Università degli Studi di Palermo

AREA RICERCA E TRASFERIMENTO TECNOLOGICO
SETTORE DOTTORATI E CONTRATTI PER LA RICERCA
U. O. DOTTORATI DI RICERCA

Corso di Dottorato di Ricerca in Dinamica dei Sistemi
Dipartimento di Scienze Politiche e delle Relazioni Internazionali
Settore Scientifico Disciplinare IUS/04

REGULATING DIGITAL PLATFORMS: AN ANTITRUST ANALYSIS OF A MULTIFACETED PHENOMENON

IL DOTTORE
GIUSEPPE GIORDANO

IL COORDINATORE
CHIAR.MO PROF. SALVATORE MANCUSO

IL TUTOR
CHIAR.MA PROF.SSA CHIARA GARILLI

CICLO XXXV
ANNO CONSEGUIMENTO TITOLO 2024

TABLE OF CONTENTS

INTRODUCTION

The digital revolution has surely been a powerful driver of growth for the global economy, leaving his mark also on our society and lifestyle. As acknowledged by the EU Commission, since the adoption of the so-called e-commerce directive "*new and innovative information society (digital) services have emerged, changing the daily lives of Union citizens and shaping and transforming how they communicate, connect, consume and do business. Those services have contributed deeply to societal and economic transformations in the Union and across the world*[1]". Indeed, it was estimated that in 2021 the 91% of the population of the 27 UE Member States accessed the Internet, while the 75% of the same people have bought goods and services online[2].

The fact that digital platforms have become an integral part of our daily lives has proven particularly true during the COVID-19 pandemic, when the global economy, as well as our social life, has been kept running by digital infrastructure and sophisticated digital solutions.

Aside from all the potential benefits stemming from the dissemination of online platforms, their expansion in several markets has risen several antitrust concerns. As an example, while at the very beginning of the spreading of the Internet there was the hope that digital actors would have competed among them to provide more and more diversified products and services, allowing consumers to easily choose between such products or services and to freely switch from one provider to another, digital markets have developed in a different way, with few extremely large big-tech undertakings acting as a gateway through which users can surf the Internet[3].

Such evolution of digital markets has, consequently, fueled concerns over potential harms to competition resulting from the conduct of the mentioned very large platforms that hold an entrenched position, casting doubts, *inter alia*, on the adequacy and efficiency of the extant EU legal framework applicable to them. To make matters worse, given the peculiar

[1] European Commission (2020), Explanatory Memorandum accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, at 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en

[2] European e-commerce report (2021), at 13, available at: https://ecommerce-europe.eu/wp-content/uploads/2021/09/2021-European-E-commerce-Report-LIGHT-VERSION.pdf

[3] Puric S., "*New european solutions for strengthening competitiveness in digital markets*", EU and Comparative Law Issues and Challenges Series, 5(Special Issue), pp. 295-314, 2021, at 296.

features of online markets, big-tech undertakings sometimes have also been able to escape antitrust scrutiny from competition Authorities, for instance in the case of digital mergers that do not trigger the provisions contained in the sectorial EU legislation, factor that has inflamed the debate on the necessity of formulating *ad hoc* legal instruments capable of tackling with the challenges posed by their operation within the EU market.

Also, aiming at providing solutions and suggestions on how to effectively regulate such a peculiar phenomenon, scholars and experts, have long discussed on the appropriate definition of online platform, without reaching, at least until now, a definite consensus over this topic.

On these grounds, the aim of this final dissertation is, essentially, to partake in the debate on how to regulate the ground-breaking phenomenon of digital markets and platforms, in an attempt to provide some solutions to such a thorny issue.

In greater detail, the structure of the present contribution is as follows: In the first Chapter we will go in depth in the dispute on the notion of platform by delineating the main features of such a phenomenon and trying to offer a conclusive definition of digital platform that could prove useful for correctly addressing and regulating such a multifaceted topic. The second Chapter provides the reader with an analysis of the legislative legal framework applicable to digital markets, starting from the several challenges posed by online platforms to the extant legal framework, coupled with a comparison of the pros and cons of both *ex ante* and *ex post* regulation, then focusing on the Digital Markets Act and its likelihood of actually being the statutory instrument capable of governing the phenomenon under consideration. The third Chapter will be devoted to mergers and acquisitions in the digital environment, with a specific attention to the so-called killer acquisitions, which are able to circumvent scrutiny from competition Authorities, a phenomenon that could result in invalidating all the regulatory efforts discussed in this dissertation. Finally, the last section will be dedicated to some concluding remarks.

