 63; Zimmer and Göhsl (n 83), 39.

[87] Compare Chirico (n 83), 494

[88] Though Article 3(2)a does not make it clear whether the requirement of being active in at least three Member States is only linked to a fair market value of EUR 75 billion, or if it's a criterion which must always be fulfilled, recital 17 connects turnover and core platform services in at least three Member States, thereby clarifying that the latter condition is an independent one (see also Podszun, Bongartz and Langenstein [n 83], footnote 24).

listed in Article 3(1). On the other hand, the Commission shall 'designate' any undertaking not meeting the thresholds but fulfilling the qualitative criteria. Hence, Article 3 makes the designation process transparent, accordingly establishes legal certainty, and yet also allows for special circumstances to be considered.

Another important feature of the designation process is the notification duty of undertakings whereby Article 3(3) obliges those meeting the thresholds to notify the Commission 'without delay and in any event within 2 months'. Thus, in general, it is not up to the Commission to monitor markets regarding the emergence of new gatekeepers.

Once designated as gatekeeper, an undertaking must comply with all the obligations listed in Article 5. Furthermore, Article 6 shows obligations that can be further specified by the Commission. Correspondingly, some of the actions outlined by Article 6 are rather vague.[89] Nonetheless, as well as Article 5, Article 6 contains a self-executing blacklist.[90] According to Recital 23, there is no 'efficiency defence'.[91] In Article 7, there are special obligations regarding interoperability. As *Schwab* pointed out during the press conference, the advantage of stipulating obligations within the act means that undertakings get 'a very clear direction of what fair markets mean'.[92] Yet, to a certain extent, Articles 5 and 6 are 'backward-looking'.[93] However, on top of these fixed duties, Article 12 empowers the Commission to adopt delegated acts to update the obligations to address new forms of behaviour. They shall be based on market investigations carried out by the Commission according to Article 19 – which, however, might take up to 24 months.[94] Moreover, Article 12(2) limits the possibility of updates to certain forms of obligations. Therefore, although there is a flexibility clause, it does not allow for quick adaptations or for tackling something completely new and thus unforeseen.

Taking a closer look at Article 5 reveals obligations regarding either end-users, or business-users as well as duties concerning both user groups.[95] Article 5(2) addresses the usage of personal data. In particular, the clause forbids an undertaking from processing personal data for advertising services using services of third parties, combing personal data gathered

[89] Therefore, i.a. critical regarding the obligation to refrain for self-preferencing formerly stipulated by Article 6(1)(d), now Article 6(5): Polley and Konrad (n 83), 201.

[90] Podszun, Bongartz and Langenstein (n 83), 61; Petit (n 83), 535.

[91] Critical: Kumkar (n 83), recital 16.

[92] Schwab and others (n 80).

[93] Ibid.

[94] Therefore, critical: Haus and Weusthof (n 83), 320; Monti (n 31), 99; Podszun, Bongartz and Langenstein (n 83), 66.

[95] Petit (n 83), 535.

from different services, cross-using personal data, and signing in end-users to combine personal data. Article 5(3) and (4) entail obligations concerning business-users. The gatekeeper is forbidden from hindering business-users from offering the same products or services on other channels at different prices or conditions; business-users must also be allowed, free of charge, to communicate and promote offers to end-users acquired via its core platform service or through other channels. According to Article 5(5), end-users must be allowed access via the software application of a business-user. Article 5(6) hinders gatekeepers from preventing either of the user group from raising contentious issues with a public authority. Article 5(7) impedes gatekeepers from making it mandatory to use their identification services, web browser engines, payment services, or technical services. On top of that, according to Article 5(8), gatekeepers are not allowed to make the use of one core platform service mandatory in order to be granted access to another one. Finally, both Article 5(9) and (10) concern online advertisement and the provision of the necessary information.

Article 6 contains thirteen paragraphs depicting further obligations such as: allowing for an easy un-installing of any software application on its operating system (Article 6(3)); the installation of third-party software (Article 6(4)); or impeding the gatekeeper from treating its own services and products more favourably in raking, indexing, etc. (Article 6(5)).

Regarding the obligations listed, opinions on whether they present a coherent picture differ. On the one hand, they have been called 'a random "best of" competition law cases'.[96] On the other hand, they can be quite convincingly grouped by the types of the market failures they address (lack of transparency, hazard of platform envelopment, restrained user mobility and unfair practices).[97]

Finally, a note on enforcement: Unlike Articles 101 and 102 TFEU, the DMA is to be enforced solely by the European Commission.[98] According to Article 38(7), a national competition authority (hereinafter: NCA) may 'conduct an investigation into a case of possible non-compliance with Articles 5, 6 and 7 […] on its territory.' However, the Commission may take over or terminate such proceedings at any time. Bearing in mind that the DMA is only addressed to a few undertakings active in most Member States, there is certain merit to this centralised approach.[99] Yet, one cannot fail to notice that the approach disregards the expertise of NCAs such as the one gathered by the *Bundeskartellamt* in applying Section 19a.

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[96] Podszun, Bongartz and Langenstein (n 83), 65.

[97] Monti (n 31), 91. For a similar classification see Petit (n 83), 535 ff.

[98] Critical: Haus and Weusthof (n 83), 323.

[99] In depth: Monti (n 31), 92 ff.

## 2. Comparison

Contrasting the DMA and Section 19a, one big similarity stands out: Both of them focus on digital platforms.[100] While in the case of Section 19a, one has to consult the reasoning behind the law published by the government,[101] the DMA directly addresses gatekeepers, which are defined in relation to the digital realm and their importance for digital services. Thus, both their scopes of application and their purpose point in the same direction, that is, regulating undertakings carrying weight in the online world. In particular, it is the intermediary power that they assess.

Taking a closer look at how an undertaking becomes the norm's addressee, Article 3 of the DMA and Section 19a both establish a 'designation procedure'. However, though Article 3(1) names qualitative criteria, Article 3(2) establishes a presumption according to certain thresholds.[102] Because of these thresholds, the European Commission will have an easier job than the *Bundeskartellamt*, most likely resulting in fewer delays. Moreover, for the undertakings concerned, thresholds enhance legal certainty.[103] At first glance, Section 19a has the advantage of greater flexibility. Yet, Article 3(8) of the DMA also leaves room for further designation relying on quantitative criteria. Therefore, regarding the norm's addressee, Article 3 augments the manageability and legal certainty while still encompassing the flexibility of Section 19a.[104]

The second stage regarding the prohibited conduct manifests even greater differences. Once designated as a gatekeeper, that undertaking must follow the obligations stipulated in Articles 5 and 6 of the DMA. By contrast, according to Section 19a(2), the *Bundeskartellamt* must always take action first and may only prohibit concrete practices. Even activities similar to the ones addressed by the prohibition decision will not be captured.[105] Moreover, the *Bundeskartellamt* must not issue a prohibition decision without due cause. In practical terms, this will most likely lead to an undertaking first engaging in a certain behaviour, and the *Bundeskartellamt* only reacting to that fact. Thus, there are more steps to be taken in Germany before finally addressing the actual problem. Moreover, the solution will most likely not be as lasting as

[100] In depth Paal and Kieß (n 34), 3 ff.

[101] See Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 73: 'role of a gatekeeper' ('Gatekeeper-Funktion').

[102] Compare Botta (n 27), 504: 'major differences'.

[103] Gerpott (n 68), 275.

[104] See, however, Haus and Weusthof (n 83), 320 criticising the lack of flexibility in the DMA's designation process, pointing also at another weak spot in the market investigation following an undertaking rebutting its designation.

[105] Höppner (n 9), 77.

that on the basis of the DMA. By contrast however, because of its generalized approach, the DMA bears the risk of overregulation.[106]

Section 19a(2) is supposed to allow for a case-by-case approach giving the *Bundeskartellamt* the means of taking individual circumstances into account. Yet, even though the listed activities are still rather abstract, within the legislative process, examples were ultimately included into the final draft. This was due to the fact that the Commission's 2020 Proposal for the DMA[107] was published. However, as Section 19a – unlike the DMA – relies on a prohibition decision, this alignment did not make sense. Now, Section 19a allows for less flexibility while still having the problem of requiring a prohibition decision first. Moreover, Section 19a does not contain a flexibility clause. The list stipulated within Section 19a(2) is exhaustive. Therefore, there is no room for prohibiting completely new forms of behaviour.

Comparing the concrete duties imposed by Section 19a(2) and the DMA, the first thing to stand out is that there are many more obligations listed within the DMA than within Section 19a. On the one hand, this is because Section 19a only depicts the forms of conduct in abstract terms, requiring the *Bundeskartellamt* to make a prohibition decision. Even though it is sometimes vague as well, the DMA contains blacklists in itself. Yet, taking a closer look at the various obligations, one cannot fail to notice that, on the other hand, Section 19a(2) almost exclusively focuses on other undertakings being hindered in their business endeavours. While some of the examples, in particular Number 4(a) ('making the use of services conditional on the user agreeing to the processing of data'), allow for 'end-users' to be considered, the abstract clauses refer to 'competitors' and 'other undertakings'. By contrast, the obligations listed in the DMA address both business-users as well as consumers. At the same time, however, the behaviour outlined by Section 19a(2) has an equivalent within Articles 5 and 6 of the DMA.[108] Thus, apart from its other advantages, the DMA also has a broader scope.

### 3. Section 19a after the DMA applies

According to its Article 54, the DMA will apply from 2 May 2023. This upcoming event leads to the question of Section 19a's future. It is twofold:

[106] Paal and Kieß (n 34), 20 f.

[107] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final).

[108] Ibid 18.

first, one must ask whether Section 19a will violate European law, and, if not, one must consider its future relevance.

### 3.1. Legal admissibility

Similar to the 2020 Proposal, the final version of the DMA draws a line between competition law and regulatory law. Article 1(6)(b) declares that Member States are still allowed to apply their national competition rules prohibiting other forms of unilateral conduct insofar as 'they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers'. Thereby, on the one hand, the legal provision repeats and confirms Article 3(2)(2) of Regulation (EC) No 1/2003.[109] On the other hand, however, there is a restriction as well – only clauses stipulating stricter obligations remain admissible.

By contrast, Article 1(5) of the DMA forbids 'further obligations on gatekeepers […] for the purpose of ensuring contestable and fair markets.' Still, Member States may impose obligations on gatekeepers 'for matters falling outside the scope of this Regulation, provided that those obligations […] do not result from the fact that the relevant undertakings have the status of a gatekeeper within the meaning of this Regulation.'

As the DMA was explicitly designed as regulatory law,[110] this leads to the conclusion that Section 19a's destiny depends on it either being categorised as competition law or as regulatory law. If it was competition law, it would fall within the scope of Article 1(6)(b), and thus be still admissible, at least insofar as it establishes stricter obligations than the DMA. Otherwise, the DMA would take precedence once an undertaking had been named a 'gatekeeper'.[111]

As Section 19a was designed to tackle Big Tech, its main scope concerns the very same undertakings as the ones identified as 'gatekeepers' by the DMA. In making a counter-exception for undertakings, explicitly addressed by the DMA because of their status as gatekeepers, the wording at the very end of Article 1(5) makes it clear that the clause prohibits all national laws to impose obligations on undertakings with a similar objective as the DMA. Hence, Section 19a would be inadmissible with regard to gatekeepers.

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[109] Zimmer and Göhsl (n 83), 58.

[110] Schwab and others (n 80). Compare also Recital 10: The 'Regulation aims to complement the enforcement of the competition law'.

[111] Andreas Grünwald, 'Gekommen, um zu bleiben? – § 19a GWB im Lichte des DMA-Entwurfs' [2021] NZKart 496, 496 f.

Within the Proposal, the Commission referred to the DMA as installing an *ex ante* regulation, in contrast to competition law relying on an *ex post* control regime.[112] As an alternative or additional criterion, it has been pointed out that regulatory law only targets specific sectors, such as telecommunications, whereas competition law follows a universal approach.[113] Notwithstanding these rather clear delimitation possibilities, categorising Section 19a is difficult, and German Scholars have been disputing its nature ever since it was first introduced:[114] Although Section 19a allows for an *ex ante* decision, in practice *ex post* prohibitions are far more likely.[115] As well as the DMA, Section 19a primarily addresses a special sector.[116] Yet, the wording is not restricted to the digital realm. Thus, Section 19a can be considered to be somewhere in-between, and has been rather befittingly called a 'chimaera'.[117]

In the final version of the DMA, Recital 10 refers to national competition law as 'rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour'. This definition hints at Section 19a being 'competition law' by European standards. Yet, in the end, if the *Bundeskartellamt* keeps applying Section 19a, it is up to the CJEU to decide whether a legal provision such as Section 19a falls within the scope of

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[112] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842 final) 4. As '[s]anctions under competition law aim to influence future behaviour' critical: Haus and Weusthof (n 83), 324.

[113] Justuts Haucap and Heike Schweitzer, 'Die Begrenzung überragender Marktmacht digitaler Plattformen im deutschen und europäischen Wettbewerbsrecht' [2021] Perspektiven der Wirtschaftspolitik 17, 19; Haus and Weusthof (n 83), 324.

[114] In favour of competion law: Haus and Weusthof (n 83), 323; Dragan Jovanovic and Jakob Greiner, 'DMA: Überblick über den geplanten EU-Regulierungsrahmen für digitale Gatekeeper' [2021] MMR 678, 679; Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal' [2021] ZEuP 503, 509; Wolfgang Bosch, 'Die Entwicklung des deutschen und europäischen Kartellrechts' [2021] NJW 1791, recital 45; Franck and Peitz (n 3), 526; Nothdurft (n 12), recital 139 ff.; Gunnar Wolf and Niklas Brüggemann, 'AGENDA 2025: Der Digital Markets Act und §19a GWB' (19 July 2022) <https://www.d-kart.de/blog/2022/07/19/agenda-2025-der-digital-markets-act-und-%c2%a719a-gwb/> accessed 26 August 2022; Zimmer and Göhsl (n 83), 58 f. In favour of regulatory law: Grünwald, '§ 19a GWB' (n 50), recital 27; Gerpott (n 68), 279; Nagel and Hillmer (n 12), 330; Zimmer and Göhsl (n 83), 59; Polley and Konrad (n 83), 199.

[115] Compare Paal and Kieß (n 34), 19; Podszun (n 31), 9. Therefore critical: Höppner (n 9), 77

[116] Compare Philipp Bongartz, '§ 19a GWB – a keeper?' [2022] WuW 72, 73.

[117] Torsten Körber, 'Lessons from the Hare and the Tortoise: Legally imposed self-regulation, proportionality and the right to defence under the DMA – Part 1' [2021] NZKart 379, 381. Moreover: Steinberg, L'Hoest and Käseberg (n 64), 416.

Article 1(5) or (6) of the DMA. As Article 1(5) commences with 'In order to avoid the fragmentation of the internal market' and Section 19a bears exactly this risk, despite Recital 10, there is the real possibility of the CJEU ruling against the future admissibility of Section 19a.

Nonetheless, a decision against Section 19a would not hinder the *Bundeskartellamt* from applying Section 19a to undertakings not meeting the requirements of the gatekeeper status under the DMA. As the presumption of Article 3(2) of the DMA requires the scrutinised undertaking to offer core platform services in at least three Member States, undertakings only operating on a national level come to mind in particular. Thus, even if Section 19a was to be considered regulatory law, an admissible scope of its application would remain. Yet, when looking at the reasoning behind the law published by the government, Section 19a was not established with these smaller businesses in mind, but with regard to Big Tech. Therefore, it would lose its main application scope.

### 3.2. Future relevance

Even if Section 19a was to be considered admissible after the DMA applies, the question of future relevance remains.

According to the reasoning behind the law published by the government, Section 19a was designed as a legal rule allowing for a case-by-case approach and thus great flexibility in reacting to new practices.[118] Yet, its necessary vagueness results in the *Bundeskartellamt* being obliged to produce well-founded decisions – which of course takes time. In the case of *Google*, the declaratory decision mounts up to 173 pages and took almost an entire year to be issued.[119] In comparison to the DMA's straightforward approach of thresholds combined with a notification duty, the German procedure appears cumbersome, especially when one considers that this decision, of designating an undertaking the norm's addressee, does not result in any legal obligations. Instead, it requires a second, specific decision.

Hence, after the DMA applies, apart from undertakings not big enough to reach the thresholds, only one relevant future application comes to mind – a conduct yet to arise, not addressed by either Article 5, 6, 7 of the DMA and not suitable to be tackled by the flexibility-clause of Article 12. However, comparing the lists of Section 19a(2) and of Articles 5, 6, 7 and 12 of the DMA, this scenario seems rather unlikely.

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[118] Gesetzesentwurf der Bundesregierung, 10th Amendment (n 15), 75.

[119] See *Alphabet Inc. Google Germany GmbH* (2021) B7-61/21 (BKartA).

Therefore, even if Section 19a were to remain in its entirety, its future relevance would most likely be restricted to enterprises not big enough to be considered a gatekeeper on the EU scale.

## V. Conclusion

A lighthouse project or a superfluous national solo run? The paper has listed several weak points regarding Section 19a's design. In particular, the need for a prohibition decision makes the process overly complicated. However, in comparison to traditional competition law and its ability to tackle Big Tech, Section 19a still has the potential to speed up the process. Indeed, as Google proposed remedies on its own after being designated the norm's addressee, Section 19a may have greater practical value than its design suggests.

Still, there is the risk of market fragmentation as the legal rule is limited to German territory. Nevertheless, with the DMA being delayed at the beginning of the legislation process, the only alternative left to Germany was not acting at all. On top of that, instead of market fragmentation, there might be positive spill-over effects. Thus, Section 19a has the potential to compensate for a temporary regulatory deficit, possibly preventing markets from tipping in the meantime.[120] During this interim phase, Section 19a is beneficial.

However, once the DMA applies, continuing the effort of designating undertakings as of paramount significance, that are also gatekeepers, will at least lead to unnecessary duplication of effort. Therefore, other Member States should not copy the approach of establishing their own 'Lex GAFA', even if it was designed as competition law within the meaning of Article 1(6) (b) of the DMA.

Finally, because of the quantitative designation thresholds and its direct prohibitions, the DMA is better suited to tackle Big Tech. That is why even if Section 19a is not abolished, it will become redundant or its scope of application will be reduced to addressing undertakings only operating on a national market.

Thus, the term 'lighthouse project' might be too grand. However, regarding the interim phase, Section 19a is not a superfluous national solo run either. Instead, Section 19a should be considered a useful bridge for the time gap before the DMA applies.

[120] Paal and Kieß (n 34), 28.

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# The Digital Markets Act between the EU Economic Constitutionalism and the EU Competition Policy

by

Claudia Massa*

**CONTENTS**



## *Abstract*

Given that a lot has already been written by legal scholars on the practical implications that the entry into force of the Digital Markets Act will have, the present article intends to bring the discussion back to the theoretical level, trying to find out where the roots of this proposed regulation lie, with an analysis of the context in which it falls, the EU principles and values upon which it is based, the objectives it intends to pursue, and the legal-economic theories behind it.

## *Resumé*

La doctrine a déjà beaucoup écrit sur les implications pratiques de l'entrée en vigueur du Digital Markets Act, c'est pourquoi le présent article vise à ramener la discussion au niveau théorique, en essayant d'identifier les racines de cette

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Article received: 4 July 2022, accepted: 23 September 2022.

proposition de règlement, a travers une analyse du contexte dans lequel il s'inscrit, des principes et valeurs de l'UE sur lesquels il repose, des objectifs qu'il entend poursuivre et des théories juridico-économiques qui le sous-tendent.

**Key words:** Digital Markets Act; EU Economic constitutionalism; EU competition policy; Big Tech; EU Law.

**JEL:** K21, K42, L43

## I. Introduction

The digital reform is a challenge that has been embraced in various parts of the world and it is quite difficult to structure, as it is necessary to keep up with technology, to protect fundamental rights, to safeguard innovation by not holding it back, and to establish a level playing field for businesses operating on the market.

The European digital reform project started in 2015 and led to the adoption of several pieces of secondary legislation as well as to the proposal by the Commission, at the end of 2020, to adopt two complex regulations, the Digital Services Act (hereinafter: DSA)[1] and the Digital Markets Act (hereinafter: DMA)[2], which are currently at the centre of the academic and institutional debate[3].

[1] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final.

[2] 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/2020/842 final.

[3] The DMA, in particular, was the subject of numerous amendments (available here: https://www.europarl.europa.eu/committees/it/imco/documents/latest-documents). On 22 November 2021, the Internal Market Committee (hereafter: IMCO) of the European Parliament adopted its position on the proposed regulation by 42 votes in favour, 2 against and 1 abstention (available here: https://www.europarl.europa.eu/news/en/press-room/20211118IPR17636/digital-markets-act-ending-unfair-practices-of-big-online-platforms). The Council, instead, approved its position on 25 November 2021 (see https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/regulating-big-tech-council-agrees-on-enhancing-competition-in-the-digital-sphere/). The text was then submitted to the vote of the plenary of the European Parliament during the December 2021 session and was approved by 642 votes in favour, 8 against and 46 extensions. Negotiations with EU governments on the DMA were opened in the first half of 2022 under the French Council Presidency and on 24 March 2022, the Council and the Parliament reached a provisional political agreement. The European Parliament approved on 5 July 2022 the final text by 588 votes to 11. The consolidated text (available here: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html#title2) was then approved by the European Council on 18 July 2022.

These legislative initiatives fit into the peculiar context of what might be called 'EU Economic constitutionalism'[4]. For the purposes of the present article, this expression will be used to refer to the set of EU law's own principles and values, whose primary purpose is to guarantee the freedom of individuals and the exercise of their rights, as well as to the set out rules that are essential for establishing a fair and open economic system. This form of constitutionalism has *sui generis* contents, which derive from the peculiarity and originality of the Union's legal order, and is based on values that are common to the Member States, such as those of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in a society characterized, among other things, by pluralism, non-discrimination and solidarity (Article 2 of the TEU).

After a brief outline of the digital reform in Europe, this article will focus on the actions, aimed at tackling the Big Tech's overwhelming power, implemented in Europe and in the rest of the world. The subject of a more in-depth analysis will be the legislative proposal of the DMA that is an act that can be seen as the European *ad hoc* instrument to fight against the Big Tech's illegal behaviours on digital markets. The DMA will complement the rules of competition law that so far have done most of the work against problematic behaviours of such actors. The DMA's features relating to the protection of fundamental rights and to the protection of competition will be examined carefully, in order to demonstrate that this act is based on a competition policy approach that is

[4] On the concept of "EU Economic Constitutionalism", *cf. ex multis*, Guillaume Grégoire and Xavier Miny (eds), *The Idea of Economic Constitution in Europe*, *Genealogy and Overview* (Brill 2022); Christian Joerges, "The European Economic Constitution and its Transformation Through the Financial Crisis" in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley-Blackwell 2016); Josef Drexl, 'The European Economic Constitution and Its Relevance to the Ordo-Liberal Model' (2011) 4 Revue internationale de droit économique 419–454. On the more general concept of "European constitutionalism" (very debated since there is neither an unambiguous definition nor unanimity in the legal literature on the very existence of such a constitutionalism), *cf. ex multis*, Lorenzo Federico Pace, *La natura giuridica dell'Unione europea: teorie a confronto, l'Unione ai tempi della pandemia*, (Cacucci Editore Bari 2021) 11–13; Suvi Sankari and Kaarlo Tuori, *The many Constitutions of Europe* (Routledge 2016); Miguel Poiares Maduro, 'Three Claims of constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional pluralism in the European Union and Beyond* (Hart Publishing 2012); Neil Walker, 'Re- framing EU Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the world* (Cambridge University Press 2009); Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Oxford: Hart Publishing, 2009); Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, (Sweet & Maxwell, 2005); Miguel Poiares Maduro, 'Europe and the Constitution: What if this is as Good as it Gets?' in J.H.H. Weiler and Marlene Wind (eds), *European constitutionalism beyond the State* (Cambridge University Press 2003); J.H.H. Weiler, *The Constitution of Europe: 'Do the new Clothes have an Emperor?' and other Essays on Euro- pean Integration* (Cambridge University Press 1999).

different from the past, in terms of both the objectives to be pursued and the instruments to be used. In fact, this policy seems both taking greater account of the fundamental values and principles on which the Union is founded, rather than merely pursuing the objective of economic growth, and aiming at a faster action that adapts to the pace of change of the online markets.

In a nutshell, given that a lot has already been written by legal scholars on the practical implications that the entry into force of the Digital Markets Act will have, the present article intends to bring the discussion back to the theoretical level, trying to find out where the roots of this proposed regulation lie, with an analysis of the context in which it falls, the EU principles and values upon which it is based, the objectives it intends to pursue, and the legal-economic theories behind it.

## II. Setting the scene: the digital reform in Europe…

The digital reform in Europe traces its roots back in 2015, when the European Union's Digital Market Strategy proposed to remove online barriers and facilitate cross-border online sales. The milestones of this reform have been marked by the entry into force of several acts of secondary legislation, as well as by recent proposals of revision of existing acts and by the introduction of new regulations.