CHAPTER 1: ONLINE PLATFORMS: DEFINITIONS, CHARACTERISTICS AND COMMON ELEMENTS

1. Pros & cons of digital markets (preamble)

Being the leading characters of the digital revolution, that has shaped the last two decades, digital platforms have often been considered as inherently pro-competitive[4], since, by enabling consumers and businesses to make the most of the opportunities provided by the digital economy, they have been key drivers of growth, innovation and competition. Besides, as shown by some reports published in the last years by several Antitrust Authorities and experts, the digitalisation process of the whole economy has generated many advantages such as: (i)a decrease of transaction costs; (ii)lower prices; (iii) innovation in business models and in goods and services; (iv)increases in productivity, economic growth, market efficiency and consumer welfare[5].

From a consumeristic perspective, users of online platforms have, for instance, benefitted from greater online market transparency thanks to those platforms allowing them to compare more easily price or characteristics of competing goods or services. As an example, price comparators like Trivago or platforms granting travel information such as TripAdvisor, allow consumers to make more informed choices resulting in a higher intensity of competition both in terms of price and quality[6]. This kind of transparency is fostered by platforms also by granting customers with the opportunity to write product reviews. Customer reviews are actually, for many web-shops, an important source of feedback, a trust enhancing mechanism, and a source of information for other (potential) customers[7]. This increased market transparency has also had positive influence on business users, facilitating

[4] Muscolo G., Minuto R. A., "*sharing economy: a multifaceted phenomenon*", in The new frontiers of innovation and competition vol. II, n.1 (2018), at 99

[5] Lancieri F., Sakowski P.M., "*Competition in Digital Markets: A Review of Expert Reports*", 26 Stan. J.L. Bus. & FIN. 65 (2021), at 92

[6] Autorité de la Concurrence & Bundeskartellamt, competition law and data (2016), at 14, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2

[7] European e-commerce report (2021), supra note 2, at 18. According to the report, within the EU, 59% of e-stores offer their customers the opportunity to write product reviews, and 23% of them provide consumers with the option to review the company itself.

entry in the market by new competitors who have more information about consumer needs and market conditions[8].

Furthermore, customers accessing digital markets can profit from an incredible amount of services provided to them at no monetary cost. For example, users are generally not charged a fee directly for searching The Internet, connecting with friends on social networks, or accessing sellers through online marketplaces[9].

More broadly, with regard to consumer welfare in digital markets, we can say that "*platforms make information more accessible; make communication and interaction easier; create new markets or business opportunities; and increase choice of products and services*[10]". As a matter of fact, online platforms can benefit consumers also through:

- allowing access to benefits from increased supplier competition, including from international firms, leading to lower prices;
- more choice or variety of products/services;
- more personalized products, services and content[11];
- saving time, by allowing access to goods and/or services at any hour of the day and using a simplified transaction system;
- becoming even a potential additional source of income (some online platforms, while operating like marketplaces, also allow their users to directly sell products and/or services)[12].

Among the benefits online platforms brought to undertakings, the main ones are cost reduction and the promotion of business opportunities which, in turn, are the two main characteristics that lead to business growth. In relation to cost reduction, the most important outcome stemming from the impact of digital markets on businesses is probably the

[8] *Id*. Marketplaces like Amazon are another illustration of the benefits that market transparency may bring. Indeed, by hosting many online shops including smaller ones that might have been prevented from entering the market without such a platform, they have somewhat contributed to enhance competition within the market.

[9] Digital Competition Expert Panel, "*Unlocking Digital Competition: Report of the Digital Competition Expert Panel*" (2019), at 22, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[10] European Commission (2016), Commission Staff Working Document on Online Platforms, Accompanying the document "Communication on Online Platforms and the Digital Single Market", at 11, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0172&from=DA

[11] Australian Competition and Consumer Commission, Digital Platforms Inquiry-Final Report (2019), at 48, available at: https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

[12] European Commission (2016), *supra* note 10, at 14

reduction of transaction costs[13], which are costs associated with participating in a marketplace and that can include the search or information costs incurred in identifying relevant opportunities, negotiation and transferring costs.

Additionally, digital platforms and other online intermediaries, through the provision of their services, have, *inter alia*, delivered efficiencies and improvements in the matching of buyers and sellers around the world. Particularly, by improving this matching process, online services are increasing the value of economic activity and leading to more efficient use of resources, undoubtedly to the benefit of undertakongs (and consumers)[14]. Online platforms have also contributed to lower geographical barriers and information asymmetries, enabling the rising of new markets. They have, moreover, invested incredible sums in research and development, delivering significant gains not only to businesses, but to the society as a whole[15].

Also, the extraordinary expansion of the online advertising market in the last few years has added value even to small and medium enterprises (hereinafter "SMEs"), making it substantially easier for them to reach and serve adverts to consumers all around the world, in a way that was previously possible only for very large companies[16]. Indeed, advertising services supplied by digital platforms (such as Google and Facebook) are usually cheaper and better targeted than traditional channels (TV and radio), enabling SMEs to exploit such a kind of service that they could not have access in the past, mainly because of high costs[17].

SMEs have really taken advantage of digital platforms because, while in traditional markets they often face financial, informational, contractual, and managerial barriers to growth and even to their entry new markets, in digital markets platforms usually help them to overcome these barriers[18]. They do so by helping small and medium companies to get online and benefit from digitalisation at a fraction of the cost of doing it themselves. Indeed,

---

[13] European Commission (2016), *Supra* note 10, at 12

[14] Digital Competition expert panel (2019), *supra* note 9, at 19

[15] According to a study of the PwC, the R&D spending by the top 20 companies, including huge digital operators like Amazon, Alphabet (the parent company of Google), Microsoft and Facebook, was more than 200 billion in 2018. For further information, see PwC, 2018 Global Innovation 1000 study, "*what the top innovators get right*" (2018), available at: https://www.strategy-business.com/feature/What-the-Top-Innovators-Get-Right

[16] CMA., Online Platforms and Digital Advertising Market: Final Report (2020), at 45, available at: https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

[17] Lancieri F., Sakowski P.M., *supra* note 5, at 93

[18] EDiMA and Copenhagen institute (2015), Online intermediaries – Impact on the EU economy, at 18, available at: https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/342/1454501505/edima-online-intermediaries-eu-growth-engines.pdf

"*Online intermediaries reduce the cost of selling by lowering the operational, marketing and transportation costs of doing business. This means that the amount of capital required to start and grow a business is reduced and that the SMEs become more competitive*[19]".

Furthermore, online platforms help SMEs reaching a wider range of consumers enabling them to interact with more potential buyers, reducing at the same time the need for new capital investments and resources required to identify new business opportunities. In addition, online platforms help SMEs in building trusting relationships with their customers, reducing in this way the necessity to establish reliable foreign representation, spending managerial time and hiring new staff[20].

However, not all that glitters is gold. Despite all the "pro-competitive outcomes" listed above, market power of platforms in digital markets can severely harm competition, also affecting consumers directly, for instance through variation of prices and quality of the services provided to them, or indirectly, as the effects of unfair terms or unfair access for business users of platforms could have an impact on consumers in terms of prices, quality and range of services they receive from those businesses[21].

In relation to the direct potential harm to consumers, one of the most important sources of this negative impact deals with the amount of data they give in exchange for accessing digital services "for free". Indeed, despite the zero upfront price usually paid by consumers when accessing many digital platform services, consumers actually pay digital platforms for the services provided with their data and attention. However, this zero-price does not necessarily reflect a competitive market equilibrium, as consumers could be gaining a greater value in return for their data or even be paid for the use of such data (in this case they would receive a negative price)[22]. Furthermore, since consumers are often unable to control how their personal data are used and may effectively be faced with a 'take it or leave it' offer when it comes to signing up to a platform's terms and conditions[23], the collection of such private data could lead to a misuse of them and a violation of consumer privacy.

Digital services can also be paid through advertising. In particular, the density of advertising that consumers see as a price to benefit from the valued service or content can be used as an indicator for the quality of the services provided by a platform. As, in the last

[19] *Id*.
[20] *Id*. at 31
[21] Digital Competition expert panel (2019), *supra* note 9, at 42
[22] *Id*.
[23] CMA, *supra* note 16 at 8

few years, advertising revenues of platforms such as Google, Facebook or Amazon are constantly increasing, there is evidence that the volume of advertising consumers are exposed to is also increasing[24] at the expanses of the overall quality of the services provided[25], since this way to increase their revenue is leading platforms to be less incentivised to compete on quality, harming in turn consumers welfare.

Another potential source of direct harm for consumers deals with innovation in digital markets. More in detail, the innovation process taking place in online markets is quite different from that of more traditional industries: it is never finished, since products are in constant evolution, permanently being reworked, and less structured, because often the features of the innovation are developed at the same time as the innovation is implemented and tested. Therefore, the benefits of innovation are achieved by being "first to the market" with a service or a product and the ability to develop a user base[26]. Thus, competition on innovation in digital markets is at least equally important as price competition[27] and, hence, platforms strategies aiming at hindering innovation and the development of new, valuable digital services are likely to be the largest source of consumer harm[28].

Particularly, digital platforms can have a negative impact on innovation when their strategies forestall competition for instance by expropriating the profits of companies that supply complementary products as a way to increase their profit margins[29]. These kinds of competitive strategies are generally related to the specific stages of a platform evolution. As an example, it is possible that at the very beginning of its life a platform needs content to attract consumers, so it invites the complementors onto the platform. Therefore, complementors make huge investments in order to be partner of the platform, thinking they will obtain a return, and that expected return leads to efficient levels of investment. Nonetheless, as the platform under scrutiny becomes dominant, it starts appropriating a larger share of their "partners"' profits. It can do so by exploiting high entry barriers characterising that market and their own economies of scale and scope[30].