The first piece of secondary legislation adopted was the Geo-Blocking Regulation of 2018[5], which introduced rules to prevent unjustified geo-blocking and forms of direct and indirect territorial discrimination. The second act that entered into force was the Regulation on online intermediation services of 2019[6], designed to provide greater transparency for firms using online platforms with a focus on marketplaces, software application services, social media services, and online search engines. Two directives were adopted next: the 2019 Copyright Directive[7], which ensures greater cross-border access to

[5] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2018 L 60I, p. 1–15.

[6] 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, OJ 2019 L 186, p. 57–79.

[7] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 L 130, p. 92–125.

online content and provided for simpler licenses for online broadcasts, and the 2019 Directive on the Modernization of Consumer Protection Rules[8], aimed at ensuring more transparency in online markets and providing the same consumer rights for the 'free' digital.

With regard to the revision of existing acts of secondary legislation, it must be mentioned that the Commission launched in July 2021 a public consultation inviting comments from stakeholders on a draft revised Block Exemption Regulation on vertical agreements[9], which has been adopted on 10 May 2022 and entered into force on 1 June 2022[10]. The revision was deemed necessary to adapt the legislation on vertical agreements (that is, agreements between suppliers of goods and services and their distributors) to market developments, with particular attention to e-commerce and online platforms that, in the last decade, have revolutionized the way companies operate.

Finally, the European Commission has proposed the adoption of two complex regulations to update the rules governing digital services in the European Union: the DSA and the DMA. These acts have two main objectives: to create a safer digital space in which the fundamental rights of all users of digital services are protected, and to establish a level playing field to promote innovation, growth and competitiveness, both in the European single market and globally[11].

More specifically, the DSA focuses on issues such as liability of online intermediaries for third party content, safety of users online and asymmetric due diligence obligations for different providers of information society services, depending on the nature of the societal risks such services represent. In concrete terms, this proposed regulation contains a set of new EU-level harmonized obligations that will apply to all digital services that connect consumers to goods, services or contents, and provides for new procedures for a faster removal of illegal contents and a comprehensive protection of the fundamental rights of online users.

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[8] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ 2019 L 328, p. 7–28.

[9] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102, p. 1–7.

[10] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, C/2022/3015, OJ 2022 L 134, p. 4–13.

[11] The DMA and the DSA together form the so-called "Digital Services Act Package", whose objectives are made clear at the following link: https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

The DMA, instead, can be considered as the European tool to fight against the Big Tech's overwhelming power in digital markets and, in fact, it deals with economic imbalances, unfair business practices, which can be implemented by platforms that have assumed the role of controllers over the access to the digital market (so-called 'gatekeepers') and their negative consequences, such as weakened contestability of platform markets. Thus, this proposed regulation contains harmonized rules defining and prohibiting certain gatekeepers' unfair practices[12], and providing for an enforcement mechanism based on market investigations[13].

## III. …and the actions to address the Big Tech's overwhelming power

In addition to Europe, digital reforms are also being implemented in various other parts of the world. What brings the European reform and all the others together is the particular attention that has been paid to actions aimed at curbing the power of Big Tech, that is, the largest companies in the technology sector. The latter can be divided into three groups: 'GAFAM' (Google, Apple, Facebook – now Meta, Amazon and Microsoft, also known as the 'Big Five' or 'Tech Giants') operating in the information technology sector and active all over the world, especially in Europe and in the United States; 'BATX' (Baidu, Alibaba, Tencent and Xiaomi), giants operating in China; 'NATU' (Netflix, Airbnb, Tesla and Uber), undisputed protagonists of the digital disruption of latest years, inasmuch as they are new technologies that deeply changed certain activities and certain previous business models[14].

In order to avoid problems of fairness and contestability in digital markets, various instruments have just been adopted or are currently under discussion in the various countries: in some legal orders, legislative reforms have been envisaged, in others, *ad hoc* regulatory bodies have been set up, in others still, it has been decided to introduce instruments of *ex-ante* regulation of the obligations to which the Big Tech must be subject.

In particular, the action against Big Tech in the United States originated from the initiative of a bipartisan group of the U.S. House of Representatives, and has resulted in the presentation of five new draft bills on antitrust (currently

[12] See Article 5, 6, 7 of the DMA consolidated text.

[13] See Recital 69 of the DMA consolidated text.

[14] Netflix introduced a new streaming service, Airbnb became the leader in homestays, Tesla introduced the electric car, and Uber created an app capable of connecting users and drivers and beyond.

under discussion)[15], whose purpose is to prevent the perpetration of anti-competitive conducts by GAFAM[16]. The first draft bill prohibits platforms from owning subsidiary companies that operate on their own platform, in the event that such companies compete with other companies. In that case, the Big Tech will be forced to sell these assets in order to restore the platform's neutrality and healthy competition. The second draft bill makes it illegal, in the majority of cases, for the company to give preference to its own products within its platform. It also provides, in case of violations, a heavy penalty of 30% of the national revenue of the company concerned. The third draft bill requires platforms to refrain from engaging in any mergers, unless it can be demonstrated that the acquired company does not compete with any product or service in the market where the platform operates. The fourth draft bill calls upon platforms to allow users to transfer their data, if they wish, elsewhere, even to the platform of a competing company. Finally, the fifth draft bill increases the obligations of the Department of Justice and the Federal Trade Commission to evaluate large companies in order to ensure that the mergers that are implemented are legal.

In China, instead, the Anti-Monopoly Guidelines for the Platform Economy have been published, clarifying how the Anti-Monopoly Law will be applied to potential anti-competitive practices of online platforms[17].

Regulatory reforms have also been implemented in Japan[18], where a new law for the regulation of digital platforms called the 'DP Act' came into force

[15] "Ending Platform Monopolies Act", "American Choice and Innovation Online Act", "Platform Competition and Opportunity Act", "Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act", "Merger Filing Fee Modernization Act". These five bills are joined by a sixth, the "State Antitrust Enforcement Venue Act" on jurisdiction. For a comment on these proposals, see Caitlyn Chin, 'Breaking Down the Arguments for and against U.S. Antitrust Legislation' (*Center for Strategic & International Studies*, 2 April 2022) <https://www.csis.org/analysis/breaking-down-arguments-and-against-us-antitrust-legislation> (accessed 23 September 2022).

[16] See Marina Rita Carbone, 'Big Tech, ecco il nuovo antitrust negli USA: le conseguenze e i prossimi passi' (Agenda Digitale, 15 December 2021) <https://www.agendadigitale.eu/mercati-digitali/big-tech-ecco-la-stretta-antitrust-negli-usa-le-conseguenze-e-i-prossimi-passi/> (accessed 23 September 2022); Leah Nylen, 'House Democrats about to uncork 5-pronged assault on tech' (*Politico*, 6 September 2021) <https://www.politico.com/news/2021/06/09/house-democrats-announce-tech-bills-492703> (accessed 23 September 2022).

[17] See Alexandr Svetlicinii, 'China to discipline online platforms with antitrust enforcement?' (*Kluwer Competition Law Blog*, 17 February 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/02/17/china-to-discipline-online-platforms-with-antitrust-enforcement/> (accessed 23 September 2022); Karry Lai, 'PRIMER: China's new anti-monopoly rules for tech companies' (IFLR, 25 March 2021) <https://www.iflr.com/article/b1r3bt1z7g1771/primer-chinas-new-anti-monopoly-rules-for-tech-companies> (accessed 23 September 2022).

[18] See Toshio Dokei, Toshio Dokei, Arthur M. Mitchell, Hideo Nakajima and Takako Onoki, 'Recent Developments in Competition Law and Policy in the Digital Economy in Japan' (*Competition Policy International*, 12 March 2021) <https://www.competitionpolicyinternational.

on 1 February 2021. Moreover, since 2019, Japan has an *ad hoc* regulatory body called 'Digital Headquarters' concerned with competition of the digital market.

As for the United Kingdom, in April 2021, the creation of a new Digital Markets Unit ('DMU') was announced within the Competition and Markets Authority ('CMA'), which consists of a regulatory body designed to address competition and data management issues in digital markets[19].

By contrast, it has been decided in Australia to introduce an *ex ante* regulation, with indication of the prohibited anti-competitive conduct of Big Tech[20], in the wake of what was already done in the electricity and telecommunications fields.

The European Union, within the context of the digital reform outlined in the previous paragraph, has proposed the adoption of the DMA[21] in order to combat unfair practices implemented by the largest providers of digital core platform services – the gatekeepers. The DMA is also designed to address the problem of the lack of contestability in digital markets, which creates inefficiencies in terms of higher prices, lower quality, less choice and less innovation, to the detriment of European consumers[22].

The proposed regulation is characterized by two aspects: it is a sectorial regulation and it is an *ex ante* regulatory tool.

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com/recent-developments-in-competition-law-and-policy-in-the-digital-economy-in-japan/> (accessed 23 September 2022); Jeffrey J. Amato and Tomonori Maezawa, 'Japan: Japanese Legislature Passes Act To Regulate Big Tech Platforms' (*Mondaq*, 12 January 2021) <https://www.mondaq.com/antitrust-eu-competition-/1024456/japanese-legislature-passes-act-to-regulate-big-tech-platforms> (accessed 23 September 2022).

[19] See https://www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference; Barbara Calderini, 'La nuova Digital Markets Unit (DMU) del Regno Unito è un organismo di regolamentazione destinato ad affrontare le questioni relative alla concorrenza e alla gestione dei dati nei mercati digitali. Nasce dall'urgenza, sentita in tutto il mondo, di "governare" i giganti del web e il loro incontrollato potere' (*Agenda Digitale*, 22 April 2021) <https://www.agendadigitale.eu/mercati-digitali/big-tech-e-antitrust-in-uk-arriva-la-digital-markets-unit-ruolo-e-obiettivi/> (accessed 23 September 2022).

[20] See John Davidson, 'Big tech faces tough new laws under ACCC plan' (*Financial Review*, 7 September 2021) <https://www.afr.com/technology/big-tech-faces-tough-new-laws-under-accc-plan-20210905-p58p0r> (accessed 23 September 2022).

[21] From now on, in the present paper, all references to DMA's Articles and Recitals relate to the consolidated text approved by the European Parliament on 5 July 2022 (available here: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html#title2), unless stated otherwise.

[22] On the definition of "contestability", see Ginevra Bruzzone, 'Verso il Digital Markets Act: obiettivi, strumenti e architettura istituzionale' (2021) 2 Rivista della regolazione dei mercati 329–330.

In fact, given the aforementioned failures in the digital sector, and the inefficiency of existing legislation[23], the Commission perceived the need to introduce a specific set of rules in the form of a sectorial regulation[24] that applies only to the digital sector[25] and to a particular group of entities – the gatekeepers. The latter are providers of core platform services (that is, the digital services most used by business users and end-users) such as: (i) online intermediation services (including, for example, marketplaces, app stores, and online intermediation services in other sectors such as mobility, transport or energy); (ii) online search engines; (iii) social networking; (iv) video sharing platform services; (v) number-independent interpersonal electronic communication services; (vi) operating systems; (vii) cloud services; and (viii) advertising services[26]. The DMA focuses on these types of platforms because they are considered to be the services 'where the identified problems are most evident and prominent and where the presence of a limited number of large online platforms that serve as gateways for business users and end users has led or is likely to lead to weak contestability of these services and of the markets in which these intervene'[27]. The fact that a digital service qualifies as a core platform service does not mean that issues of contestability and unfair practices arise in relation to every provider of these core platform services. Rather, these concerns appear to be particularly strong when the core platform service is operated by a gatekeeper. Providers of core platform services can be deemed to be gatekeepers[28] if they: (i) have a significant impact on the internal

[23] See the DMA explanatory memorandum, p. 1–2. See also Recital No 13 DMA.

[24] For an assessment on the type of regulation the DMA can be considered to be, see Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act', (16 December 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625> (accessed 23 September 2022).

[25] The existence of a fully-fledged "digital sector" is debated. On this point, see Akman (n 24) 18, who affirms that: "the DMA differs substantially from traditional modes of ex ante regulation, for the following reasons. First, the DMA does not apply to a particular "sector" of the economy despite the suggestions in the legislative proposal to the contrary. Rather, the DMA applies to a particular group of entities whose commonality that brings them within the scope of the regulation is found not in the "sector" in which they operate, but in their size and economic importance (i.e. the characteristics that qualify them as "gatekeepers"). Although the "core platform service" providers that fall within the scope of the DMA are all providers of digital services, it is not possible to think of them as operating in the same "sector" of the economy: "digital" is not a distinct sector of the economy".

[26] Based on the 22 November 2021 agreement reached at IMCO, browsers, virtual assistants and smart TVs should also be included.

[27] DMA explanatory memorandum, p. 2.

[28] Note that Article 3 of the original Commission proposal reads: "A provider of core platform services shall be designated as gatekeeper if […]" whereas the text approved by IMCO reads "*An undertaking* (emphasis added) shall be designated as gatekeeper if […]".

market; (ii) provide a core platform service which is an important gateway for business users to reach end-users; and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations[29]. Such gatekeeper status can be determined either with reference to clearly circumscribed and appropriate quantitative metrics, which can serve as rebuttable presumptions to determine the status of a specific provider as a gatekeeper, or be based on a case-by-case qualitative assessment by means of a market investigation[30].

In addition, the proposed DMA is an *ex ante* regulatory tool as it contains a list of specific competition obligations for gatekeepers that aim at preventing unfair practices or practices that limit market contestability[31]. In particular, Articles 5–7 of the DMA contain several types of provisions that can be divided into two groups: Article 5 sets out obligations that are considered to be self-executing, in that their fulfilment does not require any further specific detail, while Articles 6 and 7 set out some obligations whose implementation may require a specification that is obtained through an interaction with the Commission[32]. In this regard, Article 8(2) DMA clarifies that the Commission may adopt an implementing act, specifying the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations laid down in Articles 6 and 7. Moreover, according to Article 8(3) DMA, a gatekeeper may request the Commission to engage in a process to determine whether the measures that the said gatekeeper intends to implement, or has already implemented, to ensure compliance with Articles 6 and 7 are

[29] Article 3 DMA. In this regard, it should be noted that the text of the provisional political agreement reached on March 24, 2022 stipulates that, in order to be considered gatekeepers, in addition to being present in at least three EU countries, to having at least 45 million monthly active end users established or located in the Union and at least 10.000 yearly active business users established in the Union in the last financial year, it will also be necessary to hold a market capitalisation of 75 billion (and not 65 billion as originally proposed by the Commission). Therefore, in addition to GAFAM, other companies such as Booking or Zalando could also be considered gatekeepers.

[30] For a comment on this aspect, see Akman (n 24) 6–8.

[31] On the choice of the type of regulation, see Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law & Practice 543–548; Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12(7) Journal of European Competition Law & Practice 566–569. For an analysis of the single provisions of the DMA, see Pietro Manzini, 'Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act' (*AISDUE*, 25 February 2021) <https://www.aisdue.eu/pietro-manzini-equita-e-contendibilita-nei-mercati-digitali-la-proposta-di-digital-market-act/>.

[32] Article 8 DMA. In the first version of the DMA text, it was written that the obligations set out in Article 6 were "susceptible of being further specified" and this phrase was commented by Akman (n 24) 12–13, who defined it "not immediately clear". The phrase has then been modified and the consolidated text of the DMA now reads "obligations for gatekeepers susceptible of being further specified *under Article 8*" (emphasis added).

effective in achieving the objective of the relevant obligation in the specific circumstances of this gatekeeper. The Commission has discretion in deciding whether to engage in such a process, respecting the principles of equal treatment, proportionality and good administration.

Despite being defined as an *ex ante* regulatory tool, it is possible to affirm that this proposed sectorial regulation appears as a hybrid between the traditional forms of economic regulation and competition law, as it imposes on market actors, at the same time, positive obligations requiring them to perform certain actions, and negative obligations prohibiting them to undertake certain actions[33]. Indeed, on the one hand, the proposed regulation seems a codification of a number of concerns noted by competition authorities[34], and on the other hand, it provides for a number of *ex ante* duties without requiring an assessment of the object or effect of the underlying practices.

Finally, it should be noted that alongside the DMA proposal made at the European level, one Member State has independently taken an initiative to regulate Big Tech. In January 2021, the German parliament approved the X amendment to the *Gesetz gegen Wettbewerbsbeschränkungen* (hereinafter: GWB, German Competition Act) introducing a new section to the GWB, namely section 19(a)[35]. Under the latter, the *Bundeskartellamt* (German NCA) can prohibit various conducts by companies of 'key importance in different markets' (that is, digital conglomerates) without the need to prove

[33] On the advantages and disadvantages of these two kind of approaches, see Akman (n 24) 16–18.

[34] It is no mystery that some of the obligations set out in the DMA are inspired by cases that the European competition authorities have dealt with, such as: (i) the *Facebook* case (Bundeskartellamt, *Facebook*, B6-22/16, 6 February 2019, currently on appeal, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5) inspiring Article 5(2) DMA; (ii) the *Amazon* case (Case COMP/AT.40153) Commission Decision C(2017) 2876 final [2017] inspiring Article 5(3) DMA; (iii) the *Apple App Store* case (Case COMP/AT.40437), 16 June 2020 (Opening of Proceedings), 20 April 2021 (Statement of Objections) see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40437) inspiring Article 5(4) DMA; (iv) the *Google AdTech* case (Cases COMP/AT. 40670, Opening of Proceedings), see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40670) inspiring Article 5(10) DMA; (v) the *Amazon Marketplace case* (Case COMP/AT.40462) 17 July 2019 (Opening of Proceedings), 10 November 2020 (Statement of Objections) see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40462) inspiring Article 6(2) DMA; (vi) the Apple *App Store case* (Case COMP/AT.40716) 16 June 2020 (Opening of Proceedings), see https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40716) inspiring Article 6(12) DMA; etc.

[35] On this point, see Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12(7) Journal of European Competition Law & Practice 513–528.

a violation of competition law[36]. Section 19(a) of the GWB shares a number of common features with the Commission's DMA and UK DMU proposals[37]. However, it should be stressed that the Commission has pointed out that regulatory fragmentation across Member States could seriously undermine the functioning of the single market in digital services and of the digital markets in general. Hence, the Commission has perceived the need to put in place an EU-level harmonization of the topic, given the inherently cross-border nature of the core platform services provided by gatekeepers. It is for this reason that with the DMA it was decided to opt for an EU Regulation, an act that is directly applicable in the Member States, and for Article 114 TFEU as its legal basis.[38]. Despite these choices, fragmentation could possibly occur since national authorities will continue to apply existing laws to behaviours in digital markets. In fact, according to Article 1(6) DMA, this regulation will be without prejudice to the application of Articles 101 and 102 TFEU; of national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices, abuses of a dominant positions as well as other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers, or amount to the imposition of further obligations on gatekeepers; and of the EU Merger Regulation 139/2004[39] and national rules concerning merger control. This means that the DMA is intended to minimise the detrimental structural effects of unfair practices *ex ante*, without limiting the ability to intervene *ex post* under EU and national competition rules.

## IV. The DMA and the EU Economic Constitutionalism

What prompted the Union to take action against Big Tech and to propose the adoption of the DMA?

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[36] An English version of the X Amendment can be found at the following link: https://www.d-kart.de/ wp-content/uploads/2021/01/GWB-2021-01-14-engl.pdf.

[37] For a comparison of the three regulatory proposals, *cf*. Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12(7) Journal of European Competition Law & Practice 500–512.

[38] For a comment on the choice of the legal basis, see Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12(7) Journal of European Competition Law & Practice 576–589; Ginevra Bruzzone, 'Verso il Digital Markets Act: obiettivi, strumenti e architettura istituzionale' (2021) 2 Rivista della regolazione dei mercati 331.

[39] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24, p. 1–22.

In recent years, we are witnessing a real failure by Western constitutionalism to deal with Big Data economy. It is now well known that Big Tech uses technology to acquire more and more data that leave the property of those who generate them and enter that of those who exploit them. These data transform the human being into a product and even manage to induce them to consume and to modify their behaviour, eroding their free will. Hence, there is a need to carefully consider privacy implications and to regulate Big Tech's behaviours, in order to safeguard our democratic and personal structure. The European Union, to address the first of these two needs, has adopted the GDPR Regulation[40]; the adoption of the DMA addresses the second.

European values and the protection of fundamental rights are at the heart of the DMA proposal. In fact, in the writer's opinion, an organic reading of the text leads to identify two objectives, other than the explicit ones of fairness and contestability, underlying the new rules in the DMA, which intend to pursue: on the one hand, that of protecting consumers and their fundamental rights online more effectively, especially their freedom of choice; on the other, that of making the digital markets fairer and more open for all and, therefore, of ensuring the freedom to conduct business referred to in Article 16 of the Charter of Fundamental Rights of the European Union[41].

In order to achieve these objectives, the Commission has first of all drafted a proposal for an *ex ante* regulation. The choice of such an instrument, rather than a competition enforcement tool, is in itself indicative of the fact that the EU wishes to ensure, irrespective of the commission of anti-competitive offences, the existence of a fair and contestable environment in which the fundamental rights of all companies and consumers are respected. A competition enforcement tool, by definition, would have postponed the moment of protection to a later stage compared to that of the commission of the offence by a Big Tech, so that the objectives it could have pursued would have been only that of re-establishing the competitiveness of the market by ordering the interruption of the unlawful practice, if necessary, that of punishing the infringer by imposing a sanction, and possibly that of compensating the damage, in a more markedly economic perspective than of protection of the right to participate in a highly competitive market.

Furthermore, in order to achieve the first of the two above-mentioned objectives, namely to protect consumers and their freedom of choice, an

[40] 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), OJ 2016 L 119, p. 1–88.

[41] On this point, see the DMA explanatory memorandum, p. 11.

attempt has been made in the DMA to adapt certain antitrust items to the digital environment and needs[42].

For example, Article 5(2) DMA provides for a prohibition for gatekeepers to (a) process, for the purpose of providing online advertising services, personal data of end-users using services of third parties that make use of core platform services of the gatekeeper; (b) combine personal data from the relevant core platform service with personal data from any further core platform services, 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 core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice-versa; and (d) sign-in end-users to other services of the gatekeeper in order to combine personal data, unless the end-user has been presented with the specific choice and provided consent in the sense of the GDPR. It is clear that this provision tends to limit the exploitation of consumers and to give them real choice. In addition, the envisaged opt-in system contributes to limiting deep profiling by indirectly restraining the exploitation of consumers for targeted advertising and personalised pricing.

Furthermore, Article 5(8) DMA prohibits gatekeepers from tying one core platform service to another, so that it will not be possible to impose on business users or end-users the subscription or registration to any further core platform service as a condition for being able to use, access or register to another of the gatekeeper's core platform services. For instance, a provider of an app store cannot make access to the service conditional on the use of its search engine. Again, this provision serves to promote freedom of choice.

Article 6(3) DMA serves the same purpose, in that it obliges the gatekeeper to allow and technically enable end-users to easily uninstall any pre-installed software applications on the operating system of the gatekeeper. They must be able to do so without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device, and which cannot technically be offered on a standalone basis by third-parties.

Finally, Article 6(6) DMA also guarantees the freedom of choice by requiring gatekeepers to remove technical restrictions that prevent an end-user from switching between, and subscribing to software services and applications other than those originally authorised by the platform. For example, a user of

[42] On the role of competition law in digital markets, see Pablo Ibáñez Colomo, 'What can competition law achieve in digital markets? An analysis of the reforms proposed' (6 January 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723188> (accessed 23 September 2022); Antonio Manganelli, 'Il regolamento Eu per i mercati digitali: ratio, criticità e prospettive di evoluzione' (2021) 3 Mercato Concorrenza Regole 473–500.

an operating system must be free to switch to other word processors (such as Microsoft Word) if the operating system allows the use of word processors.

On the other hand, in order to achieve the second of the above-mentioned objectives, that is to ensure the freedom to conduct business, as referred to in Article 16 of the Charter of Fundamental Rights of the European Union, the DMA contains several provisions.

First of all, even in this case, Article 5(2) DMA that prohibits the combination of personal data, comes into play, since another objective of this provision is to improve the conditions of contestability for new companies (so-called 'new comers') in a given core platform service and in adjacent markets.

Moreover, Article 5(3) DMA provides that gatekeepers must allow business users to offer 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. By limiting the gatekeepers' ability to impose restrictions on business users, this provision ensures the latter's freedom to conduct business, as it facilitates the entry conditions to other online intermediation services competing with a gatekeeper's distribution platforms (for example, app stores, intermediation platforms and operating systems).

Furthermore, Article 5(4) DMA requires gatekeepers to allow business users, free of charge, to communicate and promote offers, including under different conditions, to end-users acquired via its core platform service, or through other channels, and to conclude contracts with these end-users regardless of whether they use the core platform services of the gatekeeper or not for that purpose. This practice is known as 'side loading' and is often relevant in the context of app stores. The provision also adds that gatekeepers must allow the use on their platform of services purchased outside it by end users. This clarification is crucial because otherwise end users would never buy services outside the platform. Thus, this provision protects the freedom to conduct business in that it allows business users to use different channels to sell their services and, at the same time, it also has the effect of giving consumers more choice when shopping online.