[24] Digital Competition Expert Panel, *supra* note 9 at 43
[25] Lancieri F., Sakowski P.M., *supra* note 5 at 95
[26] Crémer J. *Et al.*, Report for the European Commission "*Competition policy for the digital era*", 2019, at 35
[27] Bundeskartellamt (2016), Working Paper No. B6 113/15, "*Market Power of Platforms and Networks*", at 18, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=2
[28] CMA, *supra* note 16, at 7
[29] Stigler Committee on digital platforms, sub-committee on market structure and antitrust report, in Stigler Committee on digital platforms final report, 2019, at 68, available at: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf
[30] *Id*. at 69

This phenomenon is mainly due to the fact that "*today's platforms understand that they can obtain higher margins if they either make all of the necessary complements themselves or position themselves as a mandatory bottleneck between partners and customers—leading to many platforms taking a significant commission on sales on their platform or extracting value through barter of information. In particular, today's digital platforms are very careful to maintain complete control over the user relationship so that they do not face any threat of disintermediation*[31]". This behaviour may be highly harmful for innovation in digital markets since it could lead to an increase in barriers to entry and also discourage investments both in products that can directly compete with that sold by platforms and in complementary products that might be easily expropriated by platforms without adequately rewarding investors[32].

What makes matters worse is that platforms privileged access to data of consumers (as discussed above) enables them to identify eventual threats and to cautiously eliminate them through, for instance, exclusionary behaviours or even acquisitions. Indeed, as we will analyse in greater detail in Chapter 3, incumbent online platforms may adopt an aggressive merger policy directed at firms that are still developing their products or that have recently entered the market, with the aim to integrate the goods and services of the acquired firms in their ecosystem in order to protect or strengthen such ecosystem[33]. This policy may even curb potential start-up investors, by limiting the scope of ongoing innovation projects or introduction of innovative products in the market at the expense of consumer welfare, a practice known as "killer acquisition"[34]. The last result of all this strategy is an endless loop where less investments in innovation lead to less market entry, as investors are recalcitrant to invest in start-ups that will probably be "killed" by incumbent platforms. Consequently, potentially rival start-ups cannot have access to important fundings, thus they stop posing a threat to the incumbent platforms. This further reinforces the market power of dominant firms, making them more capable of eliminating potential start-ups, restarting the circle[35].

---

[31] *Id*. at 70

[32] Lancieri F., Sakowski P.M., *supra* note 5 at 96-97

[33] Portuguese Autoridade da Concorrência (2019), Digital ecosystems, Big Data and Algorithms, issues paper, at 35-36, available at: https://www.concorrencia.pt/sites/default/files/processos/epr/Digital%20Ecosystems%2C%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf

[34] *Id*. The mentioned phenomenon can take place because digital platforms are usually capable of exert a certain degree of control over their business partners and this control may indirectly lead to consumer harm, among other things, when: business users are charged unfair fees or unfair contractual terms; undertakings are not given fair access to consumers (for example when they are denied access to platform); the platform is able to influence its business partners reputation.

[35] Lancieri F., Sakowski P.M., *supra* note 5 at 97

Consumers will clearly suffer from this reduction in innovation and have less choice in the future.

Nevertheless, consumers can also be indirectly harmed by platforms because they can be expected to suffer from the impact of the same platforms on the business they interact with. As an example, when digital platforms charge businesses partners with fees or commissions higher than they would in real competitive market, undertakings will tend to pass on consumers the costs associated with the high fees charged by online intermediaries[36]. Accordingly, if for instance the costs for digital advertising are higher, this will be reflected on the prices that consumers pay for products that make heavy use of digital advertising. In addition, quality may also be diminished as costs fall on the margins of dependent businesses and, in the long run, these conditions are likely to undermine the ability of the involved firms to invest in R&D, a situation where consumers will not be able to benefit from new and innovative products or services[37].

To sum up, all considerable benefits notwithstanding, not only consumers could face less beneficial outcomes than they should as a result of platforms negative impact on digital markets, for instance because of quality of products or services potentially affected by data issues (e.g., privacy issues) or due to increased advertising and lower levels of innovation than that present in a more competitive landscape, but also undertakings could be endangered by their eventual anti-competitive conducts.

Therefore, in light of these potential damages to competition in digital markets, since the very beginning of the XXI century there has been the urgent need to understand how it would be possible to govern the unprecedented economic phenomenon represented by online platforms, which gives rise to several antitrust concerns, and to assess the adequacy and efficiency of the extant EU legal framework, which has been primarily conceived for traditional businesses and markets rather than for such a omnipresent digital environment.