From the analysis of the examples given above, it is clear that the provisions of the DMA are remarkably aimed at protecting consumers and businesses' fundamental rights and not only at achieving economic growth. This approach of the institutions is very different from the previous one, which was more concerned with avoiding real or presumed negative effects on innovation and investment than with the risk of long-term impacts on the consumer's freedom of choice and the newcomers' freedom to conduct business. Probably

the watershed that triggered a strong need to re-examine the effectiveness of the existing antitrust toolkit and to consider possible *ex ante* measures such as the DMA, was the 2016 Cambridge Analytica case[43], despite the fact that it had a more data protection-related implication, an essentially political relevance and was limited to only one platform (Facebook). The case, as is well known, concerned the fraudulent collection of personal data of millions of accounts, which were then used for political propaganda and targeted marketing campaigns. It immediately raised concerns more about privacy and freedom of citizens to form an undistorted opinion at election time than from an antitrust perspective. Subsequently, however, the fact that a company had been able to exploit data in that way and to have a major influence on political dynamics made people think, more generally, about the big data economy, its implications in various fields, including that of competition between undertakings, and about the circumstances under which regulatory intervention was possible, preferable or advisable. This reflection gave rise to main regulatory proposals and to the new approach of the institutions, more focused on the protection of fundamental rights in order to respond to the digital revolution and to counter the power assumed by technological platforms.

In fact, in the writer's opinion, with the DMA there seems to be a reaffirmation of the fundamentals of the Ordoliberal doctrine[44], which had been quite abandoned following the 2008 economic crisis but whose principles (such as freedom of trade, competitiveness, prohibition of State aid, balanced budgets) have had a great influence on the European economic law[45]. This doctrine is opposed to the classical *laissez-faire* view and is based on the assumption that it is not possible to develop a good natural economic order through the free market alone. In fact, the experience with *laissez-faire policies* had shown that market economy left to its own devices eventually lead to the concentration

[43] For an in-depth look at this case, see Emanuele di Menietti, 'Il caso Cambridge Analytica, spiegato bene' (*Il Post*, 19 March 2018) <https://www.ilpost.it/2018/03/19/facebook-cambridge-analytica/> (accessed 23 September 2022).

[44] For an in-depth study of Ordoliberal doctrine, see Malte Dold and Tim Krieger (eds), *Ordoliberalism and European Economic Policy* (Routledge 2021); Josef Hien and Christian Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017).

[45] See Lorenzo F. Pace, 'Il principio dell'indipendenza della banca centrale e la stabilità dei prezzi come obiettivo della politica monetaria: quale influenza dell'ordoliberalismo in Germania e nell'Unione Europea?' (2019) 72(288) Moneta e Credito 349–364. Consider also the influence exerted by the Freiburg Ordoliberal School and, in particular, by Prof. Ernst-Joachim Mestmäcker, special advisor to the Commission from 1960 to 1970, on the interpretation of the principles of Articles 81 and 82 TEC. On this point, see Lorenzo F. Pace, *I fondamenti del diritto antitrust europeo* (Milan 2005) 100–102.

of economic power in private hands[46]. This is the reason why, according to Ordoliberals, markets have to regarded as not self-correcting but rather as "fragile creatures" to be preserved by vigorous antitrust enforcement and, in the case of natural monopolies, even by regulation[47]. The stigma of the Ordoliberal doctrine can be summarised as follows: to regulate the market in order to make it effectively free. And this is exactly what the DMA does: it regulates the behaviours that Big Tech must assume in order to make the digital market free, free for firms to actually exercise their freedom to conduct business, and free for consumers to choose whether to share their personal data, whether to subscribe to a service, which software applications to use, etc.. Just as in the Ordoliberalism the state intervenes only to make the market less anarchic and to avoid the danger that, without any regulation, monopolies or oligopolies might emerge, so the DMA intervenes to establish rules to create a fair and contestable market and to combat the Big Tech's monopolies. In this set-up, it is clear that a key role lies with the companies themselves and their proactive role. Indeed, in order to avoid problems due to information asymmetries, the burden is shifted over companies, which have easier access to information concerning their own structures and market position and which can proactively adapt their conducts to comply with the rules set out in the DMA. This approach is also in line with the Court of Justice of the European Union's case-law, in particular with the *AstraZeneca*[48] and *Deutsche Telekom*[49] judgments in which the Court relied upon the "special responsibility" argument to justify dominant firms' duty to proactively self-assess their conduct, even beyond the requirements of sector regulation[50].

In conclusion, thanks to the DMA, the EU Economic constitutionalism regains strength in comparison to the last years and a greater freedom on the market is ensured by virtue of an approach that seems to be inspired by the Ordoliberal doctrine, with the effect that the protection of consumers and companies' fundamental rights return in the spotlight, exceeding the goal of the economic growth.

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[46] See Walter Eucken, 'Das Problem der wirtschaftlichen Macht", in Walter Eucken, *Unser Zeitalter der Mißerfolge. Fünf Vorträge zur Wirtschaftspolitik.* (1951, Tübingen) 1–15; Amadeo Arena, 'The relationship between Antitrust and Regulation in the US and the EU: Can legal tradition account for the differences?' 2014 3(2) Cambridge Journal of International and Comparative Law 353.

[47] Walter Eucken, *Grundsatze der Wirtschaftpolitik* (7th edn,, UTB, Stuttgart, 2004) 297.

[48] Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v. European Commission*, EU:C:2012:770.

[49] Case C-280/08 P, *Deutsche Telekom AG v. European Commission*, EU:C:2010:603.

[50] On this point, see Maarten Pieter Schinkel and Pierre LaRocuhe, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act', in Roger D. Blair and D. Daniel Sokol (eds), The Oxford Handbook of International Antitrust Economics, (Oxford University Press, 2015), (2).

## V. The DMA and the EU Competition Policy

It is worth asking the following questions: why is regulating the Big Tech's behaviour on the market important in order to promote effective competition in digital markets[51]? Why is a specific act necessary for this purpose?

To answer these questions, it is appropriate to start from two general assumptions. The first is that competition is a means, not a goal. The goal is to ensure the proper functioning of the economic activity and optimal conditions of consumer welfare, while competition is a necessary means where resources are limited and access to them must be guaranteed. In fact, Adam Smith said that competition is a race to conquer limited resources[52]. To regulate this race is the task of law, whichever sphere it relates to, wherever resources are limited, because, if they were not, there would be no race and, therefore, no need for law. This leads to the second assumption: competition requires rules. Ronald Coase, a British economist, wrote that "if there is anything approaching perfect competition, it normally requires a complex system of rules and regulations"[53] and this complex system of rules and regulations is called market. The market, therefore, is not a spontaneous formation but an institution whose form is given by regulatory discipline.

In the case under consideration in this paper, in the context of core platform services (such as online intermediation services, search engines, social networking services, video sharing platform services, interpersonal electronic communication services, operating systems, cloud services and advertising services), what have been defined as "resources" can be identified in the access points for business users to their customers and vice versa, and they appear to be effectively limited because few large digital platforms (i.e. Big Tech) own them. Therefore, a "race" to conquer these limited resources – or at least to have access to them – really exists and, therefore, there is a need for the law to regulate it. The law at issue is contained in the DMA. The latter will complement existing EU and national competition rules,[54] which are deemed insufficient to regulate the "race". In fact, "although Articles 101 and

[51] As stated in the DMA proposal, both in the Impact Assessment, p. 9 and at point 1.4.1. of the Legislative Financial Statement, the Commission's multiannual strategic objective targeted by the proposal is "to ensure the proper functioning of the internal market by promoting effective competition in digital markets, in particular a contestable and fair online platform environment".

[52] George J. Stigler, 'Perfect Competition, Historically Contemplated' (1957) 65(1) Journal of Political Economy 1.

[53] Ronald H. Coase, *Impresa, mercato e diritto* (Il Mulino 2006) 49.

[54] On this point, see Assimakis Komninos, 'The Digital Markets Act: How Does it Compare with Competition Law?' (14 June 2022) <https://ssrn.com/abstract=4136146?> .

102 TFEU apply to the conduct of gatekeepers, the scope of those provisions is limited to certain instances of market power, for example dominance on specific markets and of anti-competitive behaviour, and enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms"[55]. Thus, the DMA is intended to address unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules. However, the complementarities between the DMA and competition law raise many interesting issues (such as the one on the concurrent application of EU and/or national competition rules by national competition authorities and national courts[56]) that can only be discussed in the future. As for now, an important remark on the topic is that under the most recent case law of the Court of Justice[57], the principle of *ne bis in idem* has been found to be applicable between sectoral regulation and competition law enforcement, as long as the respective cases relate to the same facts. However, a limitation of that principle can be justified on the basis of Article 52(1) of the Charter of Fundamental Rights. In that case, an *ad hoc* assessment is required and the conditions for the justification are the following: (i) the duplication of proceedings must be acknowledged as a possibility in the law itself; (ii) there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; (iii) the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe, and (iv) the overall penalties imposed correspond to the seriousness of the offences committed[58].

These premises serve to lay the basis for an assessment on the need to adopt an act such as the DMA and on its quality and effectiveness. Indeed, some scholars – albeit in the context of overall positive considerations of the legislative proposal – have indirectly criticised it, either because the cases it regulates overlap with the provisions of Article 102 TFEU[59], or because

[55] Recital No 5 DMA.

[56] See Assimakis Komninos (n 54).

[57] Case C-117/20, *bpost SA v Autorité belge de la concurrence*, ECLI:EU:C:2022:202.

[58] *Ibidem*, paras 54–58. On this point, see also Recital No 86 DMA, which has now adopted the described test.

[59] Manzini (n 31); Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (22 February 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730#> 14–17.

it is incomplete[60], too complex, or badly structured[61]. In fact, these issues – which will not be discussed in this paper as they have already been extensively examined elsewhere – are quite evident. However, there are some arguments that lead to the conclusion that today competition in digital markets could greatly benefit from an act such as the DMA, even if it seems to need some adjustments.

As regards the need to adopt an act like the DMA, it should be noted that, given the peculiarities of the sector, there are three needs that must be addressed and to which the DMA seems to provide a fairly satisfactory response, although it does require some adjustments.

First of all, there is a need for an act that overcomes what have been perceived as the main weaknesses of the use of competition law in digital markets, namely the slowness with which antitrust cases proceed. In this respect, the merit of the legislative proposal lies in the fact that it consists in an *ex ante* regulation (as noted in the previous paragraphs), which allows to anticipate the protection at a time prior to the commission of the offences by the Big Tech.

At the same time, there is a need for an act that adapts to the changing reality of the online world and the DMA provides for the possibility for the Commission – either on its own initiative or following a justified request of at least three Member States[62] – to conduct investigations to identify new unfair practices or practices limiting market contestability[63]. Thus, in addition to the obligations already established in the text, the DMA provides for the possibility of updating and expanding the list of gatekeepers' obligations by advancing a proposal to amend the Regulation[64] or by adopting delegated acts[65]. This ensures that the DMA can keep pace with digital developments. There is, therefore, a certain foresight on the part of the European legislator in attempting to create a regulatory environment in which the power of the gatekeeper is fairly contained.

Finally, it is essential to regulate in a more systematic way the Big Tech's behaviour on the market, and thanks to the DMA, a good degree of systematic regulation can certainly be achieved. However, it is precisely for this purpose that some adjustments to the DMA text would be desirable since, as already noted by legal scholars, the list of obligations for gatekeepers contained

[60] Monti (n 59).

[61] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law & Practice 540; Monti (n 59) 2–3.

[62] Article 41 DMA.

[63] Recital No 69, Articles 16 and 19 DMA.

[64] *Ibidem*.

[65] Recital No 78, Articles 12 and 49 DMA.

therein appears confusing, with numerous prescriptions that are "extremely heterogeneous and different from each other"[66]. In the writer's opinion, the existence of an *ad hoc* act on digital markets is undoubtedly a value in itself, but this act could be better structured, perhaps providing for a more rational subdivision of obligations, with an organisation into distinct groups on the basis of the objectives pursued, which should not simply be the generic ones of fairness and contestability that inspire the entire digital reform act, but should be more specific (for example, promoting access to data, facilitating consumers' choice, promoting transparency, etc.).

Turning to the issue of the quality and effectiveness of the DMA, it should first be noted that such an act creates at the same time greater legal certainty and greater deterrent effect for Big Tech. They know in advance what specific obligations they have to comply with, they have the possibility to communicate with the Commission to discuss the effectiveness of the measures they intend to implement in order to avoid infringements[67], they know that there is an institution (i.e. the Commission with its High-Level Group[68]) that is highly aware of the most common anti-competitive practices in digital markets, that is ready to act and that has at its disposal an *ad hoc* tool upon which to quickly base its action. On this latter point, it has to be noted that even national competition authorities could play a key role as according to Articles 37 and 38 DMA[69] those authorities shall cooperate with the Commission on any matter relating to the application of the Regulation and in monitoring *ex-post* compliance[70].

As regards the abovementioned deterrent effect of the DMA, it should be pointed out that it could even be strengthened by combining public enforcement with private enforcement. On this topic, actually, in the first version of the DMA's proposal there was a complete lack of provisions[71]. On

[66] Manzini (n 31) 33.

[67] Article 8(2) DMA.

[68] The high-level group provides the Commission with advice and expertise. See Article 40 DMA.

[69] Article 38 DMA is inspired by Article 11 of Regulation 1/2003, even though the system of cooperation that it introduces is not completely identical. In fact, it does not include a rule equivalent to Article 11(6) of that Regulation, so the opening of proceedings by the Commission to investigate a violation of the DMA rules does not relieve national authorities of their competence to apply EU or their national competition law.

[70] On this point, see Monti (n 59) 6; Christophe Carugati, 'The Role of National Authorities in the Digital Markets Act', (20 October 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947037>.

[71] On this point, see Assimakis Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement' in Nicolas Charbit and Sebastien Gachot (eds) *Eleanor M. Fox Liber Amicorum, Antitrust Ambassador to the World* (Institute of Competition Law 2021).

the contrary, Articles 38 and 39 of the DMA's consolidated text provides for some rules that open and coordinate the system with private enforcement actions. However, in the writer's opinion, more could have been done in terms of introducing provisions facilitating actions for damages. It is clear that the damages suffered by victims of a breach of the DMA are certainly small compared to the revenues that Big Tech manages to obtain, so the danger of being exposed to actions for damages that can be more easily brought by customers, albeit numerous, would contribute only to a limited extent to discourage gatekeepers from behaving in a way that is incompatible with their obligations. However, it is undeniable that the introduction of such provisions would have various positive effects, also in terms of completeness of the system (as private enforcement would be a concrete option and complement to public enforcement) and protection of the individual. Moreover, it has to be taken into account that the DMA appears to be a particularly fertile ground for private enforcement. It is so, first of all, because while gatekeepers are best placed to internalise the obligations set out in the DMA and adapt their business practices in order to ensure compliance with them, their customers are best placed to verify whether there has been a failure to comply with those obligations[72]. Secondly, because it is up to the Commission to designate the gatekeepers, so anyone wishing to bring an action for damages would not be faced with the difficulty of having to define the relevant market and the dominant position. Furthermore, the obligations under Article 5 of the DMA are self-executing, so anyone who considers that they have not been complied with can appeal to the national courts. The obligations referred to in Article 6 and 7 of the DMA, instead, are susceptible to further specifications that the Commission indicates in a decision, which is the result of an *ex ante* agreement with the gatekeeper on the measures that the latter must implement. In the event of violation of such a decision, the latter could be precious for the proposition of an action for compensation of damages, since it will become a parameter of legality of the conduct of the gatekeeper and will facilitate, in this way, the proof of the commission of the unlawful act. Finally, it should be stressed that the provision within the DMA of rules facilitating the bringing of damages actions would be in line not only with various judgments of the Court of Justice of the European Union (such as *Francovich* or *Courage*[73]) but

[72] Monti (n 59) 12.

[73] Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, EU:C:1991:428, in which the Court made it clear that individuals may enforce before national courts the rights enshrined in Community rules and noted that the full effectiveness of Community rules and the full protection of the rights recognised by them would be jeopardised if individuals were unable to obtain compensation in the event of an infringement of Community rules attributable to a Member State. This same approach was later used in the judgment in

also with other acts of EU law providing for an enforcement in the hands of private actors acting as "private attorneys general" (i.e. a kind of prosecutor in US law). This is the case, for example, of the rules introduced by the so-called "Damages Directive"[74] in the context of antitrust enforcement, such as those relating to the binding nature of final decisions adopted by national competition authorities and review courts for the purposes of follow-on actions[75] or those relating to the disclosure of evidence[76].

Overall, since competition law has proved to be insufficient in addressing the challenges posed by digital markets, there is a concrete need to adopt the DMA to complement the system. The interaction between those two

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case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, EU:C:2001:465, para 27, in which the Court affirmed that: "Indeed, the existence of such a right [to compensation] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.".

[74] 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, OJ 2014 L 349, p. 1–19 (hereafter: Directive 2014/104/EU).

[75] *Ibidem*, Article 9. On this point, see ex multis, Mario Siragusa, 'L'effetto delle decisioni delle autorità nazionali della concorrenza nei giudizi per il risarcimento del danno: la proposta della commissione e il suo impatto nell'ordinamento italiano' 2014 Concorrenza e mercato 297–315; Renato Nazzini, 'The Binding effect of decisions by Competition Authorities in the European Union' 2015 2(2) Italian Antitrust Review; Bruno Nascimbene, 'La vincolatività del provvedimento di condanna dell'Autorità garante successivamente alla direttiva sul private enforcement (Direttiva 2014/104/UE',' (14 November 2016) <http://rivista.eurojus.it/wp-content/uploads/2017/01/Relazione-14.11.2016.pdf> (accessed 23 September 2022); Claudia Massa, 'The effects of decisions adopted by competition authorities in the framework of Directive 2014/104/EU: criticalities and future prospects' in Roberto Mastroianni and Amadeo Arena (eds), *60 years of EU competition law. Stocktaking and future prospects* (Editoriale Scientifica Naples 2017) 113–128.

[76] Directive 2014/104/UE, Articles from 5 to 8. On this point, see ex multis, Stefano Bastianon, 'La tutela dei privati e l'accesso alle informazioni riservate: recenti sviluppi' in Giuseppe Tesauro, *Concorrenza ed effettività della tutela giurisdizionale tra ordinamento dell'Unione europea e ordinamento italiano*, (Editoriale Scientifica Naples 2013); Caterina Fratea, *Il private enforcement del diritto della concorrenza dell'Unione europea – Profili europei, internazionalprivatistici e interni* (Edizioni Scientifiche Italiane 2015) 47–62; Cristina Lo Surdo, 'Programmi di leniency, accesso e divulgazione nel giudizio civile alla luce della Direttiva sul danno antitrust' (26 May 2015) <http://www.osservatorioantitrust.eu/it/programmi-di-leniency-accesso-e-divulgazione-nel-giudizio-civile-alla-luce-della-recente-direttiva-sul-danno-antitrust/> (accessed 23 September 2022); Michele Trimarchi, 'La divulgazione delle prove incluse nel fascicolo di un'autorità garante della concorrenza nella direttiva sull'antitrust private enforcement (direttiva 2014/104/UE)' 2015 24 AIDA 204–220; Claudia Massa, 'The disclosure of leniency Statements and other Evidence under directive 2014/104/EU: an Undue Prominence of Public Enforcement?' 2018 2(1) Market and Competition Law Review 149–169.

instruments – competition law and DMA – may pose some problems even if, as stated above, there are rules in the DMA's consolidated text that try to regulate this coexistence. Anyway, it seems that the DMA has the right qualities and a good degree of effectiveness to respond to the peculiarities of the digital sector.

## VI. Final remarks

Several states in different continents are currently grappling with digital reforms. What all of these reforms have in common is the focus on one of the most complex issues to be faced nowadays: the Big Tech's enormous market power and their anti-competitive behaviours. Various instruments have been used to restore fairness and contestability to digital markets: in some legal orders, legislative reforms have been envisaged (e.g. in the US, China and Germany), in others *ad hoc* regulatory bodies have been set up (e.g. in Japan and the UK), and yet in others the introduction of instruments for *ex ante* regulation of the obligations to which Big Tech must be subject has been opted for (e.g. in the EU and Australia).

The EU legislator has proposed the adoption of a regulation, the DMA, containing harmonised rules defining certain obligations to prevent some gatekeepers' unfair practices and providing for an enforcement mechanism based on market investigations. The proposed Regulation is characterised by being a sectoral regulation (as it applies only to the digital sector and to a particular group of entities, the gatekeepers, i.e. providers of core platform services) and is presented as an *ex ante* regulatory tool, imposing obligations that Big Tech must comply with, without requiring an assessment of the object or effect of the underlying practices.

An organic reading of the DMA leads to identify two main objectives of the DMA, other than the explicit ones of fairness and contestability: that of more effectively protecting consumers and their fundamental rights online, especially their freedom of choice, and that of making digital markets fairer and more open for all and, therefore, of ensuring the freedom to conduct business referred to in Article 16 of the Charter of Fundamental Rights of the European Union. The attention to the protection of these fundamental rights within the DMA emerges from numerous provisions: on the one hand, there are some provisions which ensure that consumers are not exploited, that their data are not profiled, that they are not subject to abusive tying practices between one service of the core platform and another, that they are given the possibility to choose which software applications to use, etc.;

on the other hand, there are other provisions aimed at facilitating the entry of newcomers into a given core platform service or adjacent markets or into an online intermediation service competing with the distribution platforms of a gatekeeper, at hindering practices such as the side loading, etc. Thus, it is possible to affirm that the approach of the European legislator in the DMA seems to be inspired by the principles of the Ordoliberal doctrine, whose stigma is that the market should be regulated in order to make it effectively free. In fact, this is precisely the task of the DMA, namely that of regulating the behaviour that Big Tech must assume in order to make the digital market free, both for companies and consumers.

As far as the relationship between the DMA and competition law, they will complement each other since the DMA is intended to address unfair practices by gatekeepers that either fall outside the existing EU competition rules, or that cannot be as effectively addressed by these rules. However, the complementarities between the DMA and competition law raise questions that can only be discussed in the future. For the time being, the only certainty on the topic is that the Court of Justice affirmed that the principle of *ne bis in idem* is applicable between sectoral regulation and competition law enforcement, as long as the respective cases relate to the same facts, and a limitation of that principle can be justified on the basis of Article 52(1) of the Charter of Fundamental Rights.

In any case, the DMA seems to be promising in addressing the main weaknesses in the use of competition law in digital markets (i.e. the slowness with which antitrust cases proceed), by taking the form of an *ex ante* regulatory tool, in adapting to the changing reality of the online world, by containing provisions that allow the Commission to identify new unfair practices, and in regulating in a more systematic way the Big Tech's behaviour on the market, although a greater rationality in the categorisation of the obligations provided for would be desirable. Moreover, also from the point of view of the effectiveness of competition in digital markets, the DMA has a major relevance, mainly because it tries to create a greater legal certainty (by introducing a specific legal framework, knowable in advance and ensuring the possibility of confrontation with the Commission) and a greater deterrent effect for Big Tech. In relation to this latter aspect, it has been pointed out in this paper that a greater deterrence and, consequently, the maintenance of a more effective competition in the EU could be achieved by combining public enforcement with private enforcement. Articles 38 and 39 of the DMA's consolidated text provides for some rules on this topic but more could have been done. After all, the DMA is perfectly compatible with such a combined system, as its features and the tools it introduces already make it prone to facilitating damages actions.

Overall, the DMA allows the EU Economic constitutionalism to regain strength compared to recent years, as it ensures a more effective protection of fundamental rights and greater freedom on the market, by virtue of an approach that seems to be inspired by the Ordoliberal doctrine and that no longer has the economic growth as its sole objective. At the same time, the promotion of competition in digital markets is strengthened, as the DMA seems to have the right characteristics to overcome the inefficiencies of competition law in this field, although the relationship between these two instruments might be difficult. Finally, the DMA ensures legal certainty and a good degree of deterrent effect, even though to this end some changes to the text would be recommended, for example with regard to a more rational reorganisation of the obligations laid down and to the introduction of more specific rules to facilitate the bringing of private actions for damages.

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# Gateways to the Internet Ecosystem – Enabling and Discovery Tools in the Age of Global Online Platforms

by

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Article received: 15 July 2022, accepted: 9 September 2022.

## *Abstract*

The *Google Shopping* case has provided significant lessons that reach beyond antitrust enforcement. 'Enabling and discovery tools' create a layer that serves as a gateway to the Internet ecosystem. Therefore, on the one hand, they play a key role in ensuring the openness of the Internet ecosystem, and on the other hand, they exercise a primary influence on consumer experiences and their cognitive processes, which in turn determine online consumer transactions. Enabling and discovery tools, such as adopting design methods based on applied behavioural sciences (for example: user experience design (UX) and user interface design (UI)), create global challenges at the crossroads of antitrust, consumer law and platform regulation. At the same time, in light of the complexity of the platform economy, some market phenomena might be particularly difficult to identify and address, while fast and efficient adaptation is an essential factor for market players. This brings advocacy – the promotion of a competitive environment – into the focus also at the national level, particularly where a dual enforcement regime makes a multifocal approach possible.



## *Résumé*

L'affaire Google Shopping a fourni des leçons importantes qui vont au-delà de l'application du droit de la concurrence. Les «outils d'activation et de découverte» créent une couche qui sert de passerelle vers l'écosystème d'Internet. Par conséquent, d'une part, ils jouent un rôle clé pour assurer l'ouverture de l'écosystème d'Internet et, d'autre part, ils exercent une influence primordiale sur les expériences des consommateurs et leurs processus cognitifs, qui à leur tour déterminent les transactions des consommateurs en ligne. Les outils d'activation et de découverte, tels que l'adoption de méthodes de conception basées sur les sciences comportementales appliquées (par exemple: la conception de l'expérience utilisateur (EU) et la conception de l'interface utilisateur (UI)), créent des défis mondiaux au carrefour du droit de la concurrence, du droit de la consommation et de la réglementation des plateformes. Dans le même temps, compte tenu de la complexité de l'économie des plateformes, certains phénomènes de marché pourraient être particulièrement difficiles à identifier et à traiter, alors qu'une adaptation rapide et efficace est un facteur essentiel pour les acteurs du marché. Cela place le plaidoyer pour la promotion d'un environnement concurrentiel au centre de l'attention également au niveau national, en particulier là où un double régime d'application du droit rend possible une approche multifocale.



**Key words:** discovery and enabling tools; platforms; digital sector; antitrust; consumer protection; advocacy; Gazdasági Versenyhivatal

**JEL:** K2

## I. Introduction

'Lessons are not given, they are taken'.[1] Lessons from the *Google Shopping* case[2] can be considered as a real-life manifestation in contemporary competition law of the famous saying by the Italian poet Cesare Pavese. In this landmark case, some market phenomena of the digital economy have been examined with an antitrust focus. For more than a decade, however, the *Google Shopping* case has had an important secondary effect by making it increasingly evident that there are some specific tools and elements in the Internet ecosystem which are influential in users' access to Internet-based services. Lessons taken from the still ongoing *Google Shopping* case have had a significant spin-off impact on other fields of regulation (such as consumer law and platform regulation). Furthermore, the case has offered some insights on the operation of online tools and elements designed to 'orientate' users, that is, instruments meant to direct/lead users to the relevant digital space. It also affected the role performed by national competition authorities (hereinafter: NCAs) in the field of digital markets.

The *Google Shopping* case highlighted the importance of these gateways to the goods and services available in the digital space. In the context of the Internet value chain, these phenomena can be considered the frontline in shaping users' experiences and behaviours within the Internet ecosystem. By allowing users to interact with the whole Internet ecosystem to create, offer and access new applications, contents and services, these tools and elements have a key role to play to ensure the openness of the Internet ecosystem. The Body of European Regulators for Electronic Communications (hereinafter: BEREC) has created for them the umbrella concept of the 'enabling and discovery layer'.[3] Moreover, particularly by giving prominence, fast-changing and multi-faced enabling and discovery tools are also guiding the cognitive discovery process of end-users over the Internet ecosystem. In the light of the *Google Shopping* case, and recent developments in EU regulation, enabling and discovery tools create an intersection of antitrust law, consumer law and the sectorial regulation of digital markets. The EU platform regulation reflects the fact that digital markets have been reshaped

[1] 'Le lezioni non si dànno, si prendono.' (18.08.1946) – Cesare Pavese, *Il mestiere di vivere* (Einaudi 2012).

[2] Case T-612/17 *Google and Alphabet v Commission* [2021] EU:T:2021:763 (*Google Shopping*).

[3] BEREC, Draft BEREC Report on the Internet Ecosystem (9 June 2022) <https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/BoR%20%2822%29%2087%20Draft%20BEREC%20Report%20on%20the%20Internet%20Ecosystem.pdf> accessed 20 September 2022.

by the emergence of global online platforms, which by now perform the role of the primary forum and vehicle of information flow between market players.

EU rules on new platform regulation allocate new tasks to the European Commission. However, the role of NCAs cannot be separated from the aforementioned global online context either, nor from the issue of information overload dominating the 21st century. Considering the complexity and novelty of the business models and business dynamics evolving for market players in the platform economy, some market phenomena might be particularly difficult to identify and address. Meanwhile, in the rapidly developing environment of digital markets, timely adaptation is a key factor. This puts advocacy – non-enforcement activities performed by competition authorities to promote a competitive environment for economic activities – into the limelight.[4] In the field of advocacy, by distilling and channelling the results of international and national level enforcement activities, NCAs are involved in empowering consumers and firms to meet the newly emerging challenges. In addition, those national authorities that have dual powers of antitrust and consumer protection, may apply a multifocal approach. Therefore, they can provide valuable results also in the field of advocacy. The Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter: GVH) belongs to these authorities, and has kept advocacy among its organisational priorities over the last three decades. This is the focus and the perspective of this paper which proceeds as follows.

Part II outlines the role of discovery and enabling tools in the context of the platform economy. This question is important and timely, because the *Google Shopping* case revealed that search functions and 'ranking' have become gateways to information, services and goods available on the Internet. By setting forth that 'users typically look at the first three to five generic search results on the first general search results page and pay little or no attention to the remaining generic search results',[5] the *Google Shopping* case created a link between an antitrust infringement and the direct market effect of cognitive consumer biases. Therefore, this article analyses the implications of the *Google Shopping* case for both antitrust, and for business-to-consumer commercial practices.

Part III deals with the regulatory framework of the enabling and discovery tools which fall on the crossroads of antitrust, consumer protection and the newly emerging platform regulation. In the context of the regulatory framework, we refer to some recent elements in GVH enforcement in the field of enabling

[4] International Competition Network, Advocacy and Competition Policy, Report by the Advocacy Working Group (2002) <www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf> accessed 20 September 2022.

[5] *Google Shopping* [n5] [65] [172].

and discovery tools, which reflect the fact that the GVH is aware also of applied behavioural elements, and reaches out to, among others, the tools of market analysis and behavioural sciences to create an adequate assessment framework.

The pace of the changes in the global online economy requires fast and effective adaptation by market players – NCAs can provide effective support in this field. Part IV focuses on answers provided by the GVH to the twofold question of: (i) how can the relevant lessons be delivered to, and taken by their final addressees, with emphasis on consumers; and (ii) what role can advocacy play in this context.

## II. Gateways to the Internet ecosystem in the age of platforms

Nowadays, we all struggle with constant information overload in almost every area of our lives. This is especially noticeable when browsing online. As early as 1996, Steve Jobs underlined that most people do not actually use the Internet to get more information from it, as it had become obvious, even by then, that users are getting more information daily than they can in fact process.[6] Therefore, it is not coincidental that when users come across any kind of online interface, they expect that a search and/or filtering function is available there, with which they can narrow down the information available to a scope relevant to their actual interests or needs. Already long before the age of platforms, the amount and complexity of online information made it obvious that relevant information were, in fact, inaccessible and unmanageable without the use of search features. As the complexity of the Internet ecosystem has grown, and global digital platforms emerged, access to Internet-based contents, applications and services entailed the raise of a complex set of enabling and discovery tools including: searching, ranking, recommendation engines, consumer reviews, chatbots, virtual assistants, etc.

The emergence of online platforms has radically changed online markets. For the purposes of this study, we define a digital platform as any form of operation that provides for the creation of interfaces, for intermediary services based on digital technologies as an infrastructure, enabling the establishment of connections between different social and/or economic users (groups) with the most diverse subjects and purposes. The intermediary, interactive value-creating activity is known also in the 'traditional' offline economy. However, one of the main characteristics of platforms is that they operate online, that

[6] Michael B Becraft, *Steve Jobs: A Biography* (Greenwood 2016).

is, mostly on the basis of a specific company's technology and infrastructure.[7] Consequently, in economic terms, platforms are two- or multi-sided markets, where undertakings need to get two or more distinct groups of customers, who value each other's participation in the same platform, in order to generate economic value.[8] Such markets are generally characterized by the non-neutrality of the price structure and the existence of externalities across different groups.[9] Surplus can be created or destroyed – it depends on whether externalities are positive or negative – when the different groups interact.[10] The price structure of such a market has a great impact on the willingness of different groups to trade, and thereby, it is very important from the point of view of total and consumer welfare. The most important task of a platform provider is to find a pricing balance between the different sides' interests, to 'get both sides of the market on board'[11], and every change of the pricing structure has also an influence on the whole market.

The diversity of platforms is thus also rooted in the variety of business models. The most important core models are based on fees for subscriptions, advertising, access and sales transactions or a combination of these elements.[12] Online platforms as multi-sided markets often have to adapt to the fact that one group of their users is very price sensitive, often – as also in the case of the use of enabling and discovery tools – only a 'zero price' is acceptable for such users; at the same time, other group(s) of users compete for the attention of the first group. Other characteristic features that can be identified in most of the platform models include some forms of tracking and mapping of consumer data and/or behaviour followed by grabbing and influencing where the first group of users focuses their attention. In this context, 'attention' refers to the amount of time a potential consumer spends on specific content, which might have already been customised to the profile of the given consumer.

[7] Tamás Klein, Endre Győző Szabó and András Tóth, *Technológiai jog – Robotjog – Cyberjog* (Wolters Kluwer 2018).

[8] 'New Research Explores Multi-Sided Markets' (*HBS Working Knowledge*) <https://hbswk.hbs.edu/item/new-research-explores-multi-sided-markets#:~:text=A:%20Two-%20and%20multi-,to%> accessed 20 September 2022.

[9] OECD Competition Committee, Two-Sided Markets (2009 June) <https://www.oecd.org/daf/competition/44445730.pdf> accessed 20 September 2022.

[10] Mark Armstrong, 'Competition in two-sided markets' (2006) 37(3) The RAND Journal of Economics 668, <http://dx.doi.org/10.1111/j.1756-2171.2006.tb00037.x> accessed 20 September 2022.

[11] Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1(4) Journal of the European Economic Association 990, <http://dx.doi.org/10.1162/154247603322493212> accessed 20 September 2022.

[12] Antonio Capobianco and Anita Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' (2017) 9(1) Journal of European Competition Law & Practice 19, <http://dx.doi.org/10.1093/jeclap/lpx082> accessed 20 September 2022.

In his article, Evans introduces the concept of 'attention rivalry', which exists among online platforms as a source of their competition dynamics. He suggests that in addition to the traditional scope of antitrust, the 'analysis should focus on competition for seeking and providing attention rather than the particular products and services used for securing and delivering this attention.'[13] The approach formulated by Evans explains the significance of enabling and discovery tools, which, beyond their primary function of displaying and ranking specific content to the users, exercise also a material influence on consumer attention.

The *Google Shopping* case revealed that search functions and ranking have become crucial gateways and/or highways to/for information, services and goods available on the Internet. Consequently, an antitrust infringement affecting the use of these tools can result in a significant erosion and distortion of consumers' freedom to choose. To put it in other words, Google's anti-competitive behaviour has restricted the options of a large number of consumers by diminishing the array of merchants and/or products that such consumers had the opportunity to select from.[14]

To see the whole picture, however, we have to take a step back in time. Over time, as search engines have added significant value to certain websites from a marketing perspective, the business importance of both these websites and search engines has extended to a different dimension. In parallel, by the end of the first decade of the 21st century, debates about the so-called 'search bias' have become more common.[15] The business model of search engines, which have eventually become platforms, is based on the intermediary role that provides a link between (i) content providers (targeting users), (ii) users (looking for content) and (iii) advertisers (also targeting users). Thus, although the service of search engines is free for its users, the focus of their attention is extremely valuable to advertisers, especially since users can be well characterised based on their searches. Hence, the role of the intermediary generates significant advertising revenue, but the amount paid by advertisers in most cases depends on how many times users actually click on the 'sponsored' ranking items they pay for.[16] Gradually, search services have

[13] David S Evans, 'Attention Rivalry Among Online Platforms' (2013) 9(2) Journal of Competition Law and Economics 313, <http://dx.doi.org/10.1093/joclec/nht014> accessed 20 September 2022.

[14] 'How Google is eroding consumers' freedom to choose – Consumer Corner' (*Consumer Corner*) <www.beuc.eu/blog/how-google-is-eroding-consumers-freedom-to-choose/> accessed 23 September 2022.

[15] Joshua D Wright, 'Defining and Measuring Search Bias: Some Preliminary Evidence' (2011) George Mason University Law and Economics Research Paper Series: 12–14/2011.

[16] Maurice E. Stucke and Ariel Ezrachi, 'When Competition Fails to Optimize Quality: A Look at Search Engines' (2016) 70(18) Yale Journal of Law and Technology 70–107.

become differentiated, general search services and price comparison services were separated, and Google itself also entered (in addition to general search services) the market of price comparison services.

## 1. The Google Shopping case – rivalry for visibility

The central issue of the *Google Shopping* case from the antirust point of view can be concisely summarised as Google had abused its dominant position (as a general Internet search engine) by favouring its own comparison shopping service; it did so by giving its own comparison shopping service a more prominent placement on the results page of its general Internet search engine than it gave to its rivals in the market of comparison shopping services. Thus, although this approach is not directly mentioned in the *Google Shopping* judgement, 'self-preferencing' – or, according to the General Court (GC) terminology, 'favouring' – seems to have played a significant role in reaching the conclusions of this ruling.

As we previously described, over the last few decades, search engines have emerged as primary channels for e-commerce. Finally, in the evolution of the search engines market, Google Search has become the most important gateway to transactions in the digital world. As a result, it reached the unique position that, while being the most popular online service, it also simultaneously served as a general entry point for orientation and discovery in digital markets. 'Visibility' is a core issue for e-commerce transactions. For merchants, content providers or service providers in the digital world, visibility is a key success factor: demotion of competitors could decrease their visibility to an extent unprecedented in offline markets. From this point of view, the *Google Shopping* case can be interpreted as stating that a standalone breach of Article 102 TFEU can resulted from a unilateral conduct whereby a vertically integrated dominant platform provides greater visibility to its own products/services (or that of its preferred market players), as opposed to the products/services competing with those offered by the platform (or its preferred merchants). As a consequence, it thus prevents competitors from obtaining visibility, or having their visibility significantly reduced.[17]

The traffic generated by Google's search engine could be considered as the real asset, which increases the relevance of specialised search results, and, in particular, the reality and breadth of the offerings of comparison shopping services, by enhancing the ability to convince merchants to provide data about their products. On the one hand, Google could generate revenue thanks to

[17] Elias Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU' (2021) 6 European Papers 1345–1361.

commissions paid by merchants and online advertising; on the other hand, it could provide information about users' behaviour, which improved the usefulness of search results for the purposes of machine learning, experiments or suggestions of other search terms that might be of interest for users. These issues are to be assessed in the context of existing network effects and very high entry barriers, a fact that increased the complexity of the *Google Shopping* case.

Google challenged the causal link between the competitors' traffic decrease and its own conduct, and referred to broader industry developments and shifting user preferences as alternative causes. However, the GC did not accept this argumentation: even if these causes could have been considered as possible explanations, they were found to be closely linked to the functioning of Google's algorithms ranking generic results.[18]

In addition, also importantly for the development of the digital economy, the GC emphasised that product or service improvements as such do not exclude that a conduct has anticompetitive effects – although such arguments can be taken into account only at the stage of objective justification.[19] Closely related to the arguments on product improvement, Google claimed that its behaviour was not discriminatory: while generic results were based on 'crawled' data, and on the relevance derived from this data, product results were based on data feeds directly provided by the merchants and on product-specific relevance signals. Google thus applied different technologies to different situations with the legitimate goal of improving the quality of its results.[20] The GC did not accept Google's argument and emphasised that the discrimination did not lie in a different treatment based on the nature of the results, product-related or general, but on the different treatment between the origin of the results – those coming from Google were preferred to those coming from its competitors.[21]

Considering the nature of the abuse in the *Google Shopping* case, one should not forget that Article 102 TFEU prohibits not just traditional abusive behaviours, as listed in competition law textbooks, but can also cover any other market practices that might constitute abuse by a dominant undertaking. In this respect, the GC acknowledges, for instance, that leveraging practices of a dominant undertaking are not prohibited as such by Article 102 TFEU.[22] However, in the *Google Shopping* case, through leveraging, Google was relying on its dominant position on another market (the market for general search services) 'in order to favour its own comparison shopping service on the

[18] *Google Shopping* [n5] [383]–[391].
[19] *Google Shopping* [n5] [188].
[20] *Google Shopping* [n5] [272].
[21] *Google Shopping* [n5] [284].
[22] *Google Shopping* [n5] [164].

market for specialised comparison shopping search services by promoting the positioning and display of that comparison shopping service and of its results on its general results pages, as compared to competing comparison shopping services, whose results, given their inherent characteristics, were prone to being demoted on those pages by adjustment algorithms.'[23]

Based on the facts of the case, one can have the gut-feeling that Google's abusive conduct is similar to several types of traditional abuse: in certain elements, it reminds us of refusal to deal, margin squeeze, or even tying and bundling. A recent OECD study examining the abuse of dominance in digital markets identified new forms of abuse of dominance therein, and explained that a new theory of harm 'relates to a dominant firm active in multiple related markets (whether they are vertically related, as an input and completed product, or horizontally, for example as complements). However, instead of appropriating a competitor's innovations, abusive leveraging (or discriminatory leveraging) theories of harm focus on ways in which a firm can use (or leverage) its dominant position in one market to favour its products in a related market. This type of conduct, which can take the form of self-preferencing (for example providing platform access advantages to its own product), has been identified as a potential exclusionary abuse of dominance by some competition authorities.'[24]

## 2. Intervention to the discovery process: 'findability'

There are always two sides to a coin: visibility is crucial for companies while 'findability' is key for consumers. Findability is the ease with which information in the digital world can be found, both from outside the concerned website and/or by users already on the website. In online markets, where consumers face many options, their discovery and decision-making process can be supported, and consumer search cost decreased by ranking the options. Ranking by providing prominence, in turn, directly influences how consumers search and, finally, what they choose to buy.[25] Ranking can have a fatigue-releasing effect,[26] but simultaneously, the relevant cognitive biases

[23] *Google Shopping* [n5] [167].

[24] As most relevant examples of this theory of harm, the 2020 OECD Report mentioned the *Google Shopping* case and the *Allegro* case of the Polish competition authority. OECD, Abuse of Dominance in Digital Markets (2020) <https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf> accessed 20 September 2022 ('2020 OECD Report').

[25] Raluca Ursu, 'The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions' (2018) 37(4) Marketing Science 530–552.

[26] Raluca M. Ursu, Qianyun Zhang ad Elisabeth Honca, 'Search Gaps and Consumer Fatigue' (2021) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3757724> accessed 20 September 2022.

in consumer behaviour have also significant consequences on the market outcome. By setting forth in the *Google Shopping* case that 'users typically look at the first three to five generic search results on the first general search results page and pay little or no attention to the remaining generic search results', the direct market effect of cognitive consumer biases related to ranking was acknowledged.[27] Some traditional consumer biases, already been well-known in the offline markets, can return in a re-charged manner in online markets,[28] but some new generation consumer biases can also be identified, which first manifested in online markets.

Though the *Google Shopping* case analysed the underlying behaviour in terms of abuse of dominance, but it made the fact obvious, at the same time, that search engines and ranking are specific forms of business-to-consumer commercial practices, which are central for consumers' orientation in the digital information overload that consumers have to cope with. Therefore, an alternative interpretation can be formulated about the role of ranking (enabling and discovery tools) whereby it is seen as an instrument with the potential to exclude the competitors of the platform from becoming the very limited focus of consumer attention by exploiting the cognitive biases of consumers.

Thus, beyond antitrust lessons, such as the assessment of indispensability,[29] one of the key realisations derived from the *Google Shopping* case is revealing the role of applied behavioural sciences, and the relevant interventions into the transactional decision-making process, in the context of digital platforms. The significance of applied behavioural sciences, like the UX design (which is focused on user experience[30]) is also clearly represented in the market analysis of the online retail sector conducted by the GVH when examining the design process of online retail entities.[31]

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[27] The concept of cognitive bias describes the systematic (i.e. non-random) error in thinking, in the sense that a judgment deviates from what would be considered desirable from the perspective of accepted norms or correct in terms of formal logic. 'Behavioral Economics Guide 2021' (*BehavioralEconomics.com | The BE Hub*, June 13, 2022) <https://www.behavioraleconomics.com/be-guide/the-behavioral-economics-guide-2021/> accessed 20 September 2022.

[28] As, for example, an 'authority bias' has a significant role in the success of influencer marketing.

[29] Deutscher, [n20], Pablo Ibanez Colomo, 'Indispensability in Google Shopping: what the Court did, and did not, address in Slovak Telekom.' (*Chillin'Competition*) <https://chillingcompetition.com/2021/04/02/indispensability-in-google-shopping-what-the-court-did-and-did-not-address-in-slovak-telekom> accessed 20 September 2022.

[30] User experience is defined as 'a person's perceptions and responses that result from the use of or anticipated use of a product, system or service.' in ISO 9241–210, Ergonomics of human-system interaction – Part 210: Human centered design for interactive systems.

[31] GVH, Az adatvagyon keletkezése és szerepe az online kiskereskedelemben fogyasztóvédelmi és versenypolitikai szempontból (2022. február 16.).

## III. Discovery and enabling tools: on the crossroads of antitrust, consumer protection and sectorial regulation

By now, ranking of search results can be considered as a somewhat outdated first-generation tool in the discovery and enabling toolset. Due to the development of technology, there are also some other mainstream tools of the big data era that can be affected by cognitive biases of imperfectly rational consumers too. We agree with the BEREC report[32] that there is a wide and fast changing group of elements in the Internet ecosystem that create a discovery and enabling layer serving as a gateway to other application layer elements. The elements of this intermediary layer can shape user experience within the Internet ecosystem and are crucial as they provide resources, technical means and contractual arrangements that influence the ways users access Internet-based services.

As regards behaviours guiding consumer decisions, influencing the architecture of online choices (that is, practices of influencing consumer choice by organizing the context in which they make decisions), similar antitrust concerns or preferential treatment issues may come up in relation to representations of relative prominence, recommendation engines, chatbots, virtual assistants etc. Further, in digital markets, consumer orientation may also be heavily influenced by the choices of other consumers, their opinions, ratings and reviews in terms of their cognitive biases as well (such as, the social influence bias or the confirmation bias).[33] Collaborative platforms drew attention to the role of trust, which is considered as an essential success factor in their functioning.[34] What is essential in building trust are reputation feedback systems, based on qualitative evaluations and numerical evaluations attached to the user profile of the platform, as well as transparency in terms of the identity of contractual parties. Therefore, it is crucial that the opinions and assessments provided on the platform, as well as the identification of contractual parties, are reliable.[35]

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[32] BEREC [n8].

[33] OECD, Understanding online consumer ratings and reviews (2019) accessed <https://www.oecd-ilibrary.org/science-and-technology/understanding-online-consumer-ratings-and-reviews_eb018587-en> 20 September 2022.

[34] Alberto De Franceschi, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives', *European Contract Law and the Digital Single Market* (Intersentia) <http://dx.doi.org/10.1017/9781780685212.002> accessed 20 September 2022.

[35] Diane Coyle, 'Making the Most of Platforms: A Policy Research Agenda' [2016] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.2857188> accessed 20 September 2022. Further, Giuseppe A Veltri and others, 'The impact of online platform transparency of information on

In a recent case, the GVH considered as an infringement of the prohibition of unfair commercial practices that in the accommodation offers available on the Booking.com website and mobile application, the firm adopted an unlawful behaviour which took the form of 'attention grabbing' (that is, providing prominence by striking colour, font size or other characteristic) information (such as '32 more people are also watching'; 'One person is considering booking this accommodation right now', 'Highly sought after! Booked 17 times in the last 24 hours'), which gave consumers the impression that the accommodation they were just viewing was subject to high demand and limited availability.[36] The GVH adopted a decision that this practice can exert psychological pressure and distort consumers' decision-making process, as it subconsciously evokes emotions and fears in consumers that if they do not book the accommodation immediately, they may lose out on it, which can be described as the fear-of-missing out effect. In its arguments, the GVH relied on its market analysis of digital comparison tools published in March 2020,[37] supported by a market research survey and the findings that have been made in this field by behavioural economics. The GVH *Booking.com* case was the first landmark case of the Hungarian NCA where the scientific results of behavioural economics were directly referred to.[38] Incidentally, such references are a reoccurring element in the decisions of the GVH since then.[39] These cases represent an example that behavioural economics elements are infiltrating the enforcement practice of some NCA with a double enforcement regime. Although behavioural sciences have not been formally and systematically integrated into EU policy-making and legislation, some of their findings have been integrated into several EU policies, mostly in the field of consumer protection; behavioural findings are channelled into sectorial regulations as well.[40] Typical problems involving consumer biases when consumers assess online information might provide another good reason for regulators to address transparency questions. They may also support public intervention

consumers' choices' [2020] Behavioural Public Policy 1, <http://dx.doi.org/10.1017/bpp.2020.11> accessed 20 September 2022.