2. **Online platforms: a lack of definitional consensus**

Digital markets are "places" where goods and services can be bought and sold through a digital technology which uses a binary code to record information, allowing such

[36] Digital Competition Expert Panel, *supra* note 9 at 44
[37] *Id*.

information to be transmitted electronically over telecommunication networks. Therefore, digital markets require a trading environment based on electronic information or data exchanged among several users. Today this mainly happens on the World Wide Web or on the Internet.

Online platforms are undeniably the key component of digital markets because they provide the necessary infrastructure for goods and services to be bought or sold through the Internet, allowing also users to interact with contents, services and other functionalities over the web. They have, so, allowed a shift from the offline world to the online environment. However, there is no consensus on a single definition of platform neither in the economic sphere nor in the legal area[38]. This indeterminacy is the natural consequence of the difficulty faced by scholars and experts in identifying the *trait d'union* among the various entities commonly associated with the term, mainly because of the great range of categories of existing platforms. Digital platforms, indeed, can vary depending on the "sides" (i.e., groups of users) they operate with, the activities they perform, the market in which they act as well as their positioning on it (in other words, their size and their market shares)[39]. In addition, digital markets, and consequently platforms, are always evolving, thanks to the introduction of new products and business strategies, so that they are constantly changing[40]. This somehow explains why it is so difficult to come up with a single definition of such a heterogeneous phenomenon.

Nonetheless, researchers have devoted considerable effort to this subject by proposing countless descriptions, categorisations, and taxonomies of online platforms, which, even if they "*suffer from excessive specificity, over-inclusiveness, or being too vague*[41]", are still valuable because they highlight the innumerable nuances distinguishing platforms, also emphasizing at least the essential common characteristics of this multifaceted phenomenon. Particularly, the economic perspective has been the main approach in dealing

---

[38] European Commission (2016), *supra* note 10, at 2

[39] As acknowledged by the EU Parliament, "*it would be very difficult to arrive at a single, legally relevant and future-proof definition of online platforms at EU level, owing to factors such as the great variety of types of existing online platforms and their areas of activity, as well as the fast-changing environment of the digital world*". For more info on the topic, see European Parliament resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI)), para. 6-13, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0272&from=EN

[40] According to different Authors, online platforms would be characterized by the so-called "disruptive innovation", i.e., a peculiar type of innovation capable of profoundly altering the functioning of a given market and/or industrial sector by eroding the consolidated position of incumbent undertakings. See Bower J.L. and Christensen C.M., "*Disruptive Technologies: Catching the Wave*", in Harvard Business Review 73, no. 1 (January–February 1995): 43–53.

[41] Hagiu, A., Wright, J., "*Multi-sided platforms*", International Journal of Industrial Organization, Vol. 43, 2015, at 4, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2794582

with online platforms, which are outlined as "*matchmakers*" that help two or more different kinds of customers find each other and engage in mutually beneficial interactions[42].

More in detail, Jean-Charles Rochet and Jean Tirole are considered as pioneers in the field of online platforms since, at the very beginning of the XXI century, they were able to elaborate a groundbreaking economic model which described for the first-time platform competition in two-sided markets[43]. According to them, two-sided markets (and more in general multisided ones) are defined as "*markets in which one or several platforms enable interactions between end-users and try to get the two (or multiple) sides "on board" by appropriately charging each side. That is, platforms court each side while attempting to make, or at least not lose, money overall*[44]". Particularly, their model established price structure and related strategies as key features for distinguishing between one-sided and two-sided markets. As an example, depending on the pricing strategy adopted, a platform can *ex ante* decide to charge a fixed membership (or access) fee to one or more of its sides (such as to the seller and to the buyer) just to join the platform or, conversely, impose a fee for using it[45]. A platform can also decide whether to charge all of its sides or just one of them. Thus, the price structure set by each platform is so crucial because it contributes to produce different kinds of externalities[46] that platforms are strongly incentivized to internalize in order to "*get both sides on board*[47]".

---

[42] Evans D.S., Schmalensee R., "*Matchmakers: The New Economics of Multiseded Platforms*", Harvard Business review press, 2016. A clear example of this kind of business model can be represented by a payment card system network that helps retailers and consumers get together and transact by using the same payment method.

[43] Rochet J.C. and Tirole J., "*Platform Competition in Two-Sided Markets*", Journal of the European Economic Association, Volume 1, Issue 4, 2003, Pages 990–1029, available at: https://academic.oup.com/jeea/article/1/4/990/2280902. The model theorized by Rochet and Tirole was so important that they were awarded the Nobel Memorial Prize in Economic Sciences in 2014 for their contributions to the new economics of multisided platforms.

[44] Rochet J.C. and Tirole J., "*Two-Sided Markets: A Progress Report*" (2006), 37, The RAND Journal of Economics, 645,646., at 2. Nowadays economists prefer to refer to these businesses as multisided platforms rather than two-sided because many of them usually facilitate interactions between more then two groups (sides) of users wishing to interact.

[45] *Id.* pg.4

[46] In economics, externalities are defined as positive or negative consequences of economic activities on unrelated third parties. According to Rochet and Tirole, two-sided platforms strategies give birth to "membership" or "usage" externalities (as explained later, many authors refer to externalities as network effects). *See*, for instance, OECD (1993) "*Glossary of Industrial Organisation Economics and Competition Law*", compiled by Khemani R.S. and Shapiro D.M., commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, at 44, available at: https://www.oecd.org/regreform/sectors/2376087.pdf

[47] Filistrucchi L. *et al*., "*mergers in two-sided markets - a report to the Netherlands competition authority*" (2010), at 5. The example of videogames consoles can be helpful in this case: a video game console without enough interesting games will not attract players and one without enough players will not attract game developers. Therefore, one good strategy for platforms to get the balance right is by setting the right prices on its different sides.

Even if the model offered by Rochet and Tirole has been largely criticized by the literature, either for being to "over-inclusive"[48] or too much focused on the price strategies of the platform[49], it is undoubtedly the milestone from which, for the following two decades and still today, the authors studying online platforms have taken inspiration to develop their own proposals for a definition of such a challenging phenomenon. Some authors have, for instance, tried to define online platforms by proposing alternative models that consider other strategies than those related just to prices[50] or by stressing the difference between traditional retailers and two-sided platforms[51]. Other experts have, conversely, emphasized the key features of multi-sided platforms, defined as organizations creating "*value primarily by enabling direct interactions between two (or more) distinct types of affiliated customers*[52]".

Furthermore, in an attempt to go beyond the debate between traditional markets and two or even multi-sided platforms, numerous scholars provided multiple taxonomies based, for instance, on the characteristics and objectives of the platforms at stake (such as that built on the distinction between two-sided transaction platforms and non-transaction ones[53]) or categorizations developed on the services offered by the entities under scrutiny[54].

Even the European Commission strived to quell the debate on digital platforms, by stating that "*online platform refers to an undertaking operating in two (or multi)-sided*

[48] Katz M.L., Sallet J., "*Multisided Platforms and Antitrust Enforcement*" (2018), 127 Yale L. J. 2142

[49] Hermalin B.E., Katz M.L., "*What's So Special About Two-Sided Markets*?" (2018), in Towards A Just Society: Joseph Stiglitz and 21st Century Economics

[50] In one of his works, Mark Rysman clearly argued that what really matters in dealing whit platforms is not simply the prices they pay or charge but the strategies they are able to employ (such as the degree of openness adopted by the platforms and the "sides" pursued). For other information *see* Rysman M., "*The Economics of Two-Sided Markets*" (2009), Journal of Economic Perspectives, Volume 23, Number 3, pp. 125–143

[51] As an example, according to Andrei Hagiu, an intermediary can choose between two different strategies of functioning: being a merchant (or one-sided mode), like traditional retailers do, or a platform (two-sided mode). The major difference between the two modes is that, while merchants have full control over its sale to consumers, two-sided platforms do not retain ownership over the sellers' good but simply establishes buyers and sellers' affiliation within a common marketplace. *See* Hagiu A., "*Merchant or Two-Sided Platforms?*" (2007), Review of Network Economics Vol.6, Issue 2

[52] Accordingly, this definition would include such organizations as American Express, eBay, Facebook, Skype, YouTube and even PlayStation, in their current forms, but does not encompass traditional cable TV companies, department stores, movie theatres, satellite radio companies, or video game arcades. *See* Hagiu A., Wright J., "*Multi-Sided Platforms, a Working Paper*", Harvard Business School Working Paper, No. 12-024, October 2011.

[53] *See* Filistrucchi L., Geradin D., Van Damme E., Affeldt P., "*Market definition in two-sided markets: Theory and practice*" (2014) 10:2 Journal of Competition Law and Economics 293-339; OECD (2017), "*Market definition in multi-sided markets*", Note by Sebastian Wismer and Arno Rasek

[54] Some Authors have, as an example, highlighted the difference between "attention" and "matching" platforms. While the former, like Google, help one group of users to reach the attention of another group of users, the latter is useful to connect two or more user groups for the purpose of direct interaction. *See* Bundeskartellamt (2016) working paper – "*the market power of platforms and networks*" (executive summary); Luchetta G., "*Is the Google platform a two-sided market*" (2014) 10:1 Journal of Competition Law and Economics 192

markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups[55]", or that platforms "*cover a wide-ranging set of activities including online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy*[56]" and that they "*create an open marketplace for the temporary usage of goods or services often provided by private individuals*[57]".

However, the EU Commission could not draw up a clear definition of the phenomenon which was unanimously accepted by the literature. As a matter of fact, its notion of platforms has been judged as unclear, because "*broadly interpreted, the proposed definition could encompass 'all of the Internet'; strictly applied, it would only capture specific elements of the businesses with which it is concerned*[58]".