[36] VJ/17/2018 (GVH *Booking.com* case) English language press release: Gigantic fine imposed on Booking.com by the GVH – GVH' (*Tartalmak – GVH*) <www.gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh> accessed 23 September 2022.

[37] GVH, Piacelemzés a digitális összehasonlító eszközök fogyasztói döntésre gyakorolt hatásai feltárására (2020).

[38] Ibid. [414].

[39] As, for instance, in VJ/41/2019 ('GVH Szállás.hu Case) [141] [147].

[40] Alberto Alemanno and Alberto Spina, 'Nudging legally: On the checks and balances of behavioral regulation' (2014) 12(2) International Journal of Constitutional Law 429, <http://dx.doi.org/10.1093/icon/mou033> accessed 20 September 2022.

into the operation of enabling and discovery tools and advertising markets, also by means of regulation, rather than waiting for case-by-case antitrust assessments in response to complaints from consumers or competitors of big gatekeepers.

Having identified the role of cognitive biases in the online decision-making process, which is also clearly represented in the *Google Shopping* case, the possibility of a 'behavioural market failure' may arise, which could be listed alongside the three standard market failures, namely externalities, market power and asymmetric information. Sellers operating in a competitive market show a strong inclination to design their products, contractual terms and pricing methods in response to consumer biases, which may result in both efficiency losses and harm to consumers. Under specific circumstances, the existence of biased demand, generated by imperfectly rational consumers, may result in market failure. If such behavioural type of market failure is identified, compulsory information disclosure may serve as a solution. Such mandatory disclosure can be designed either for imperfectly rational consumers, or for sophisticated intermediaries that advise imperfectly rational consumers.[41]

In the light of the behavioural market failure theory, and in a world with imperfectly rational 'e-consumers', where the merchants are otherwise not induced to correct systematic mistakes in consumer decisions, it seems reasonable that the benefits of competition might be extended by regulation, and especially by means of mandatory disclosure of information.

In this context, we give a short overview of the regulatory initiatives in the field of: (i) consumer law, since most of the relevant behaviours take the form of business-to-consumer commercial communication; and (ii) emerging platform regulation, as a newly established sectorial regulation, also reflecting the underlying regulatory goals to address behavioural market failure.

## 1. Consumer law

The 2005 Unfair Commercial Practices Directive (hereinafter: UCPD) seeks to protect the integrity of the consumer decision-making process in business-to-consumer relationships by keeping commercial practices in check.[42] The UCPD represents a sector-neutral approach: in addition to the brick-and-

[41] Oren Bar-Gill, 'Competition and Consumer Protection: A Behavioral Economics Account' (2011) 11(42) New York University, Law & Economics Research Paper Series 1, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974499> accessed 20 September 2022.

[42] 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

mortar world, it applies to all platforms, online shops as well as other less typical forms and methods of online sales. A fitness check of consumer law was performed in the framework of the EU's 'New Deal for the Consumer' strategy, which revealed that the rules of the UCPD had to be adapted to the new challenges of digital markets. Consumer reviews, endorsements and ranking, as well as other forms of prominent placement of commercial offers within online search results, were identified as the primary concerns that had to be resolved by way of consumer law.

On the one hand, the Omnibus Directive introduced a modernization into the UCPD, declaring in its preamble that 'consumers increasingly rely on consumer reviews and endorsements when they make purchasing decisions.'[43] Therefore, if a trader displays consumer reviews, the UCPD sets out the relevant mandatory disclosure rules: (i) the merchant must inform the consumers whether there are processes or procedures in place to ensure that the available reviews come from consumers who have actually used or purchased the product, (ii) if the trader does use such processes or procedures, information disclosure must also cover the method of monitoring and processing consumer reviews. Traders are prohibited from directly or indirectly publishing false consumer reviews or endorsements.

On the other hand, the Omnibus Directive defined ranking in a broad sense: '[r]anking refers to the relative prominence of the offers of traders or the relevance given to search results as presented, organised or communicated by providers of online search functionality, including resulting from the use of algorithmic sequencing, rating or review mechanisms, visual highlights, or other saliency tools, or combinations thereof.'[44]

The new rules of the UCPD black-listed, that is formulated a clear ban on practices where a seller provides information to a consumer in the form of search results, in response to that consumer's online search query, without clearly disclosing any paid advertising or payments made specifically for achieving a higher ranking of products within the search results.

Online marketplaces that enable consumers to search for products and services offered by third parties are required to inform consumers about the key parameters used by default in determining the ranking of the offers displayed as a result of the query, and their relative importance compared

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European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (UCPD).

[43] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7, preamble para (47).

[44] Ibid, preamble para (19).

to other parameters. This information should be concise and easily and directly accessible in a prominent place. The term 'key parameter' refers to any general criteria, process, special signals built into algorithms, or other adjustment or demotion mechanism used in the context of ranking. As for sponsored ranking, if a seller has directly or indirectly paid the provider of the online search functionality for a higher ranking of their product within the search results, the provider of the online search functionality should inform consumers of that fact in a short, easily accessible and comprehensible form. Online search functionality, of course, can be provided by different types of online traders, including intermediaries, such as online marketplaces, search engines and comparison websites.

## 2. Sectorial regulation of platforms

Transparency requirements for key parameters determining ranking create a link between the UCPD and the already existing sectorial EU Platform to Business Regulation (hereinafter: P2BR)[45] because this issue is already regulated by the P2BR.[46] The transparency requirements of the P2BR apply to a wide range of online intermediaries, including online markets, but they are applicable only between traders and online intermediaries. Therefore, in the transactional triangle, similar transparency requirements had to be introduced in the UCPD in order to ensure adequate clarity for consumers, except for online search engine providers, who are already required by the P2BR to record, individually or in combination, the key parameters that play a central role in ranking and their relative importance. They must do so by placing a simple and comprehensible description of that fact on the interface of their online search engines in an easy and publicly accessible way.[47]

The *ex-ante* rules in the Digital Markets Act[48] (hereinafter: DMA) regarding the required behaviour of gateway platforms include a ban on self-preferencing

[45] 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 [2019] OJ L186/57 (P2BR).

[46] The European Commission published guidelines that address in detail the main requirements for online platforms identified in the P2BR (Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01).

[47] Judit Firniksz, 'Rangsorolás – új szabályozási igény a platformok és az információs túlterheltség korában', Verseny és Szabályozás 2021 (KTI KRTK 2022) <https://kti.krtk.hu/wp-content/uploads/2022/01/vesz2021_teljes-1.pdf> accessed 20 September 2022.

[48] 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 [2022] OJ L265/1 (Digital Markets Act; DMA).

in ranking as well as a ban on manipulation of ranking. The lessons learned from the *Google Shopping* case are easily revealed in the 'problem catalogue' of the Digital Markets Act. The prohibition is aimed at preventing a gatekeeper who owns significant market power from applying differentiated or preferential (legal, commercial or technical) treatment in terms of ranking on the core platform service for products or services offered by itself or a business user, which is under the control of the gatekeeper. Ranking in this context refers to all forms of relative highlighting, including the display, rating, reference or audio-based results.

While interpreting the obligations relevant to ranking imposed by the DMA, it needs to be considered that such duties belong to obligations susceptible of being further specified. In such cases, gatekeepers are expected to be effective in ensuring compliance with the obligations imposed, that is, the measures performed by them must be able to achieve the objective of the relevant obligation. Should, however, the European Commission find that the measures intended (or already performed) by the gatekeeper are inadequate or insufficient to fulfil the relevant obligations, it may specify the steps to be followed by the gatekeeper to comply with its duties.

There was a wide-spread professional debate whether a sector specific regulation is necessary for digital markets or if existing competition law instruments could be considered appropriate to meet the challenges of the incredibly dynamic changes in digital world. As a consequence of the seven-year investigation into the relevant conduct, the *Google Shopping* case was caught in the crossfire of debates suggesting that the timeframe of *ex-post* competition proceedings might undermine the relevance of the content of the adopted decisions. By now, the question whether a sectorial regulation is required in the digital markets has already been settled. No doubt, however, that the line of argumentation used by the GC while analysing Google's behaviour is expected to be a primary source in the coming regulatory dialogue with gatekeepers on ranking related issues.

'Recommender' systems, in addition to search engines, belong to the most important gateways for consumers to discover products. Recommender systems can effectively reduce users' search costs by pointing them towards transactions that may best match their needs and tastes. The logic of the ranking-related regulation can be identified in rules for the recommender systems set forth by the Digital Services Act: very large online platforms must ensure that users are appropriately informed, and can influence the information presented to them.[49] Therefore, platforms are required to clearly

[49] 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 [2022] OJ L277/1 (Digital Services Act, DSA) Pursuant to Article 2(o), 'recommender system' refers

present the main parameters for the recommender systems in an easily comprehensible manner, so that users understand how information is prioritised for them.

## 3. New paths for regulation?

Regulation is constantly competing with the development of regulated conditions. Platform economy and the relevant enabling and discovery tools in the digital space are changing fast. Therefore, regulation can only follow such improvements. By definition, regulation always concerns the past or, best case, the present, but keeping up with the speed of development in the digital sector is nowadays a real challenge. While in the offline environment, a product may be placed on the bottom shelf, in the virtual world of online platforms a search or recommender algorithm can determine whether a product can have a place on the 'virtual shelf' at all. This trend may, however, be exacerbated by 'alexification', that is, with the rise of virtual assistants (such as Google's Home, Apple's Siri or Amazon's Alexa), which may further shrink the space on the virtual shelf.

In addition, there are still open professional debates on the controversial role of information that consider whether disclosure requirements are, in fact, capable of drastically improving current regulatory regimes at a very small cost. As such, are disclosure requirements likely to improve welfare,[50] or do they merely place additional burdens on market participants with little return?[51] There are reasonable doubts whether the very often extremely complex compulsory disclosure requirements adopted and proposed to balance the effects of consumer biases can, in fact, effectively ensure guidance and orientation to consumers in the context of the platform economy? In

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to fully or partially automated systems used by an online platform to suggest, in its online interface, specific information to given recipients of the service, including those resulting from a search initiated by the recipient, or otherwise determining the relative order or prominence of information displayed.

[50] Alemanno and Spina [n38].

[51] 'Online disclosures' were considered as a potential policy response to the issue of personalised pricing. The researchers failed to find evidence that even strong, repeated disclosure improved consumer awareness of personalised pricing or that it protected them from paying more than they otherwise might, even where the practice wass thought of as unfair. Julienne, Barjakova, Robertson and Lunn found their findings consistent with other research indicating that disclosures may not always be successful in raising consumer awareness and protecting consumer interests. Hannah Julienne, Martina Barjaková, Deirdre Robertson and Pete Lunn, 'Online disclosures fail to make consumers aware of personalised pricing' (2021) ESRI Research Bulletin: March 2021.

other words, it is not obvious whether consumers, who are already heavily overwhelmed by an information overload, will be able to process the additional compulsorily disclosed information provided to them. Will they be able to enjoy the benefits and protection that come with such information?

The human brain cannot absorb unlimited amount of information. The term 'information overload' was invented by Bertram Gross in 1964.[52] Gross defined information overload as a phenomenon which occurs when the amount of input to a system exceeds its processing capacity. Market actors, as human decision-makers, have a fairly limited cognitive processing capacity, and if this capacity is exceeded, as a result, a reduction in the quality of their decision will occur. Today, and especially in the digital economy, data/information we encounter every day grows in an unprecedented level. The speed of technological development is increasing exponentially. Online information flow is increasing the volume of knowledge, which doubled, in 2020, every 12 hours; by contrast, it took 25 years for the body of knowledge to double in 1945.[53] While certain neuroscience studies examine how the information overload of the digital age affects our brains,[54] one thing seems certain: when the amount of input information exceeds the information processing capacities of consumers, it will lead to lower quality of their decisions as well as of their consumer experience.[55] In the digital economy, many online businesses compete for a limited amount of consumer attention, and even products and services can turn into tools competing with each other for this attention.[56] As referred to in Part II, the tech industry seems to be well prepared to handle the information overload effect, and by building on and using the results of applied behavioural sciences, to influence consumer decisions in the way preferred by the company.[57] The UCPD, however, focuses on giving consumers more information, when it prohibits misleading omissions, but it does not contain a rule against a confusing information overload. This

[52] Bertram M Gross, *The Managing of Organizations: The Administrative Struggle* (Free Press of Glencoe 1964).

[53] Amitabh Ray, 'Human knowledge is doubling every 12 hours' (*LinkedIn: 22 October 2020*) <www.linkedin.com/pulse/human-knowledge-doubling-every-12-hours-amitabh-ray> accessed 20 September 2022.

[54] Martin Korte, 'The impact of the digital revolution on human brain and behavior: where do we stand?' (2020) 22(2) Dialogues Clin Neurosci 101–111.

[55] Minjing Peng, Zhicheng Xu and Haiyang Huang, How Does Information Overload Affect Consumers' Online Decision Process? An Event-Related Potentials Study (2021) Frontiers in Neuroscience <https://www.frontiersin.org/articles/10.3389/fnins.2021.695852/full> accessed 20 September 2022.

[56] Evans (n 17).

[57] 'Information Overload, Why it Matters and How to Combat It' (*The Interaction Design Foundation*) <www.interaction-design.org/literature/article/information-overload-why-it-matters-and-how-to-combat-it> accessed 23 September 2022.

article agrees with Helleringer and Sibony,[58] that context matters, and that the online platform environment requires a shift of focus from content to context. By stipulating complex information disclosure rules, regulation may also contribute to 'information overload syndromes' afflicting consumers. Consumers are struggling with information disclosure, as it usually takes the form of incomprehensible legal texts generally hidden in the least visited parts of websites. Often annoyingly, and also raising a cognitive dissonance, pop-up windows hold up users from reaching their original goal until they accept certain terms and conditions, which they do not have the time and ability to substantially process and understand. These types of disclosure might have successfully addressed the traditional information asymmetry type of market failures, but if regulators intend to reach out to consumers in the digital era, this might seem a rather contra-productive strategy.

Contemporary interdisciplinary research focuses on adequate solutions for this problem. The Legal Design Lab of Stanford Law School uses human-centred design and agile development methodology to design new solutions for legal services. As one of their four fields of research, their team works on 'Smart Legal Communication' by designing and testing new ways to communicate legal information, including notices, policies, contracts, process guides, to best engage and empower people.[59] The 'law-by-design' approach, as explained by project leader Margaret Hagan,[60] places the two separated yet interlinked actors, the lay person on the one hand, and the legal professional (acting on behalf of the tech firms) on the other, at the centre and tries to process better interfaces and tools with which people can navigate through legally relevant information.

## IV. Channelling and distilling: advocacy performed on the national level

It is a task for the policymakers to verify whether the current and planned regulatory framework on enabling and discovery tools is adequate to ensure the correct functioning of the Single European Market in the global digital economy and, if not, to propose efficient solutions. Updating regulatory tools may be amongst those interventions, but competition authorities on the

[58] Genevieve Helleringer and Anne-Lise Sibony, 'European Consumer Protection Through the Behavioral Lens' (2017) 23 Columbia Journal of European Law 608–645.

[59] The Legal Design Lab | Stanford Law School (*Stanford Law School*) <https://law.stanford.edu/organizations/pages/legal-design-lab/#slsnav-our-mission> accessed 20 September 2022.

[60] 'Legal Design' (*Law By Design*) <https://lawbydesign.co/legal-design/> accessed 23 September 2022.

national level must cope with the challenges of the age of platforms under strict social and time pressures.

In terms of regulation and competition enforcement related to enabling and discovery tools, many open issues remain. Firstly, in many cases it is not quite obvious whether the relevant practices constraining enabling and discovery tools can be optimally dealt with by means of antitrust, consumer protection, data protection and/or emerging platform laws. Secondly, the pace by which the behaviour of e-consumers, that is, consumers performing transactional decisions in digital marketplaces, can adapt to the challenges, and (among others) understand the content of mandatory disclosures, might also largely depend on competition advocacy and consumer education implemented by the relevant enforcement authorities.

Competition advocacy performed by competition authorities can have a major impact on the promotion of a competitive environment for economic activities.[61] There are numerous options to create a competition and consumer friendly economic environment by means of non-enforcement mechanisms: competition advocacy may, accordingly, take different forms. The yearly reports submitted to the Hungarian Parliament by the GVH (which is operating as an independent administrative authority) consistently present that the GVH has constantly followed the changes that have transformed market characteristics and competitive dynamics. Historically, in the last three decades of its operation, the GVH has steadily provided competition advocacy relative to the following major fields: (i) privatisation; (ii) legislation, government policies and sectorial regulatory reforms; (iii) competition policy; and (iv) building a stable competition culture.

From the very beginning, GVH has taken an active role in shaping the Hungarian competition culture by placing emphasis on competition advocacy as a priority (i) to orientate the market actors how to behave in line with competition law requirements, and (ii) to inform consumers about their relevant rights. One of the declared objectives of the GVH has been to contribute to the development of the competition culture by disseminating knowledge about consumer and competition policy, in order to raise public awareness of these issues, and by the promotion of the development of competition-related legal and economic activities of public interest.[62]

In different eras, competition advocacy has played slightly different roles – it has been a long journey from the years of economic transition to the challenges

[61] International Competition Network (n 7).

[62] Annamária Tevanné Südi (ed), All about the Hungarian Competition Authority (Gazdasági Versenyhivatal 2017) <www.gvh.hu/pfile/file?path=/en/gvh/competition_culture_development/ccc_publications/Mindent_a_GVH-rol_szines_2017_angol_webre&inline=true> accessed 20 September 2022.

of digital markets – but the consistent advocacy efforts became a distinctive mark of the GVH. In this context, we have to emphasise that the GVH has a special position among Hungarian enforcement authorities, since it plays a dual enforcement role being both the competition and the consumer protection watchdog. Therefore, beyond its supervisory tasks (that is, antitrust procedures and investigations in the field of business-to-consumer commercial practices of nationwide significance), from early on, the GVH has been placing emphasis on competition culture. In the possession of complex market intelligence, the GVH made efficient steps to orientate regulatory stakeholders, and educate economic operators how to meet the requirements of competition and consumer law, and, simultaneously, to inform them about their rights.

The annual advocacy work plans include a variety of activities: seminars and events for business representatives, consumers, lawyers, judges, academics on specific competition and issues; press releases about current enforcement cases; the publication of annual reports and guidelines that specify the criteria followed to resolve competition cases, economic studies on competition issues, including the impact of regulation in markets and industries; professional competitions for students; regular market research; co-operation with consumer organisations; supports provided to relevant projects (academic researches, articles, etc.). All these activities have contributed to creating a healthy competition culture, which can be seen in the attitudes of consumers and undertakings providing goods and services.

Consumer behaviour is one of the key factors determining competition culture. Conscious consumer decision-making and consumer awareness can, in the long run, also raise the efficiency of law enforcement. The GVH has built up traditions and put consistent efforts in channelling the results of national and international case-law and the novelties of statutory requirements, in the basic knowledge and daily operation of the economic actors in the Hungarian market.

Advocacy, however, has to face the challenges raised by digital markets.[63] Hence, the GVH's advocacy regularly addresses anomalies experienced in the digital economy (such as influencer marketing[64] and practices of food delivery platforms[65]). The authority also participates in joint actions organised by the

[63] Report on ICN Members' Recent Experiences (2015–2018) in Conducting Competition Advocacy in Digital Markets (Advocacy Working Group Paper, International Competition Network, 2019) XXXX <www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/AWG_AdvDigitalMktsReport2019.pdf> accessed 20 September 2022.

[64] #GVH#Megfeleles#Velemenyvezer (Tartalmak – GVH) <www.gvh.hu/data/cms1037278/aktualis_hirek_gvh_megfeleles_velemenyvezer_2017_11_20.pdf> accessed 23 September 2022.

[65] Egyértelműen, megismerhetően, átláthatóan, (Tartalmak – GVH) <www.gvh.hu/pfile/file?path=/vallalkozasoknak/Egyertelmuen_megismerhetoen_atlathatoan_javaslatok_a_hazai_etelkiszallito_platformoknak.pdf1&inline=true> accessed 23 September 2022.

European Commission. Recently, the GVH contributed to the compilation of European consumer protection experience, gathered via the joint sweep organised by the Consumer Protection Cooperation Network.[66] Based on the overview of Hungarian platforms, the GVH gained insight into how they inform consumers on the criteria and methodology of their evaluation systems (in other words ratings), and stipulated recommendations for relevant market actors. Based on its first-hand experiences from (i) unfair commercial practices related procedures that also affect ranking problems, (ii) the sweep into the rating issues, (iii) the findings of sector inquires and market analyses, and (iv) market signals from consumers and competitors, the GVH has already directly faced these new challenges.

By 2018, the GVH developed its medium-term digital strategy, taking into account the enforcement experiences in digital markets and market intelligence available from national and international sources.[67]

The GVH explained that the *raison d'être* of an independent digital market strategy is largely justified by the dynamics of the affected markets, the special characteristics of digital supply and demand, and, in particular, by the fact that consumer transaction decisions in the digital economy are special, and fundamentally different from other markets. In the framework of its mid-term digital strategy, the GVH has performed a market analysis of the effects of digital comparison tools with the aim: (i) to draw attention to the phenomena perceived in the context of digital comparison tools that prevent consumers from being adequately informed when using these tools, and (ii) to formulate recommendations to promote the provision of transparent information to consumers, without which the use of comparison tools may also lead to distortive effects on competition.[68] This was the first market analysis which the GVH carried out in the field of consumer protection, and the GVH took this occasion to formulate non-exhaustive and non-binding recommendations

[66] The GVH investigated the publication of consumer reviews as part of a joint European action – GVH' (Tartalmak – GVH) <www.gvh.hu/en/press_room/press_releases/press-releases-2022/the-gvh-investigated-the-publication-of-consumer-reviews-as-part-of-a-joint-european-action-> accessed 23 September 2022.

[67] GVH, Középtávú Digitális Stratégia (2018).

[68] For the purposes of market analysis, the GVH defined – in accordance with the definition of the working group established by the European Commission in 2015 – the term 'digital comparison tool' as a term 'including all digital content and applications developed to be used by consumers primarily to compare products and services online, irrespective of the device used (e.g. laptop, smartphone, tablet) or the parameter(s) on which the comparison is based (e.g. price, quality, user reviews). To the extent that operators of search engines, travel or ticket booking sites, e-commerce platforms acting as a marketplace for several traders develop functions or applications dedicated to the comparison of products and services, these functions or applications are also covered by the term 'comparison tool.' GVH [n40] [13].

relating to: (i) commercial practices related to the business model (such as: result lists, rankings, or highlights), and (ii) commercial practices that are not closely related to the business model (for example: market leadership statements or the application of trust certificates), which the operators of digital comparison tools should bear in mind.

The above examples illustrate that the GVH seems ready to integrate new approaches to advocacy as regards interventions into the digital cognitive processes. Recently, in an interesting initiative, the GVH used enforcement tools to achieve advocacy goals simultaneously. In the *Szállás.hu* case, the authority imposed a commitment adjusted to the context of digital markets. As part of a commitment, the GVH ordered the entity operating an accommodation reservation site to launch a consumer information campaign to raise their awareness about (i) behaviours that are likely to exert psychological pressure upon them, (ii) the importance of recognising such behaviours, and (iii) the ways in which they can be avoided. Furthermore, a market survey and consumer research was also to be performed on methods of psychological pressure based on consumer biases of social proof, scarcity, and fear of missing out. The results of the survey were` also published for competitors and UX/UI experts in charge of the design of user interfaces.[69]

The findings of relevant research and the experiences of applied behavioural sciences (including tools used by the industry, such as the form of legal design) might, however, be efficiently and effectively incorporated also into the competition advocacy activities of competition authorities, especially those ones which – like the GVH – have dual enforcement powers in the field of competition and consumer protection law.

## V. Conclusions

The *Google Shopping* case had a focus on the abuse of dominance in the world of digital gateways of the Internet ecosystem. At the same time, it made the fact clear that enabling and discovery tools have also a dimension of a business-to-consumer commercial practice, since they provide guidance for users in the environment of digital information overload with which consumers have to struggle in the platform economy. Unlawful use of enabling and discovery tools may exclude competitors fighting from the, very

[69] The site 'megfontoltan.hu' created as part of the campaign serves as an educational forum assisting consumers in assessing online offers and realising dark patterns. 'Mit tehetsz, ha egy weboldalon sotét mintázatokkal találkozol?' (*Megfontoltan az Interneten*, n.d.) <http://www.megfontoltan.hu> accessed 20 September 2022.

limited, attention of consumers by exploiting their cognitive biases. The article concludes that, beyond antitrust lessons, one of the key realisations provided by the *Google Shopping* case is highlighting the impact these tools may have on the cognitive processes of consumers, as well as the role applied behavioural sciences may play in designing digital platforms. Furthermore, the impacts of the *Google Shopping* case can be seen in platform regulations, such as: in the self-preferencing rules of the Digital Markets Act, and the digital transparency rules placed in consumer law.

Considering the global nature and complexity of the platform economy, some market phenomena might be particularly difficult to identify and address for market players, even thought fast and efficient adaptation is a key factor here. This brings advocacy, and the promotion of a competitive environment, into the focus even on the national level. By distilling and channelling the results of enforcement activities, and providing guidance on how to face the challenges of the digital economy, NCAs are involved in empowering consumers and other market players to perform lawful behaviour in this new operational context. Further, those national authorities which have a dual regime of antitrust and consumer protection, may apply a multifocal approach. As such, they can provide valuable results also in the field of advocacy, by representing the expectations stemming from the complex and intertwining regulatory scene.

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# The Housekeeping of the Court of Justice: the *ne bis in idem* Principle and the Territorial Scope of NCA Decisions

Case Comment to the *Nordzucker* Judgment of the Court of Justice of 22 March 2022, Case C-151/20

by

Kamil Dobosz*

**CONTENTS**



## *Abstract*

The case commentary examines the recent ruling of the Court of Justice in the *Nordzucker* case. This judgment is important not only for the new approach to the *ne bis in idem* principle in competition law (which was first established in the *Bpost* case, issued the same day), but also for the clarification of the concept of "idem" with respect to the territorial effects of the infringement on the territories of two member states. The judgment thus provides guidance for the extraterritorial application of EU competition law.

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Article received: 14 September 2022, accepted: 3 December 2022.

***Résumé***

Le commentaire porte sur l'arrêt rendu récemment par la Cour de justice dans l'affaire *Nordzucker*. Cet arrêt est important non seulement en raison de la nouvelle approche du principe *ne bis in idem* en matière de droit de la concurrence (qui avait été établi pour la première fois dans l'arrêt *bpost* publié le même jour), mais aussi en raison de la clarification du terme "idem" en ce qui concerne les effets territoriaux de l'infraction sur les territoires de deux États membres. Ainsi, l'arrêt fournit une orientation pour l'application extraterritoriale du droit européen de la concurrence.

**Key words:** EU competition law; ne bis in idem; National Competition Authorities; protection of the same legal interest

**JEL:** K21, K33

## I. Introduction

In March 2022, the Court of Justice delivered two seminal judgments in the *Nordzucker*[1] and *bpost*[2] cases. Although they were not adjudicated in the form of a joint case, they share significant common factual elements and findings. This paper is focused on presenting *Nordzucker*'s factual and legal side as well as its analysis. It references the opinion of the Advocate General, alluding remarks to *bpost*, as well as providing insights on the missing elements in the commented ruling.

As a starting point, it should be indicated that both the aforementioned cases are associated with Article 50 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter), which provides that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.' Its application triggered various doubts and issues which the Court had to face. *Nordzucker* altered the manner in which some of them will be functioning from now on. To a limited extent, they correspond to expectations articulated in literature (such as Rizzutto, Lynch, 2021, Veenbrink, 2019, Dobosz, 2018, 256–60). More importantly, when adjudicating, the Court considers the ties of cases being dealt with

[1] Judgement of the Court of Justice of 22.03.2022, Case C-151/20, Bundeswettbewerbsbehörde versus Nordzucker AG, Südzucker AG, Agrana Zucker GmbH, ECLI:EU:C:2022:203.

[2] Judgement of the Court of Justice of 22.03.2022, Case C-117/20, bpost SA v Autorité belge de la concurrence, ECLI:EU:C:2022:202.

by competition agencies. For one, it may be a pure legal analysis carried out towards legal cohesion, but it is unquestionably not devoid of a policy component through touching upon the rules governing the competition law system of the European Union.

## II. Circumstances before the national bodies

The preliminary reference has been made in proceedings before the Austrian Oberster Gerichtshof (hereinafter: Austrian Supreme Court), whilst the primary dispute concerned the Bundeswettbewerbsbehörde (Federal Competition Authority of Austria), that is the Austrian National Competition Authority (hereinafter: NCA) and Nordzucker AG, Südzucker AG and Agrana Zucker GmbH. The Austrian NCA established in its proceeding that the above undertakings participated in a practice contrary to Article 101 TFEU and the corresponding provisions of Austrian competition law.

All undertakings concerned operate on the market for the production and marketing of sugar intended for industries and household consumption. Agrana is the main sugar producer in Austria. Nordzucker and Südzucker enjoy a strong position on the German sugar market together with another key player. Nordzucker has factories located in the north part of Germany, while Südzucker has its factories in the south. As noted in the judgement[3], the characteristics of sugar, and its transport costs affect the German sugar market dividing it into three main geographical areas. They are, in turn, dominated respectively by one of these three major producers. This specificity is not found in other countries, especially in Austria.

The enlargement of the European Union in 2004 was welcome with concerns among German sugar producers, due to new competitive pressure from firms from the acceding states. This circumstance is crucial for the whole background of the anticompetitive practices in question. From no later than 2004, several meetings took place between the sales directors of Nordzucker and Südzucker, at the end of which they agreed not to compete by penetrating their traditional core sales areas. This arrangement was supposed to combat new competitive pressure. Towards the end of 2005, Agrana noticed deliveries of sugar from a Slovak subsidiary of Nordzucker that were targeted at the Austrian market. Moreover, deliveries were reaching Austrian industrial customers, although they were, until then, exclusively supplied by Agrana.[4] In February 2006, Agrana's managing director called Südzucker's sales director

[3] Para 9 of *Nordzucker*.

[4] Para 12 of *Nordzucker*.

and informed him of those deliveries and asked him for the name of a contact person at Nordzucker. As a result, Südzucker's sales director reached out – by phone – to Nordzucker's sales director with reference to these deliveries to Austria. He also explained the possible consequences for the German sugar market (hereinafter: the telephone conversation at issue)[5].

Nordzucker eventually decided to submit leniency applications, in particular to the Bundeskartellamt, that is the German NCA (German Federal Competition Authority), and to its Austrian counterpart. Both NCAs launched their own (separate) investigations. Then, in 2010, the Austrian NCA applied to the Oberlandesgericht Wien (hereinafter: Higher Regional Court in Vienna) requesting a ruling that Nordzucker had violated EU and domestic competition law. Sanctions for Südzucker and Agarna were also included. The German NCA issued a decision in 2014 establishing the relevant anticompetitive agreements concluded by Nordzucker, Südzucker and a third German producer and imposed a fine on Südzucker. The German NCA based its decision also on EU and national competition rules.

Interestingly, the telephone conversation at issue was one of the parts of the documentation stored by both NCAs. In terms of the German proceedings, it constituted the only case material concerning Austria. Unsurprisingly, the evidence collected by the Austrian NCA was much broader in this respect. These factors, conducive to the adjudication of the Higher Regional Court in Vienna, caused the latter to dismiss the action brought by the Austrian NCA. The Higher Regional Court in Vienna motivated its ruling by holding that the agreement concluded during the telephone conversation at issue had already been subject to a penalty imposed by another NCA, and thus the *ne bis in idem* principle would be impaired if the Austrian NCA imposed a sanction as well. The Austrian NCA did not agree with that interpretation and challenged the judgement before the referring court. The Austrian Supreme Court had doubts with regard to the *ne bis in idem* principle laid down in Article 50 of the Charter since the telephone conversation at issue was, at any rate, expressly mentioned in the German NCA's final decision.

The Austrian Supreme Court shared some observations with the Court of Justice of the European Union (hereinafter: CJEU or Court). The first issue to be raised was the incongruence throughout the case-law of EU courts in terms of the *'idem'* component of the *ne bis in idem* principle.[6] On the one hand, there is a collection of rulings such as *Toshiba* (14.02.2012, C-17/10, EU:C:2012:72, paragraph 97) that introduces three premises of the principle in question: the 'facts' must be the same, the 'offender' must be the same and the 'legal interest protected' must the same. Compulsorily, they all have to

[5] Para 14 of *Nordzucker*.

[6] Para 21 of *Nordzucker*.

be satisfied to determine that the *ne bis in idem* principle is infringed. On the other hand, among others, *Van Esbroeck* (9.03.2006, C-436/04, EU:C:2006:165, paragraph 36) and *Menci* (20.03.2018, C-524/15, EU:C:2018:197, paragraph 35), are instances where the Court did not qualify the 'legal interest' as a valid criterion. The latter examples are not, however, in the scope of competition law but other fields of EU law.

Another aspect that was considered is the geographical effect of the cartel in the territories of different Member States through the lens of '*idem*'.[7] The referring court, the Austrian Supreme Court, recalled the rulings that may be relevant to this end – *Archer Daniels Midland* (18.05.2006, C-397/03 P, EU:C:2006:328), *Showa Denko* (29.06.2006, C-289/04 P, EU:C:2006:431) and *Toshiba*.

Aside from the above considerations, the Austrian Supreme Court was aware of the position of the Austrian NCA, which consistently held that the fine imposed in the final decision of the German NCA did not take into account the effects that occurred beyond the territory of Germany.[8] Nonetheless, an opposite view was presented by the Higher Regional Court in Vienna for which the telephone conversation at issue was of particular importance for the decision of the German NCA.

The referring court also took into consideration that Nordzucker was granted immunity under national leniency rules. The preliminary request was to clarify the potential correlation between this circumstance and the *non bis in idem* principle. It was also inferred, on the basis of paragraph 94 of *Toshiba*, that this principle could be applied if the imposition of fines was at stake.

Given all the outlined factors, the Austrian Supreme Court posed the following 4 questions for a preliminary ruling:

> '(1) Is the third criterion established in the Court of Justice's competition case-law on the applicability of the *non bis in idem* principle, namely that conduct must concern the same protected legal interest, applicable even where the competition authorities of two Member States are called upon to apply the same provisions of EU law (here: Article 101 TFEU), in addition to provisions of national law, in respect of the same facts and in relation to the same persons?
>
> In the event that this question is answered in the affirmative:
>
> (2) Does the same protected legal interest exist in such a case of parallel application of European and national competition law?
>
> (3) Furthermore, is it of significance for the application of the *non bis in idem* principle whether the first decision of the competition authority of a Member

[7] Para 22 of *Nordzucker*.

[8] Para 23. In addition, a statement of an official of the German NCA was recalled, according to which only anticompetitive effects in Germany were covered by the decision at issue.

State to impose a fine took account, from a factual perspective, of the effects of the competition law infringement on the other Member State whose competition authority only subsequently took a decision in the competition proceedings conducted by it?

(4) Do proceedings in which, owing to the participation of a party in the national leniency programme, only a declaratory finding of that party's infringement of competition law can be made also constitute proceedings governed by the *non bis in idem* principle, or can such a mere declaratory finding of the infringement be made irrespective of the outcome of previous proceedings concerning the imposition of a fine (in another Member State)?'

## III. The Court's findings

Having the queries reorganised and split, the CJEU commenced with replying to the first and third question. In general, they concern the framework for the application of Article 50 of the Charter, with particular attention to the premise of the 'same facts'. The query focused on whether, in the context of that framework, the proceedings of a NCA are, or are not proscribed against a concrete undertaking. Going into details, the reference asked for instructions from the CJEU on the right of national authorities to impose fines for a breach of Article 101 TFEU, along with its national counterpart, when adjudicating conduct which has had an anticompetitive object or effect in the territory of one Member State, where that conduct has already been referred to, by a NCA of another Member State, in a final decision which the latter NCA has adopted with respect of that undertaking, following its own infringement proceedings under EU and domestic competition law.

Handling the questions, the Court recalled pertinent case-law, starting with *Limburgse Vinyl Maatschappij* (15.10.2002, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 59), to accentuate that the *non bis in idem* principle is deemed to be a fundamental principle of EU law. Besides, the Court made a few more remarks, reflecting the *Menci* judgment (its paragraph 25 and the case-law cited), raising that a duplication of both proceedings and penalties of a criminal nature for the purposes of Article 50 of the Chapter for the same acts and against the same person is prohibited. It is the referring court's task, however, to establish the criminal nature. Doing so, three criteria are relevant: the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of severity of the penalty which the entity concerned is liable to incur. Nonetheless, having the criminal nature recognised solely on the basis of national law, is not decisive here. This criterion is thus

relative, unlike others that must be fulfilled. In other words, the Court of Justice highlighted the '*bis*' condition and the '*idem*' condition. Extrapolating these rules to competition law, the principle at issue serves to preclude an undertaking being found liable, or the bringing of proceedings against it afresh, on the grounds of anticompetitive conduct for which it has already been penalised or declared not to be liable by a prior decision that can no longer be challenged.[9] Formulating this conclusion, the Court invoked, for the first time in this ruling, the *PZU* judgement (*Powszechny Zakład Ubezpieczeń na Życie*, 3.04.2019, C-617/17, EU:C:2019:283, paragraph 28), which acted, in recent years, the notable judicial source when it comes to the *non bis in idem* principle.

Those observations were followed by additional comments. The first one referred to the very prerequisite for the '*bis*' condition – the decision or judgement has to be made as to the merits of the case. Hence any procedural outcomes or directives do not satisfy it. Unquestionably, the German decision at issue did touch upon the merits of the case. In turn, the '*idem*' condition with respect to the main proceedings, as well as Nordzucker's and Südzucker's situation has to be affirmatively verified.

The Court noticed that whenever identical facts are at stake, Article 50 of the Charter prohibits the imposition of multiple criminal penalties as a result of different proceedings brought for those purposes.[10] Then, far-reaching conclusions were presented – the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence.[11] Otherwise, the protection conferred by Article 50 of the Charter would be dependent on the specificities of the different legal regimes of the Member States, as already emphasised in *Menci* (paragraph 36) and *Garlsson Real Estate* (20.03.2018, C-537/16, EU:C:2018:193, paragraph 38).

Having broadly outlined the ambit of the *ne bis in idem* principle against the backdrop of the concrete circumstances of the case, the Court took a meaningful step asserting that for the sake of avoiding differences among various fields of EU law, Article 50 of the Charter shall be applied in accordance with the aforementioned premises in a uniform fashion.[12] This statement is also present in *bpost*. It is not an accident that the Court had the intention to reiterate this approach, and coined it by two rulings delivered at the same time.

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[9] Para 32 of *Nordzucker*.
[10] Para 38 of *Nordzucker*.
[11] Para 39 of *Nordzucker*.
[12] Para 40 of *Nordzucker*.

The territory and the product market related to the object or effects of the anticompetitive practice should be identified, so as to ascertain whether the identity of the facts is the same, or not when deciding if a prohibition to act applies to another (intervening) authority. Clearly, the CJEU does not adjudicate on the facts of cases where preliminary questions were posed. Therefore, it is within the margin of power of the referring court to seek ties in terms of facts between the final decision of the German NCA and the Austrian proceedings (along with the projected Austrian decision). Doing so, the territory, product market and period covered by that decision have to be meticulously checked by the referring court. Access to such decision is moreover possible thanks to procedural solutions stipulated in Article 12(1) of Regulation No 1/2003 when one NCA is entitled to submit a request for access to information held by another NCA. In this case, it would be for the benefit of national courts from the jurisdiction of the fist NCA. As a digression, the extended length of the route to obtain access to a decision and necessary information can be put on the table when EU law is being amended in this respect.

The telephone conversation at issue is of utmost interest for the Austrian court because the discussion pertaining to the Austrian sugar market was mentioned in the German NCA's final decision. This factual element constitutes a challenge for the referring court and impedes decisive assessment in light of the *ne bis in idem* principle. In other words, for the Court of Justice it is out of the question for a mere reference to a fact associated with the territory of another Member State, to be deemed sufficient to evaluate it as one of the constituent elements of the infringement. Another facet to be validated here is to analyse to what extent the fact at issue has affected the liability, for that infringement, of the entity against which proceedings were brought, and whether it was conducive to impose a penalty on that entity. Those aspects altogether should be reviewed in order to determine if the infringement encompassed the territory of the other Member State or not. It can be interpreted that in paragraph 45, the CJEU was essentially attempting to differentiate the overall scope of the cartel that concerned both Austria and Germany and the decision of the German NCA in terms of the factual (and legal) components it contained. Only covering the German sugar market, or including the Austrian market as well, is a pivotal consideration to be taken into account. It is also indicative that for the sake of quantifying the fine, only the turnover achieved in Germany was calculated in its decision. This assessment may have two mutually exclusive outcomes.[13] If the prior proceedings did not relate to the same facts, new

[13] Para 48 and 49 of *Nordzucker*.

proceedings could be brought and, where appropriate, (new) penalties could be imposed. The opposite scenario would be that the German final decision was issued also on the basis of the cartel's anticompetitive object or effects in the Austrian territory, which would preclude later proceedings in Austria, and even more so penalties, as it would amount to a limitation of the fundamental rights enshrined in Article 50 of the Charter.

The considerations of the CJEU could have stopped on that last point, and yet the Court gave further instructions so as to answer the first and third questions by searching for a justification for any limitation of the fundamental right at hand in compliance with Article 52(1) of the Charter. This direction was already determined in the case-law of the CJEU (judgments of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56, and *Menci*, paragraph 40). This approach was, however, never before suggested, let alone utilised, in an antitrust case. Article 52(1) of the Charter hence authorises a limitation on the exercise of the rights and freedoms recognised by the Charter only if two sets of criteria are met, elementary and advanced ones (corresponding respectively to the two sentences of this provision). To be specific, a limitation has to be expressed in the law and it cannot compromise the rights and freedoms at stake. Furthermore, a limitation shall be necessary and genuinely meet objectives of general interest recognised by the European Union, or is needed to protect the rights and freedoms of others. The latter set of criteria is not rigid and leaves room for case-by-case interpretations, aside from the fact that it is conditioned by the principle of proportionality.

Having outlined the overall framework for the limitations of the *ne bis in idem* principle, the Court confronted the referred questions with that framework. The core point was to consider how a duplication of proceedings and double penalties could meet an objective of general interest. It all shall be weighed, given that Article 101 TFEU is a provision that pertains to a matter of public policy prohibiting cartels and pursuing the objective, essential for the functioning of the internal market, of ensuring that competition is not distorted in that market.[14] Subsequently, the importance of Article 3(1) and (2) of Regulation No 1/2003 was briefly noted and the basics for the correlation between Article 101 TFEU and its national counterparts explained. According to the Court, this analysis was useful to evaluate if two authorities would pursue the same objective of general interest (ensuring that competition in

[14] To that effect the following judgments were referred to *Eco Swiss*, 1.06.1999, C-126/97, EU:C:1999:269, paragraph 36, and *Manfredi*, 13.07.2006, C-295/04 to C-298/04, EU:C:2006:461, para 31. Especially as regards the former, seemingly it was not fully utilised in the CJEU rulings.

the internal market is not distorted by anticompetitive practices) when they consider both EU and national antitrust norms. In any event, a duplication of proceedings and penalties, which do not pursue complementary aims relating to different aspects of the same conduct, cannot be justified under Article 52(1) of the Charter.[15]

Subsequently, the Court moved to the fourth question, omitting to explain the second question. The CJEU maintained that there is no need to rule on the latter owing to the answer given to the first and third questions – this will be a subject of further insight below. When it comes to the fourth question, the national leniency programme is well known for benefitting undertakings that voluntarily provide significant input to antitrust interventions carried out by competition agencies. An uncertainty remained, however, as leniency may impact other future proceedings and fines. It had to be clarified whether the *ne bis in idem* principle can be applicable if an undertaking that took advantage of leniency.

The Court started its observations with an introductory statement that even a mere bringing of proceedings against an undertaking afresh, on the grounds of an anticompetitive conduct for which it has already been penalised or declared not to be liable by a prior decision (that can no longer be challenged), becomes eligible to be protected by that principle. Essentially, building a bridge between *ne bis in idem* and other principles (*res iudicata* and the principle of certainty), a party shall be secure in the knowledge that it will not be tried again for the same offence (see, to that effect, *PZU*, paragraphs 29 and 33). Thus, the initiation of another (and subsequent if appropriate) proceedings falls within the scope of this principal prohibition. Hence the authority's power to impose sanctions does not matter in this respect as it constitutes a further aftermath of the proscribed proceedings. The Court also listed case-law, Article 101 TFEU, and Articles 5 and 23(2) of Regulation No 1/2003, so as to demonstrate that a finding of an infringement without imposing a fine is an exception, solely legitimised by an active engagement in a national leniency programme; yet it cannot be carried on with prejudice to the effectiveness and uniformity of EU law application either.[16] When answering the fourth question, the Court firmly asserted that the *ne bis in idem* principle covers also leniency, because of the explication of the extraordinary nature of leniency programmes, supposed to pose the ground for the conclusion that they, ultimately, serve as a substitute to a typical finding of an infringement, along with the imposition of sanctions.

[15] Para 57 of *Nordzucker*.
[16] Para 64 of *Nordzucker*.

## IV. Comments to the ruling

### 1. The 'magnitude' of change

Until 22 March 2022, whenever Articles 101 and 102 TFEU were involved, a clear approach could have been employed towards the *ne bis in idem* principle, as laid out by the Court of Justice of the European Union. It predominantly originated from *Toshiba* – a milestone judgement that moulded the framework within which competition law functioned in the European Union. Rudimentary (but by no means complex) rules on the relationship between EU and national competition rules, as well as the discussed *ne bin in idem* principle, were largely set out in this judgement. *Toshiba's* perspective had to be firmly considered here so as to apprehend the actual scale of the changes stemming from the commented ruling (along with *bpost*). In contrast to the *Toshiba* judgement, *Nordzucker* essentially concentrates on the *ne bis in idem* principle and sorting out the usage of the powers of NCAs that were, in fact, procedurally fragmenting (*via* separate proceedings) but related to the same antitrust case (in a substantive sense). Alternatively, this antitrust case could have been handled by the European Commission, or only one of the two intervening NCAs. To avoid the risk of parallel investigations, each case should be dealt with by one authority (Salemme, 2019, 351), but at times, this is a purely theoretical and ideal scenario. On the one hand, since NCAs consider the territory of other Member States in an extremely low number of cases, the *ne bis in idem* principle will be respectively rarely relevant. On the other hand, this is a much telling tendency in the application of EU norms within one European jurisdiction, which weakens the predestined role of NCAs – namely, substituting for the European Commission. By the way, the leniency applications submitted by Nordzucker to both NCAs lack a one-stop-shop effect. All this is associated with the shortcomings of the current antitrust model and its operation.

The antitrust landscape was rooted in *Toshiba's* threefold approach to the *ne bis in idem* principle, which required that the facts, the offender, and the legal interest to be protected must all be the same. This approach, tailored for competition law matters, seriously differed from what was widely practised in other areas of EU law. The legal interest and its protecting umbrella have been playing a role beyond EU antitrust where the legal interest issue was to examine the law in question to grasp its potential criminal nature. This is reflected in *Nordzucker* where the Court rejected whatsoever national legal classifications. Yet the fact should not be overlooked that the reason for which the Court had to build its framework for the principle at issue, is that when

*Toshiba* was rendered, there was no Charter in *acquis européenne* – Protocol 7 to the European Convention on Human Rights was taken into account instead. There is no doubt that in 2012, the CJEU manoeuvred to shape the preferred contours of the *ne bis in idem* principle within the EU antitrust system. Interestingly, even now, Protocol 7 is relevant for interpreting Article 50 of the Charter (Rossi, Sansonetti, 2020, 59).

## 2. To have your cake and eat it too

The word 'revolution' is one of those terms that are rarely uttered, only in exceptional instances. Is it really valid here? Usually, the Court of Justice is not willing to be bolder than necessary. Luckily in this case, an unquestionably giant step forward was taken, concurrently with grace and in an equilibristic manner. This is how the direction of the use of Article 52 of the Charter can be translated. Hypothetically (and provocatively), if the Court could not have switched to Article 52, neither *Nordzucker* nor *bpost*, would be an object of study now as a possible turning point for competition law. While merely a guess, it can be argued that it, in fact, corresponds to the characteristics of the Court of Justice. Notwithstanding the apparent wind of change, the objectives associated with protecting the same legal interest can be preserved. In other words, the fundamental question lies in whether everything changed and yet nothing changed at the same time.