Therefore, countless definitions and taxonomies notwithstanding, currently there is no one-size-fits-all definition of "online platform". This definitional *vulnus* has surely brought a high degree of uncertainty in the application of antitrust rules aiming at governing platforms transactions in digital markets. As a result, it is not so uncommon that illegal or abusive conducts undertaken by digital platforms, due to "interpretative issues" on the notion of the same phenomenon, end up with not falling within the scope of a specific Regulation/Directive or national rule, harming in this way both competition and consumers rights.

For the reason cleared above, it is of utmost importance to find at least a minimum notion of platform that would be applicable to any legislative framework (within the European Union if nothing else).

---

[55] European Commission (2015), Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, pg.1

[56] European Commission (2016), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "*Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*", pg. 2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN

[57] European Commission (2016), Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, "*A European agenda for the collaborative economy*", pg. 3, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0356&from=EN

[58] House of Lords, "*Online Platforms and the Digital Single Market*" (10th Report of Session 2015–16), 20 April 2016, p. 22, available at: https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf

3. **A common ground for the literature: digital platforms main features**

A first step in the direction of finding a core definition of platform is to identify the common elements across most platforms. Indeed, while studying the different notions and classifications provided by the literature in the debate on platforms nature, it is possible to find certain recurring traits which, at a first glans, appear to be "platform-specific[59]".

The first characteristic is reflected in two- or multi-sidedness[60]. This feature refers to the capacity of a platform to connect different groups of users (such as business users and consumers) simply through its two – or – multi-sided structure, allowing them to transact. Thus, platforms act as digital resources that can enable efficient interactions among, for instance, external suppliers, content providers, developers, and end-users[61]. In this way, not only the transaction costs that each group of users must bear for entering in touch with each other are reduced[62], but also the platform through which they interact can create an added value from interactions and transactions between users, according to its business model.

The second key feature deals with economies of scale[63]. Indeed, digital markets benefit from an important return to scale considering that, generally, the costs of delivering online services may be so small as to be disproportionate to the number of users, which helps platforms (particularly the biggest ones) offering their services for a very low price or even for free[64].

The third peculiarity is strictly related to platforms capacity to gather and process large volume and variety of data to improve their business. Data play, as explained in the first paragraph, an extremely important role in digital markets and their collection is used by platforms to have, for instance, an insight into users' needs and preferences[65]. The output received from this analysis will be, moreover, employed in order to upgrade existing

[59] *i.e.,* a set of features that are very peculiar and that distinguish digital platforms from "traditional" markets.
[60] Parker G., Petropoulos G., Van Alstyne M.W., "*Digital Platforms and Antitrust*", Working Paper 06/2020, Bruegel, at 6, available at: https://www.bruegel.org/sites/default/files/wp_attachments/WP-2020-06-1.pdf
[61] *Id*. pg. 2
[62] Barbano M., "*Verso un antitrust italiano 4.0? I GAFAM e i big data all'esame dell'AGCM*", in Diritto del Commercio Internazionale, fasc.4, 2021, at 3
[63] This expression refers to the phenomenon where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by an undertaking. OECD (1993), *supra* note 46, at 39
[64] Offering services for free is a peculiar pricing strategy of advertising platforms, which use advertisement as their main source of revenue thanks to the fact that the more users they have, the more attractive they will be for new advertisers.
[65] Crémer J. *Et al.*, *supra* note 26, at 8

services, to shape them on users' demand or to develop new and better services[66]. By obtaining and combining such a huge amount of data, digital platforms can also benefit from the so-called "economies of scope[67]" that help them further improving their business.

Finally, the fourth major characteristic of digital markets is represented by the strong interdependency of the groups acting on a platform that is the result of externalities arising from transactions among them. More in detail, scholars refer to this kind of externalities as "network effects[68]", that can be defined as the effect that an additional user of a good or service has on the value of that good or service to others. This means that, when a network effect exists, the value of a good or service increases according to the number of people using it[69].

Furthermore, the literature generally distinguishes between two different categories of network effects: on the one hand, direct network effects that arise when the "*adoption by different users is complementary, so that each user's adoption payoff, and his incentive to adopt, increases as more others adopt*[70]", which implies that users of a product have a benefit if more people use the same product as well[71]. On the other hand, Indirect network effects that occur when "*the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) with the number of users of another group*[72]". Accordingly, this can be the case of credit cards: for instance, if the

---

[66] Puric S., *supra* note 3, at 298

[67] "*Economies of scope exist when it is cheaper to produce two products together (joint production) than to produce them separately. For example, it may be less costly to provide air service from point A to points B and C with one aircraft than have two separate air flights, one to point B and another to point C*". This implies that digital undertakings may exploit economies of scope to offer multiple services at lower costs. *See* OECD (1993), *supra* note 46, at 40