Addressing this last contentious issue, Article 52(1) of the Charter shall be scrutinised, possibly *in concreto* and *in abstracto*. As regards the latter, the first paragraph of Article 52 provides that limitations on the exercise of the rights and freedoms recognised by this Charter have to be prescribed by law, and that the essence of those rights and freedoms cannot be compromised. In addition, such limitations must be filtered through the principle of proportionality, assessed as necessary and genuinely meeting objectives of general interest recognised by the EU, or the need to protect the rights and freedoms of others. This provision should be construed coherently throughout the European Union legal system. Nevertheless, it is worth considering what it specifically means for the EU antitrust regime. First and foremost, the grounds for Article 52(1) of the Charter would materialise, if multiple authorities with the competence to apply Articles 101 and 102 TFEU were to find an infringement (regardless of the imposition of sanctions) with regard to the same entities and facts. This would amount to a *prima facie* violation of the *ne bis in idem* principle, which could, however, be theoretically justified by virtue of Article 52(1) of the Charter. The Court of Justice stated in *Nordzucker* that ensuring that competition in the internal market is not distorted by anticompetitive practices

is at the forefront of these interventions.[17] The Court references here the mainstay of EU competition law as stipulated in the Treaties and sees this finding as the pursuit of the same objective of general interest, which, in turn, refers to 'genuinely meeting objectives of general interest recognised by the Union'. Going further, ultimately it can be associated with the criterion 'protecting the same legal interest'. Therefore, it was of key importance to outline, *in abstracto*, what Article 52(1) of the Charter covers, then to capture its implementation *in concreto*, and finally to accentuate how this method is close to the one specifically set out in *Toshiba*. Although the legal frames of reference were altered, in terms of substantive optics, this 'revolution' turned out to be merely an 'evolution'.

## 3. Crumbs of an (un)eaten cake

This very agile and ingenious *modus operandi* of the Court cannot be deemed tantamount to 'dotting the i's and crossing the t's'. One may say that all the criticism of *Toshiba* can no longer be sustained. New-old doubts have remained though. Bearing in mind what the second question from the Austrian Supreme Court was, '[d]oes the same protected legal interest exists in such a case of parallel application of European and national competition law?' The CJEU considered that the answers it provided were sufficient and so this question was not dealt with individually. This was certainly convenient for the Court. The Advocate General, irrespectively of the different assumptions and approaches adopted by him at the outset, selected a more challenging path in this respect. He started with a comment that the question of whether EU and national competition laws protect the same legal interest occurred in *PZU*, but the CJEU had not found it necessary to address this issue. Upon swiftly ascertaining that there was no '*bis*', it was possible in *PZU* for the Court to then skip the '*idem*' part and beyond. A symptomatic tendency to continue on this path is rather palpable. It is indeed intriguing to consider what motivated the CJEU to dodge the issue in *PZU*, and to then change its approach in the face of similar conditions (that is, discrepancies in the territorial scope of decisions). It can be argued that *PZU* was the first step towards a twofold test (Simpson, 2019), but it is not that convincing. Judge K. Jürimäe was a Rapporteur in both cases, a fact that stimulates curiosity even more. It is clear that *PZU* was delivered by five judges of the fourth Chamber, versus the Grand Chamber assembled in *Nordzucker*. Still, it does not explain possibly why the Grand Chamber could not have dealt with it

[17] There are no contraindications for stating that the considerations cannot pertain to multilateral and unilateral practices.

in 2019. Supposedly, the awareness of the growing issues concerning the principle at issue, together with increasing tensions to make a change, could have constituted sufficient impetus for the Court to make adjustments in this respect. The imponderable issues staying behind this sequence of adjudication will arguably not be unfolded.

Unlike the CJEU, the AG contended that, in general, EU and national competition laws protect the same legal interest.[18] However, he stipulates that the protected legal interest ought to be assessed with regard to a specific provision of a Member State. Hence, a case-by-case analysis appears to be mandatory. Moreover, the AG decisively confirms the major convergence of EU and national competition rules. Without delving into every detail of the AG's considerations, EU and national competition laws have moved closer to each other since their relationship was scrutinised in *Walt Wilhelm*. For the AG, it is, in any event, difficult to imagine how the respective objectives of a national competition rule and of Article 101 TFEU could differ at all.

The approach to the second question can derive from its sheer wording, formulated as: do EU and national competition norms, applied in parallel, protect the same legal interest? This would never be ideal though, if a relationship between them had not been determined in the first place. Seemingly this is what AG Bobek endeavoured to attain, as it constitutes a *conditio sine qua non* for further discussion. If, like the Court, we steer away from the content of the second question, no *novum* would be discovered. There is a fundamental difference between: i) a national competition rule being applied concurrently with Article 101/102 TFEU, and ii) such national norm applied alone. It is not a moot point though and it is worth considering an alternate hypothetical situation. The German NCA did take into account both German and Austrian geographical markets, *inter alia*, because of the telephone conversation at issue; later on, the Austrian NCA targeted the same anti-competitive behaviour but with regard to the Austrian market only. For many reasons, which can be conceived and extensively elaborated on another occasion, the Austrian NCA applied in its proceedings exclusively domestic competition rules. The question is: does the *ne bis in idem* principle come into play in this situation too, or does it not? The ultimate answer should be, however, preceded by a primary finding – what is the relationship between national and EU competition law? This is a potentially groundbreaking question that might shake the very foundations of the current legal architecture (Dobosz, 2022, *passim*). Applying a more complex point of view, the whole scenario could be mixed with Article 3(2) and (3) of Regulation 1/2003 leaving room for qualified policies and provisions in the

[18] Para 44 of the Opinion.

national legal landscape (compare Wils, 2019). The simplified viewpoint should be sufficient to manifest the shortcomings of *Nordzucker*[19].

*Nordzucker* yielded answers that should have been known. The Supreme Court of Austria did not need to submit a preliminary reference. The Court of Justice just took that chance to modify its position on the *ne bis in idem* principle, as predicted by some scholars (Colangelo, Cappai, 2021). It shall be stressed again that differences between the territorial scopes of the German and Austrian interventions were sufficient to adjudicate that the *ne bis in idem* principle could not have been invoked. The telephone conversation at issue, which was merely mentioned in the final decision of the German NCA, was not, at any point, capable of being evaluated as a precluding factor in the Austrian proceedings. It is a matter of evidence and its assessment. In this case, it elicited discussion on the systemic aspects of competition law – in some part, unnecessarily and inadequately when it comes to the essence of the subject referred before the CJEU.

It is apparent that the Court did not seize the opportunity that presented itself, despite a tentative impression that it might have done so. The commented ruling lacks the same element regarding the bifurcated antitrust regime in the Union, as the *PZU* judgement did (to be precise, in light of the underlying doubts aroused around double sanctions)[20]. The CJEU could have applied in *Nordzucker* a similar approach as it did in *bpost*, to steer the interventions of authorities so as to avert collisions between them. It shall be borne in mind that *bpost* offers a method that can be called a 'coordinating rule'[21], while *PZU* puts more emphasis on a 'proportionality rule'[22]. These instalments are suitable enough to alleviate potential consequences that would derive from acknowledging that EU and national competition norms protect the same legal interests. The Court did have a possibility, resources (instruments) and motifs to address this challenge. Given these favourable factors, one can make

[19] The same cannot be said in terms of *bpost* as it relates to interrelations between antitrust and sectorial regulatory regimes. Thus, from the very beginning, the idea was to focus on Nordzucker in this paper.

[20] Separate fines imposed due to, respectively, national antitrust infringement and EU antitrust infringement.

[21] This 'rule' requires that 'there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed.'

[22] A call for proportionality can also be found in *PZU*. However, the more burden of the application of the law will be attached to proportionality, seemingly the more uncertainty we will come across.

a conjecture that the CJEU did not choose to adjudicate on this, and will be reluctant to do so in future as well. One of the reasons behind this strict attitude, may be related to anticipating legislative actions that would trigger their reorganisation. As a result, the Court may not find judicial intervention to be a suitable developmental tool.

## V. Potential lessons for the DMA

The first reactions[23] to *Nordzuker* (and *bpost*) were largely linking the findings of the CJEU with the upcoming Digital Markets Act[24] (hereinafter: DMA). Moreover, it can be considered to what extent the forthcoming DMA encouraged the Court to unify the test for the *ne bis in idem* principle (Colangelo, Cappai, 2021, 24). The common areas of interest for the DMA and the TFEU competition provisions are believed to be reconciled particularly in compliance with the 'refurbished' *ne bis in idem* principle. Clearly, this piece of case-law can be viewed as a kind of 'gauge', but it should not be overestimated. Even if we somehow – but unlikely for the foreseeable future – ascertain the interrelationship between EU antitrust rules and the DMA[25], it shall be noted that what the DMA is about to regulate is just one side of the coin. At the same time, Member States are more or less engaged in their own legislative processes within the same scope, or virtually the same one. Further still, there are national competition norms (counterparts to 101 and 102 TFEU) the relation of which to other elements of this puzzle continues to await circumscription.

As the German way to treat Facebook demonstrated, there is great uncertainty about the interrelationship (and potential overlaps) of EU competition law, national competition law, and data protection law (as a manifestation of a 'sectorial' regulation). Legitimate questions are also raised on the abuse of competition law (Van den Bergh, Weber, 2021). Clearly, the DMA shows greater resemblance to competition law, or at least the purposes of competition law, hence a straightforward incorporation of methods formulated whilst dealing with the regulatory paradigm (in particular including sectorial regulations) may not always fit. Yet the relationship between competition law and regulation as such, is considered to be a perennial question for competition policy (Dunne, 2021, 2).

[23] Harrison, Zdzieborska, Wise (2022), Komninos (2022)

[24] 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/2020/842 final.

[25] Providing that it does not belong to EU competition law in the first place, which is still being discussed.

## VI. Final remarks

*Nordzucker* is one of those judgements that are seminal due to the issues they touch upon. Simultaneously, this is not one of those rulings that address a legal gap, or make the unknown known. The *ne bis in idem* principle, within the constellation of competition norms, belonged to vastly contested legal institutions for years (van Bockel, 2016, 5, Nazzini, 2014), although paradoxically, its source can be found in both the ECHR system and in the legal systems of many Member States (Rosiak, 2012, 133). Its peculiar treatment was, perhaps surprisingly, ceased for the sake of convergence with other EU fields. The CJEU, however, found its way to retain the *status quo*, but in a new guise. These are key conclusions.

Other than this, what was unknown remains unknown. A final judicial untangling of the relationship between substantive norms of EU and national law was long awaited, but to no avail due to the agile workaround of the Court. This means that the European Competition Network, with the European Commission at the forefront, must intensify efforts to prevent overlapping investigations launched by different competition authorities. In the long run however, one cannot expect much success for this partial solution though.

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# B O O K  R E V I E W

**Maciej Bernatt,**
***Populism and Antitrust: the Illiberal Influence of Populist Government on the Competition Law System*,**
**Cambridge University Press, 2022, 253 p.**

This monograph is published in Cambridge University Press' Global Competition Law and Economics Policy series. The book deals with the influence of populism on competition law. It focuses on Hungary and Poland and the legal changes which took place after May 9, 2010 (the formation of the Fidesz government) in Hungary, and after November 16, 2015 (the formation of the Law and Justice government) in Poland and the impact of those changes on the competition law systems of those two countries. The book analyses the interrelationship between populism and competition law in a broader political and economic context. In doing so the author inter alia explores the main characteristics of populism that are relevant in studying the influence of populism on a competition law system and how populist governments affect the institutional structure and the enforcement of competition law.

The monograph is composed of three parts and seven chapters. Part I, which consists of Chapter 1 and 2, sheds light on the relationship between populism, democracy, and the economy. Chapter 1 sets out the topic of the monograph. Since competition law is important for market economies, the author explains that the study of populism from a competition law perspective fits well with the studies of populism focused on both democracy and the economy. He points out the motivation behind the Sherman Act in the US which was enacted to curb the concentration of excessive economic power. Both US and European history has shown that a concentration of excessive economic power could translate into political power and endanger democracy. Hence, competition laws' limits on the concentration and the use of economic power not only facilitate the functioning of markets but also safeguard democracy. After a brief outline of the existing debates about populism the monograph sets out the scope and research questions and explains its methodology. It also provides background information on Hungary and Poland – the two central case studies in this book. Lastly, the chapter explains the meaning of the key concepts used in this book.

Chapter 2 discusses the meaning of populism in the political science, legal and economic literature. The author explains that out of the two characteristics of populism, namely anti-elitism and anti-pluralism on the one hand, and illiberalism on the other hand, the latter is better suited for analysis from a legal perspective. According to the author illiberal change in democracy materializes itself in legal

actions taken by institutions controlled by ruling populist parties which are directed at dismantling checks and balances and the rule of law. This process is known as 'democratic backsliding'. Illiberal change in the economy is characterised by a departure from the ideas of economic liberalism, since they undermine the principal role of market competition, the dominant role of private ownership in the economy, market openness across borders, and the principle of competitive neutrality. This 'liberal market backsliding' as suggested by the author is a parallel process. The case studies of Hungary and Poland expound the principal characteristics of illiberalism in democracy and the economy.

Part II of the monograph is composed of Chapters 3–5. It examines and analyses the influence on the competition law systems of a number of countries that had populist governments.

Chapter 3 builds on the findings of Chapter 2 that populists' rule may work as a driver of democratic and liberal market backsliding. It identifies two variables by means of which the scenarios concerning the impact populist governments may have on competition law system can be determined. The first variable concerns the weakening of checks and balances as well as the rule of law. A lack of an independent judicial review is more likely to produce lower quality and instability of administrative decision-making and provides no safeguards against abuse of power by a competition authority. The second variable is related to the state-centred character of an economy and economic patriotism. These two processes indicate a departure from the idea that competition and open markets are vital for a well-functioning economy. They also involve an increasing role of the state as the owner of formerly private enterprises. Those two variables give rise to four possible scenarios of populist governments' influence on a competition law system: (1) deconstruction, which "materializes when the safeguards related to checks and balances and rule of law are largely dismantled and when the re-evaluation of the liberal market economic model is significant"; (2) marginalization, which "materializes when the re-evaluation of the liberal market economic model is significant, but when safeguards related to checks and balances and the rule of law have not been dismantled to a significant extent"; (3) atrophy, which "materializes when the safeguards related to checks and balances and the rule of law have been dismantled (first variable) and the extent of re-evaluation of the liberal market economic model is limited (second variable)"; and (4) limited impact (of populist government on a competition law system), which "materializes when the extent of re-evaluation of the liberal market economic model is limited and when the safeguards related to checks and balances and the rule of law have not been dismantled to a significant extent."

The actual manifestations of the influence of populist governments on competition law systems are discussed in Chapters 4–5. Mainly based on empirical findings from Hungary and Poland, but also some examples from other jurisdictions with populist governments, those manifestations are linked to the four scenarios proposed in Chapter 3. Chapter 4 analyses the influence of populism on competition authorities and courts. It examines the competition authority's independence, operating capabilities, mandate, and judicial review of the authority's actions by courts. According to the author the following aspects adversely impact competition law enforcement. First,

the independence of competition authorities is limited by means of politically driven appointment processes, more limited autonomy of decision-makers within the authority's structure, and in the Hungarian case by legislative pressure to discontinue politically sensitive cases pending before the authority. Second, an authority's operating capabilities may be impaired due to the attrition of expert senior staff and/or high fluctuation among the lower staff, which results in a decrease in the authority's expertise. Third, in the case of Poland the competition agency's competences have been extended to areas which are not related to its original competition protection mandate. Finally, populist governments advocate reforms to restrict the independence of ordinary courts. Such reforms weaken the legal safeguards of independent judicial review in competition law.

Chapter 5 examines the manifestations of the influence of populist governments on the practice of competition authorities in countries ruled by populist governments. The chapter is based on in-depth analyses of the Hungarian and Polish experiences, while also providing the reader with relevant examples of developments in other countries ruled by populist governments. The chapter shows that the practice of competition authorities is negatively affected in the following way. First, the intensity of enforcement of competition law is low and the authorities focus on small cases, such as local bid-rigging agreements, which stems from the authorities' approach of self-restraint and their limited operating capabilities. Final decisions in high-profile cases are limited to cases which are in accordance with the political agenda of the ruling party. Second, hardly any abuse of dominance cases are brought against SOEs and mergers in which SOEs are involved are reviewed leniently. Third, the populist ruling majority goes so far as to object to enforcement in some industries. And fourth, the competition authorities have a limited record in opposing anticompetitive legislative measures.

The monograph's third part is made up of Chapter 6 and examines the functioning of a regional competition law system during a time of populism. This chapter serves as a case study of the EU regional competition law system. It explains the relevance of the challenges posed mostly by competition law enforcement in Hungary and Poland for the EU competition law system and draws lessons from those experiences. The author's first finding is that the ECN+ Directive, which was implemented to improve the enforcement of EU competition law in the EU Member States, is unlikely to remedy the deficits regarding the independence and operating capabilities of the NCAs in countries ruled by populist governments. The ECN+ Directive is a minimum harmonisation tool and therefore not specifically equipped to address the challenges faced by competition authorities and courts in countries ruled by populist governments. Second, interventions by the European Commission as the guardian of the EU Treaties (e.g. using the infringement procedure under Article 258 TFEU) have mitigated or slowed down the degradation of competition law enforcement in the countries ruled by populist governments. Yet, the tactics employed by the populist governments is likely to allow them to achieve most of their pursued goals. Third, the populist governments' actions undermine the mutual trust that all NCAs adhere to a common set of values, and therefore adversely affect the decentralized system of

application of EU competition law. Lastly, the central EU competition law system is sufficiently independent to closely monitor the challenges posted at the national level by the rise of populist governments, and when necessary to take action to address them. Chapter 7 concludes this monograph, presenting the main findings and solutions to improve the resilience of competition agencies and courts to the challenges posed by the rule of populists' governments.

Populism in contemporary Europe is a topical issue and this book makes a highly valuable contribution to the current political and economic debates on this issue. It is the first monograph that has been written on the influence of populism on competition law and policy. As the author correctly points out, populism has been a point of contention in US antitrust law. On the other side of the Atlantic, populism in competition law is associated with 'an anti-bigness attitude' – a fear of large corporations and their enormous market power and sympathy for small businesses. This debate in the US has increased in more recent years with the rise of digital platforms and the emergence of the Neo-Brandeis movement.[1] In particular, populism has not been studied in the competition law scholarship in the institutional context. This work is therefore of importance to understand how populism affects the institutional characteristics and the practices of competition authorities and courts. The author provides invaluable insights about the impact of populist governments on the competition law systems of Hungary and Poland (the author's native country) but also other countries such as Greece, India, South Africa and Venezuela. The case studies on Hungary and Poland are very detailed and thorough. The author conducted 27 semi-structured interviews with current and former members of competition authorities, judges, and leading antitrust experts mainly from those two countries. Besides the impact on competition law systems this book is of relevance to the wider debates on democratic and liberal market backsliding. Moreover, the book contributes to the debate about the EU law crisis by discussing how the challenges posed by populists' governments affect the EU competition law system. In summary, this book is an indispensable resource for anyone who is interested in modern populism and its consequences for democracy and the economy.

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[1] See e.g. Sandeep Vaheesan, 'The Evolving Populisms of Antitrust' (2013) 93 Nebraska Law Review 371; Barak Orbach, 'Antitrust Populism' (2017) 15 New York University Journal of Law and Business 101; Carl Shapiro, 'Antitrust in a Time of Populism' (2018) 61 International Journal of Industrial Organization 714; D Daniel Sokol, 'Antitrust, Industrial Policy, and Economic Populism' in Damien Gerard and Ioannis Lianos (eds), *Competition Policy: between Equity and Efficiency* (Cambridge University Press 2019), p. 281; Joshua Wright and Aurelien Portuese, 'Antitrust Populism: Towards a Taxonomy' (2020) 13 Stanford Journal of Law, Business & Finance 131.

# CONFERENCE REPORTS

## 4th Brazilian Institute for Competition and Innovation (IBCI) International Conference on Competition and Innovation 9–11 November 2021

From 9 to 11 November 2021, the Brazilian Institute for Competition and Innovation (IBCI) – an open, non-profit think tank created in 2012 based on the joint initiative of a group of Professors from the Pontifical Catholic University of São Paulo (PUC-SP) and from University of São Paulo (USP) and composed of a multidisciplinary and 100% equal number of directors (50% women and 50% men) – organized a series of webinars covering a range of topics related to competition law, innovation and data, rights, and law enforcement, with a Brazilian and global view.

The first webinar was held on 9th November 2021 under the theme *Dynamic Keynote Speech/Debate*. The speakers included: Waldemar Gonçalves (Chair of the Brazilian Data Protection Authority – ANPD) and Eduardo M. Gaban (Chair of IBCI/PUC-SP). Mr. Waldemar described the way in which the National Data Protection Authority (ANPD) was formed after the creation of the Brazilian General Data Protection Law (LGPD) and summarized the main objectives and achievements of the agency during the first year of operation, as well as the challenges of the data protection law enforcement with special focus on Brazilian culture and the benefits for the economic development. Mr. Eduardo Gaban, as a competition law practitioner, pointed out the educational – and not merely sanctioning – stance of the ANPD, and introduced the topic of personal data leakage.

The second webinar entitled *EU Economic Regulation: Between DMA And DSA* took place on 9th November 2021. The speakers included: Laura Zoboli (IBCI/University of Warsaw/Centre for Antitrust and Regulatory Studies), Frédéric Marty (IBCI/Université Côte d'Azur), Alexandre De Streel (University of Namur and the Research Centre for Information, Law and Society (CRIDS/NADI), Simonetta Vezzoso (University of Trento), Alessandra Tonazzi (Director of International and European Affairs at the Italian Competition Authority – ICA), Chiara Caccinelli (Head of Unit Economic Analysis and Digital Affairs at the French regulator for electronic communications, postal and print media distribution services – Arcep). First, Frédéric Marty – in his role as moderator – opened the discussion on the application of competition rules in the digital sector in the context of the European Commission's Digital Markets Act proposal and the UK's plans to regulate the major digital ecosystems. Then, Mr. Alexandre De Streel pointed out this is the first time that Europe has a law targeting only big techs, but he also highlighted that this

revolution is based on tradition. Next, Ms. Simonetta Vezzoso discussed the role of regulation toward the digital economy and the strategy of the European commission in the DMA; followed by Ms. Alessandra Tonazzi, who made a brief historical overview of the significant changes in competition law enforcement and addressed key specific problems of the digital economy. Afterwards, Ms. Chiara Caccinelli shared her view and listed three aspects that can be improved: (i) the regulatory dialogue, (ii) the design of the obligations; and (iii) the institutional design of the enforcement. At the end, Laura Zoboli – in her role as moderator – focused on the scope of the DMA and its mechanisms, sharing some insights on the mechanisms at the basis of the DMA, and asking the speakers some questions on that point.

The third webinar *Book Presentation + Fireside Chat: "Blockchain + Antitrust"* was held on 9th November 2021, with Thibault Schrepel (IBCI/Stanford University/University Amsterdam) and Eduardo M. Gaban (Chair of IBCI/PUC-SP). In this webinar, Mr. Gaban asks Mr. Thibault the main ideas of his book. Mr. Thibault Schrepel then shared his views on the themes contained in the book, explaining the parallel between the two concepts and then focusing on the law enforcement, arguing for the need to create ways for the law to intervene – but only when necessary – in the blockchain area.

After this webinar, the conference had its *3rd IBCI Selected Papers Book Launch* which features articles selected via a call for papers as well as works by the event's speakers related to the hosted panels and surveys. The book is available online at the IBCI webpage (https://www.ibcibr.com.br/).

The fourth webinar *Book Presentation: Populism and Antitrust (Cambridge University Press)* was held on 9th November 2021, with Maciej Bernatt (University of Warsaw), Pablo Trevisán (Commissioner at Comisión Nacional de Defensa de la Competencia – CNDC), Fabiola Zibetti (IBCI/University of Chile) and María José Contreras Velasco (General Director at Mexican Competition Authority). First, Mr. Maciej Bernatt presented his book, that brings the subtitle "the liberal influence of populism government on the competition law", underlining some central issues, such as: analysis of how the political, legal, and socio-economic order influence on the competition law system, what is the impact of rule of populist governments on competition law – looking at the institutions and enforcement – as well as empirical research on the democratic backsliding and concentration of power. Following the presentation, Mr. Pablo Trevisán shared his view of the book considering the scenario of Argentina, presenting an historical development on the market and competition and the specific challenges present in the country. He concluded his analysis in the same direction of the book, stressing the importance of independence, transparency, and accountability. Ms. María José Contreras Velasco then argued that Bernatt's book offers an analytical framework to identify and manage the impact of the manifestations of populism on competition law systems and stressed that it can be helpful to prevent and prepare for some of the manifestations even when they have not already appeared, in countries that are not facing populism yet. She explained that competition advocacy can help addressing three of the main challenges that populism governments pose to competition law systems identified in the book, namely: (i) jeopardizing the independence and expertise of the competition authorities and courts; (ii) transforming the systems of competition law

into protectionists; and (iii) endangering non-competition law systems. At the end, Ms. Fabiola Zibetti, as a moderator, shared some insights and raised questions to the speakers.

The fifth webinar of IBCI *Privacy, Data Protection and Competition* was held on 9th November 2021, and featured the following speakers: Nicolo Zingales (FGV/RJ) and Lenisa Prado (CADE); and as moderator Juliana Domingues (IBCI/National Secretary for Consumer Affairs/USP). Ms. Lenisa Prado talked about antitrust, privacy and consumption, discussing the Brazilian scenario, and concluding that competition law practitioners must verify if the proxies brought by antitrust law are useful to analyze situations involving consumers in different markets (such as merger and control submissions to CADE). On another hand, Mr. Nicolò Zingales discussed the role of data in competitive dynamics, and after exposing a series of cases, he called for cooperation between competition, consumer, and data protection authorities. At the end, he reported on his experience in the EU, pointing out the advancements in regulatory cooperation. Juliana Domingues – as the moderator – finally addressed her view about the partnership between the regulatory agencies to achieve effective data protection and consumer protection.

The sixth webinar *Re-Examining Schumpeter's Legacy: Creative Destruction as Competition, Innovation and Capitalism* was held on 10th November 2021, with Magali Eben (IBCI/University of Glasgow/Creative Economy Centre), Ayse Yasar (Sciencespo) and Francisco Cabral (Tilburg University). First, Ms. Ayse Yasar presented the main thoughts contained in her paper, qualifying some of the ossified narratives around Schumpeter's legacy. For that purpose, she provided an overview of the concept of creative destruction and Schumpeter's account of 'monopolistic practices' as they were developed in Capitalism, Socialism and Democracy, focusing then on the so-called 'Schumpeterian thesis', *i.e.*, the proposition that big business or monopoly is more advantageous to innovation. Then, Mr. Francisco Cabral focused on three main points: (i) what has been done with Schumpeter's guides; (ii) what could be competition policy on Schumpeter's lands; and, finally, (iii) what would be the evolution for competition law. Magali Eben – as the moderator – shared her impressions on the paper, especially on the concept of perfect competition – that is never going to happen in reality – and on the way people interpret Schumpeter's Legacy. At the end, all three speakers presented some convergent and divergent opinions on the topic.

The seventh webinar *Class Action Vs. Transfer of Claim – Pros and Cons* took place on 10th November 2021 and featured Giacomo Pailli (IBCI/University of Florence), Giorgio Afferni (University of Genoa) and Till Schreiber (CDC Cartel Damage Claims). Mr. Till Schreiber spoke about the model of transfer of claims, based on the practical experience of the CDC Cartel Damage Claims, explaining the challenges of antitrust litigation and the support provided by CDC in the damage/economic recovery of the companies involved in a process of this nature. Mr. Giorgio Afferni then made a comparison between the American system of antitrust class action and the emerging EU system. At the end, Giacomo Pailli – as the moderator – pointed out a few pros and cons of those models, considering the arguments presented by the speakers.

The eighth webinar was held on 10th November 2021 under the theme *Dynamic Competition*. The speakers included: Thibault Schrepel (IBCI/Stanford University Amsterdam), Constance Helfat (Tuck School of Business at Dartmouth) and Peter Gordon Klein (Baylor University). The moderator Thibault Schrepel, in a very interactive way, structured some questions for the panel, to be answered by the panelists: (i) what dynamic competition is and the latest findings in this space; (ii) is antitrust law static, and if so, how to improve it; (iii) what dynamic capability is and how do we operationalize this concept. Both speakers showed their views, putting the issue of antitrust and politics in the context, focusing on the challenges of competition law enforcement and discussing the enforcement procedures.

The ninth webinar was devoted to *Papers Presentation*, with the moderators Aluísio Miele (IBCI/USP), Ana Cristina Gomes (IBCI/University of Salamanca) and Vinicius Klein (IBCI/UFPR). In particular, some articles sent by the participants to the call for papers were selected by the organizing committee to be presented in this panel. These papers addressed topics linked to the event, such as competition and innovation, technology, digital platforms, big techs, regulated sectors, ESG and innovation, big data, net neutrality, privacy, consumer manipulation in digital markets.

The tenth webinar *IP and Digital Markets* happened on 10th November 2021, with Vinicius Klein (IBCI/UFPR), Paula Forgioni (USP) and Rita Matulionyte (Macquarie University). First, Ms. Rita Matulionyte delivered a presentation on artificial intelligence and intellectual property, focusing on the developing world, bringing some information on the international debate rounding IPRs, trade secrets, and the IP and AI framework suitable for developing countries. After, Ms. Paula Forgioni, in sequence, illustrated two main challenges faced when it comes to digital markets during the pandemic that can generate concentration of power: (i) distribution and (ii) services. The moderator Vinicius Klein then addressed some insights and asked a few questions to the speakers.

The eleventh webinar, entitled *Judicial Courts and Regulatory Agencies*, featured Vinicius Klein (IBCI/UFPR), Luciana Yeung (IBCI/INSPER), Felix B. Chang (University of Cincinnati) and Paulo Furquim (INSPER). Prof. Felix B. Chang exposed his recent project – a machine learning platform – that can feed large data sets and shows latent patterns that the human eye cannot detect as a form of natural language processing. As he explained, it checks the probability that terms are going to recur across a large corpus of text or a data set. This platform stores every published decision in almost every US jurisdiction until 2018, and after Prof. Felix B. Chang team searched for the federal cases for antitrust and regulation, they concluded for the existence of two bodies in the decisions: (i) regulation and (ii) antitrust and market power, and exposed, empirically, a historic of cases in 15 clusters, revising the type of litigation, the matter discussed in the decisions, and a few other standards on the judicial courts. After, Mr Paulo Furquim, in a theoretical way, started dialoguing about the function of the regulatory agencies and the judicial reviews, exposing some features, such as average length, administrative decision overruled, and the changes in the administrative decision status. Last, Ms. Luciana Yeung and Mr. Vinicius Klein discussed a work in development about the levels of deference in Brazil through an empirical analysis,

beginning with the role of judicial review of regulatory standards, the goals and the methodology used for the research of the agencies´ regulatory standards.

The twelfth webinar entitled *Create and IBCI – Innovation and Transparency Regulation* was held on 11th November 2021. The speakers included: Magali Eben (IBCI/University of Glasgow/Creative Economy Centre), Philip Schlesinger (University of Glasgow/Deputy Director of CREATe/LSE), Martin Kretschmer (Professor of Intellectual Property Law and Director of CREATe), Aline Iramine (PhD student at University of Glasgow, CREATe), Xiaoren Wang (Research Associate at CREATe, funded by the AHRC Creative Industries Policy & Evidence Centre (PEC)), Eduardo M. Gaban (Chair of IBCI/PUC-SP) and Vinicius Klein (IBCI/UFPR). First, Mr. Philip Kretschmer gave a presentation regarding intermediary liability, transparency, and the new wave of platform regulation, going through the US and Germany rules, presenting some policy issues on copyright takedown, and a paradox arising from the fact that states delegate traditional regulatory powers to the platforms, the power of which is worrisome. Secondly, Ms. Aline Iramine discussed copyright governance by algorithms and called for a more transparent regime – addressing rules, standards, challenges and takeaways. Thirdly, Ms. Xiaoren Wang focused on the anti-creative factors of YouTube, the economic theories on cultural goods, and the psychological theories on creativity. Last, Mr. Philip Schlesinger, as a sociologist of the cultural media, focused on the new regulation of digital platforms in the UK. Constructing his argumentation, he focused on two sub-aspects: (i) the first one geopolitical – since the UK left the EU; and (ii) the second one organizational – namely the process of innovation and re-organization of the bodies and the intersecting competences. At the end, the moderators Magali Eben and Vinicius Klein stressed out a few convergent points between all the presentations, sharing some insights.

The thirteenth webinar, *Leniency Agreements,Negotiated Justice, Consensus* (*Acuerdos de Clemencia, Justicia Negociada*, *Consenso*) happened on 11th November 2021 with Professor Nicolás Rodriguez-Garcia (University of Salamanca), Renato Machado de Souza (Office of the Comptroller General – CGU) and Ana Cristina Gomes (IBCI/University of Salamanca). First, Mr. Nicolás Rodriguez presented the challenges of leniency programs and other means of negotiated justice in Spain, mainly in the case of corruption. Mr. Renato Machado de Souza, in sequence, presented the relevance and the obstacles for leniency programs in Brazil with the focus on bid rigging cartels cases. At the end, moderator Ana Cristina Gomes (IBCI/University of Salamanca) stressed out a few convergent points between both presentations and raised some open questions.

The fourteenth webinar, *DSA* (*In the EU/And Reflexes in Brazil*), happened on 11th November 2021 with Thibault Schrepel (IBCI/Stanford University/University Amsterdam), Silvia de Conca (University Amsterdam), Mateusz Grochowski (Polish Academy of Sciences/Supreme Court of Poland) and Eduardo M. Gaban (Chair of IBCI/PUC-SP). On this panel, Mr. Thibault Schrepel asked a few questions for the speakers Ms. Silvia de Conca and Mr. Mateusz Grochowski, first to frame the DSA, and then to check if there is something similar outside Europe – like in Brazil – and how this affects competition dynamics. In a very interactive panel, the speakers

talked about what they consider the best and the worst aspects of the DSA, if they consider the DSA is coming at the right time and other practical aspects in Europe. Mr. Eduardo M. Gaban explained the existing scenario in Brazil and the similarities with the DSA.

The last webinar, called *Dynamic Keynote Speech/Debate – A Fireside Chat: Bill Kovacic & Thibault Schrepel*, took place on 11th November 2021 and featured William Kovacic (George Washington University) and Thibault Schrepel (IBCI/Stanford University/University Amsterdam). Moderator Thibault Schrepel structured the conversation on two main subjects: (i) the substance of antitrust, its evolution and where it might grow; (ii) the transformation of US antitrust policy. Mr William Kovacic began by stating his skepticism about the use of categorical and linear prohibitions in this area, considering that they can easily be converted into presumptions – but not conclusive presumptions. As he explained, antitrust law should have some flexibility to take into account valid business justifications. In his view, in a dynamic technical environment, it is difficult to foresee all the circumstances under which certain justifications might be valid. Mr. Kovacic also developed some thoughts on the regulatory framework as well as enforcement actions and discussed possible reform scenarios.

The event had more than a thousand views on YouTube and more than 400 followers on LinkedIn. Detailed information about the webinars is available at: https://www.ibcibr.com.br/ and on LinkedIn: https://www.linkedin.com/feed/update/urn:li:activity:6862500808877989888/.

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# Giuseppe Tesauro Memorial Conference, Eulogy of a '*Giurista-Gentiluomo*' Naples, 1–2 July 2022

One year after the death of Giuseppe Tesauro, AISDUE, the Italian Association of European Union Law Scholars, in co-operation with the University of Naples Federico II, the Council of the Naples Bar Association, the Naples-based academic publisher Editoriale Scientifica, and the law firm Bonelli Erede, devoted a two-day conference to the life, professional activity, and legacy of the late Neapolitan jurist Giuseppe Tesauro.

The conference did not just survey the contributions that Giuseppe Tesauro made in the various fields in which he worked as a jurist, but also delved into the human figure behind the positions he held over time. The personal recollections of his colleagues, collaborators, heirs, and friends represented the added value of the event.

As most speakers have pointed out, it was arduous to talk about Giuseppe Tesauro's life and work in his different capacities as two separate topics. On the one hand, his experiences helped define his opinions, methods, and actions. On the other hand, his personality and ideas have always connected and held together every aspect of his life.

The first day of the conference, chaired by Professor Antonio Tizzano, President of AISDUE and former Vice-President of the European Court of Justice (ECJ), was held in the Aula Magna of the University of Naples Federico II and was devoted to Giuseppe Tesauro's activity as Justice and President of the Italian Constitutional Court, as Professor and as Advocate General at ECJ.

A number of prominent figures offered their welcome addresses: Professor Matteo Lorito, Rector of the University of Naples Federico II, Professor Sandro Staiano, Dean of Federico II Faculty of Law, Professor Vittorio Amato, Dean of Federico II Faculty of Political Sciences, and Professor Giulio Prosperetti, Justice at the Italian Constitutional Court. Right from the welcome addresses, which were inevitably the result of personal memories, some of the essential traits of Giuseppe Tesauro's personality emerged: his ability to demonstrate both rigour and affection, his ability to always express his Neapolitan essence, and the autonomy of his career path from that of his father, who was also a leading jurist in Italian academia and a member of the Italian Parliament. In short, throughout the conference, the various speakers described Giuseppe Tesauro as 'a *giurista-gentiluomo'* – a jurist and a gentleman – 'who served the institutions with wisdom and balance' (G. Prosperetti).

The first session, introduced by Professor Fabio Ferraro, Director of the Federico II Postgraduate Course in European Union Law, was devoted to Giuseppe Tesauro's tenure at the Italian Constitutional Court, where he served as President from July to November 2014 and Justice from November 2005 to November 2014. Speakers included Raffaella Niro, Professor of Public Law at the University of Macerata, Valeria Piccone, Judge at the Court of Cassation, and Luigi Salvato, Attorney General at the Court of Cassation, who were part of the 'Tesauro cabinet' at the Constitutional Court.

Their talks focused on the day-by-day work at the 'Tesauro cabinet', which operated in an 'extended family' atmosphere that combined passion and rigour with light-heartedness and humour. The speakers emphasised that Justice Tesauro was not isolated in an ivory tower; on the contrary, institutional contacts stimulated his team's activities just as more informal meetings. His humility and deep respect for human dignity emerged not only in his legal thinking but also in his interpersonal relationships.

These anecdotes about the day-by-day life of the 'Tesauro cabinet' went hand in hand with the speakers' account of the vision underlying Justice Tesauro's approach to constitutional law: i.e. a deep commitment to the effectiveness of judicial protection. For him, the principle of effectiveness of protection was intertwined with the principles of proportionality and reasonableness. As he stated, 'a judicial system can only be such if it ensures the protection of everyone who turns to it'. Therefore, his *ethos* was the protection of individual and collective rights. Consequently, Justice Tesauro sought ways to maximize the effectiveness of judicial protection, such as teleological interpretation combined with an *effet utile* reading of the rights of individuals.

Hence, Justice Tesauro championed the centrality of the Constitutional Court within the national constitutional order and in the relationship with European Courts. His years at the Constitutional Court were the years of that Court's opening towards Europe. He worked hard to shorten the distance between the Constitutional Court and the two European Courts by promoting judicial dialogue. One can see a symbiosis between his pro-European convictions and his commitment to the judicial protection of individuals, in line with the Italian Constitution, European Union Law, and the European Convention on Human Rights (ECHR).

The speakers recalled in unison that during his nine years at the Constitutional Court, there were some memorable rulings behind which everyone could single out Justice Tesauro's fundamental contribution. Among these, it is worth mentioning the first preliminary reference to the ECJ made by the Italian Constitutional Court in the context of an incidental proceeding (Order No. 207/2013), which marked the complete overruling of its earlier jurisprudence according to which the Italian Constitutional Court did not consider itself 'a court or tribunal' for the purpose of the preliminary ruling procedure. Similarly, the 'twin judgments of 2007' (Nos. 348 and 349/2007) defined the rank of Italy's international commitments, and notably of those stemming from the ECHR, in the Italian hierarchy of legal sources and the Constitutional Court's role in reviewing domestic statutes at variance with those commitments. The speakers also mentioned Judgment No. 238 of 2014, handed down during Giuseppe Tesauro's term as President of the Constitutional Court, which

affirmed the prevalence of the constitutional right to judicial protection of the victims of Nazi crimes *vis-à-vis* the customary principle of State immunity, thus reaffirming the centrality of the individual also in the context of international relations.

The academic activity of Giuseppe Tesauro was the subject of the second session, introduced by Professor Patrizia De Pasquale, Secretary General of AISDUE. Speakers included Professors Roberto Adam, Sergio Carbone, Ornella Porchia (currently Judge at the General Court of the European Union), Talitha Vassalli di Dachenhausen, and Ugo Villani.

The speakers first outlined Giuseppe Tesauro's academic career, which started with Professor Rolando Quadri in Naples in the field of international law. Without ever denying his 'internationalist origins', Professor Tesauro has always believed in the autonomy of the Community legal order. Moreover, he argued that the European Communities needed time to pursue the path opened up by *Van Gend en Loos* and the other 'constitutional' rulings of the ECJ. Similarly, legal scholarship needed time to contribute to the conceptualization of Community law as a legal order separate from international law and domestic law. While always recognising that the European Communities originated from 'international' treaties, Professor Tesauro strongly opposed the acritical transposition of international law challenges and solutions to Community law. Legal integration, he believed, was the specificity of the path taken by the Communities, a path led step by step by the ECJ in cooperation with national courts.

Professor Tesauro was one of the first Italian academics to devote his career exclusively to Community Law, thus setting an example for an entire generation of Community law scholars and, more recently, of EU law scholars. His activity undoubtedly contributed to making EU law an autonomous discipline of legal studies in Italy.

Professor Tesauro forged relationships with many other academics in Italy and abroad, as shown by the diversity in the 'origins' of the participants to his memorial conference. Some speakers fondly recalled his countless talks, from the most formal to the smallest and most spontaneous ones. By the same token, Professor Tesauro always acknowledged, with great openness and frankness, the role and weight of other Italian academics in the development of Community law as an academic discipline.

The speakers emphasised that Giuseppe Tesauro never stopped being a professor, even when he took up institutional roles. On the contrary, as an Advocate General at the ECJ, he maintained his curiosity and developed his ideas with great freedom and independence. In this connection, the speakers recalled how, while working on the famous *Factortame* case, he had excerpts from the famous Italian jurist and attorney Piero Calamandrei translated into French and distributed to the ECJ judges to illustrate the importance of interim measures.

Similarly, Professor Tesauro always paid great attention to the research process, rather than just its outcomes, especially when the choice of a specific line of argument led his team to outcomes different from the ones initially foreseen. The speakers also remarked that Professor Tesauro's theoretical endeavours always sought to solve concrete, real-life problems.

In this spirit, throughout his career, Professor Tesauro constantly encouraged young scholars to pursue their academic endeavors. In his last interview, published in 'Lo Stato' in June 2021, he denounced the bureaucratisation of universities and the underlying dangers of this process for younger scholars.

The third and last session, introduced by Professor Roberto Mastroianni, currently Judge at the EU General Court, was devoted to Giuseppe Tesauro's 'Luxembourg period' (1988–1998), i.e. his tenure as Advocate General at the ECJ. That panel gathered some of Advocate General Tesauro's former *référendaires*, such as Professors Massimo Condinanzi, Roberto Mastroianni, Rita Ciccone, and Attorney Anselmo Barone, as well as some of his former colleagues in Luxembourg, i.e. Professors Koen Lenaerts, former Judge of the Court of First Instance of the European Communities, currently President of the ECJ, José Luiz Da Cuz Vilaça, former Judge and Advocate general at the ECJ and President of the Court of First Instance, and Paolo Mengozzi, former Judge at the Court of First Instance and Advocate General at the ECJ.

Professor Mastroianni painted a vivid picture of the working environment of 'Tesauro cabinet' and announced that Postgraduate course in European Union law at Federico II University, which Giuseppe Tesauro contributed to establishing, will be named after him. President Lenaerts recalled, in addition to the high quality of the Opinions presented by Advocate General Tesauro, the friendliness and informality of the relationship with him in Luxembourg.

The speakers on this panel had the opportunity to share with Advocate General Tesauro also moments of daily work 'behind the scenes'. These recollections revealed his intellectual curiosity in exploring areas far removed from his usual academic interests. However, he always remained loyal to the values he held dearest: the effectiveness of judicial protection and the principle of legal certainty.

The speakers also noted that Giuseppe Tesauro's academic mindset characterized his tenure as an Advocate General, a role that he conceived as that of a 'professor in the service of the Community' (M. Condinanzi). Nevertheless, he always valued the relationship between the ECJ and national courts and made sure that his Opinions would provide practical guidance to those courts in the protection of individual rights stemming from Community law.

As in the session devoted to the Constitutional Court, this panel was an opportunity to review some of Advocate General Tesauro's most influential opinions. The most quoted one was undoubtedly the one in *Factortame* (C-213/89), where Advocate General Tesauro argued that a national court must have the power to disapply national law at variance with Community law, even if that power was incompatible with the United Kingdom constitutional tradition of the sovereignty of Parliament. The speakers also mentioned two Opinions rendered by Advocate General Tesauro on the principle of non-discrimination: the *Kalanke* case (C-450/93), concerning the sensitive topic of gender quotas, and case *P. v. S.* (C-13/94), concerning the dismissal of a transsexual individual, in which Advocate General Tesauro masterfully applied the principle of equality.

The second day of the conference was chaired once again by Professor Antonio Tizzano, President of AISDUE. It took place at the 'Alfredo De Marsico' Law Library

in Castel Capuano, Naples' former courthouse, and was devoted to Giuseppe Tesauro's activities as President of the Italian Competition Authority and as Attorney of the Naples Bar.

The introductory remarks were delivered by Antonio Tafuri, President of the Naples Bar Council, Giuseppe De Carolis, President of the Naples Court of Appeal, Patrizia Intonti, President of the Board of Directors of the 'De Marsico' Library, Elisabetta Garzo, President of the Naples Court, Raffaele Sabato, Judge of the European Court of Human Rights, and Mario De Dominicis, Professor and CEO of the academic publisher Editoriale Scientifica.

The first session was devoted to Giuseppe Tesauro's activity at the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, hereafter 'AGCM'), of which he was President from 1998 to 2005. Speakers included Giuseppe Maria Berruti, President of Chamber of the Court of Cassation and CONSOB Commissioner (the Italian financial markets regulator), Roberto Chieppa, Secretary General of the Presidency of the Council of Ministers and former President of Chamber of the Council of State, Francesco Sclafani, State Attorney, Guido Stazi, Secretary General of the Italian Competition Authority, Mario Todino, Partner at Jones Day Law Firm, and Paolo Ziotti, Attorney at Studio Legale Clarizia.

Once again, personal memories and anecdotes provided insights on President Tesauro's mindset and approach to antitrust law. When became President of the AGCM, that institution was still in its infancy and Italy's liberalisation policies had just begun. President Tesauro's task, therefore, was to 'bring European competition law to Italy'. Such a task required the implementation of concepts that did not fit easily with Italy's existing legal framework. Presidents Tesauro's term at AGCM contributed to introducing a new approach to the market, where the relationships between market players had not only a private law relevance, but also a public law one.

The speakers also recalled Giuseppe Tesauro's initial misgivings about taking the a role inherited from Giuliano Amato, who had just served as Italy's President of the Council of Ministers. Amato had an 'institutional' view of AGCM's role *vis-à-vis* the judiciary. Tesauro's view, instead, focused on the protection of individual rights and was based on his European experience.

In particular, President Tesauro never sought to shield AGCM from judicial review, nor did he seek a special status for the AGCM in disputes before Italian courts. In President Tesauro's view, AGCM had to affirm its independence *vis-à-vis* the legislative and the executive branch, not the judiciary one. Judicial review was, for President Tesauro, the opportunity to test the limits of the AGCM's powers and remit. Thus, President Tesauro's main concern was not winning individual cases, but embedding AGCM's role within the rule of law.

The speakers also highlighted how President Tesauro boosted AGCM's international reputation. His role was pivotal in the early days of the International Competition Network, whose first annual conference was held in Naples in September 2002, during President Tesauro's term at the AGCM.

Finally, the speakers recalled President Tesauro's great adaptability, open-mindedness, and firmness of convictions during his time at the AGCM. He would

carefully examine every case entrusted to the AGCM. So much of his experience as an attorney also came to the fore in his role as AGCM President. His way of constructing arguments and his unconditional respect for judicial review owe much to his longstanding experience in litigation.

The last panel was devoted to Giuseppe Tesauro's career as an Attorney of the Naples Bar. This panel was composed of Professors Raffaele De Luca Tamajo, Ferruccio Auletta, and Gian Michele Roberti, and of Attorneys Claudio Tesauro and Francesco Avolio.

Attorney Teasuro practised the legal profession intermittently throughout his life and brought to it all the knowledge, methods, and experience he had gathered from his other assignments. Thus, in his 'lawyering style', one finds a constant attention to practice and to the simplicity of argumentation, devoid of unnecessary theoretical minutiae.

In turn, Giuseppe Tesauro's background as an attorney profoundly influenced his understanding of his other roles. This is particularly evident from Giuseppe Tesauro's focus on effective judicial protection and his unwavering commitment to justice, equity, and fairness. The Constitutional Court's landmark ruling on the rights of Nazi crimes victims, his Opinion to the ECJ in the *Factortame* case, his constant emphasis on the importance of the role of national courts owe so much to Giuseppe Tesauro's experience as 'simple attorney', as he used to call himself.

Finally, this session was also an opportunity for speakers to recall how Giuseppe Tesauro spoke, often with remarkable foresight, on many fundamental issues of public interest today, first and foremost on European integration, right up to the Conference for the Future of Europe, and on the importance of safeguarding the Union's values for future generations.

As reported by many speakers at the event, the journalist Bartolo Scandizzo provided an accurate description of Giuseppe Tesauro's legacy in his obituary published in the weekly magazine Unico on 14 July 2021. Giuseppe Tesauro was an example of 'how a person can take up, exercise, and leave public offices while remembering, at all times, that only if one is above all a man, can one provide a service to humanity'.

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Established 2008

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**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES**
**VOL. 2022, 15(26)**

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**YEARBOOK OF ANTITRUST AND REGULATORY STUDIES (YARS®)**

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