[68] Some authors use the expression "network externalities", considering network effects as a sub-category of externalities. See, among others, Katz. M.L and Shapiro C., "*Network Externalities, Competition, and Compatibility*", The American Economic Review, Vol. 75, No. 3, 1985, pp. 424-440; Luchetta G., "*Is the Google platform a two-sided market?*", 23rd European Regional Conference of the International Telecommunication Society, Vienna, Austria, 1-4 July 2012, ITS, Wien

[69] The Internet is probably the clearest example of this phenomenon: its value has increased over the time thanks to the impressive increasing number of users. See Hermalin B.E., Katz M.L., "*What's So Special About Two-Sided Markets*?", in Toward a just society: Joseph Stiglitz and twenty-first century economics. - New York: Columbia University Press, 2018, pp. 111-130

[70] Farrell J., Klemperer P., "*Coordination and Lock-In: Competition with Switching Costs and Network Effects*", Handbook of Industrial Organization, Vol.3, 2007.

[71] Typical examples of platforms characterized by direct network effects are telecommunication networks or social media, because generally their users gain directly when other people use the same platforms, having in this way more opportunities for interactions with others.

[72] Bundeskartellamt (2016), *supra* note 27, at 3. This wide definition provided by the German Competition Authority covers both platforms with bilateral positive indirect network effects (the members of one group benefit indirectly from the growth of their group because it provides an incentive for the other group to grow as well) and platforms with unilateral indirect network effects (only one side benefits from the growing number of users on the other side, while there is no benefit to the users whose number has increased).

number of merchants willing to accept Visa credit cards grows, this will foster consumers to have and use a Visa card.

It is noteworthy that, on top of these essential characteristics, others are sometimes added[73], namely:

- Platforms' ability to grow extensively but inexpensively thanks to the extremely low unit costs for processing, storing replicating and transmitting data[74], also known as ability to "scale without mass[75]";
- Their potentially global reach (the chance to attract customers all over the world);
- Their capacity to benefit from switching costs that users shall bear in order to shift to another similar platform, costs that would discourage them to do so even if prices rise, quality declines, or the service provides less privacy[76];
- Their aptitude to exploit positive network effects and economies of scale and scope to quickly and strongly grow aiming at entrenching their position within the market and living other entrants not only far behind but also facing a more challenging set of obstacles to their growth[77] (so-called "winner-take-all or winner-take-most" effect[78]);

Therefore, with these characteristics in mind[79], it is in some way possible to sketch out a first, very basic, definition of digital platform, that constitutes "*a digital service[s] that facilitates interactions between two or more distinct but interdependent sets of users*

[73] OECD (2019), "*An Introduction to Online Platforms and their Role in the Digital Transformation*", OECD Publishing, Paris, pp. 23-25, available at: https://read.oecd-ilibrary.org/science-and-technology/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation_53e5f593-en#page27

[74] OECD (2019), "*Vectors of digital transformation*", OECD Digital Economy Papers No. 273, OECD publishing, Paris, available at: https://www.oecd-ilibrary.org/docserver/5ade2bba-en.pdf?expires=1664264447&id=id&accname=guest&checksum=787A7F86A22AF6271864D4A168F348E5

[75] Brynjolfsson E. *et al.*, "*Scale Without Mass: Business Process Replication and Industry Dynamics*", Harvard Business School Technology & Operations Mgt. Unit Research Paper No. 07-016, 2008, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=980568

[76] OECD (2012), "*The Digital Economy*", OECD publishing, Paris, available at the following link: https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf

[77] It must be said, however, that network effects as well as scale without mass and so on, can also be factors that make it easier for newcomers offering a better service to displace incumbents fastly. Therefore, the same characteristics that once helped a platform to become dominant in a market may eventually shift in favour of an entrant and start working against the incumbent.

[78] Thanks to this effect, successful platforms can experience a great growth that would be impossible to achieve in traditional markets. Facebook can be a clear example of this, as it reached 100 million users in a little more than four years.

[79] It has to be said however, that these features are generally identified in most platforms, but not in all. Certain features (such as network effects and data usage) are more pronounced and relevant in many platform cases. See van Eijk N. *et al.*, "*Digital platforms: an analytical framework for identifying and evaluating policy options*", TNO report, Dan Haag, 2015, p.46

(whether firms or individuals) who interact through the service via the Internet[80]". This rough definition of platform entails that three elements are at the same time sufficient and necessary for an entity to be classified as an online platform[81]:

1. The entity under scrutiny offers a service or a structure to its users;
2. The mentioned service/structure is operated via the Internet;
3. The aim of the service is to ease and promote interaction among two or more groups of users (their status notwithstanding).

This definition needs, however, to be reviewed, as it is too indefinite and restrictive at the same time.

3.1 **Should one-sided providers be considered as platforms?**

In the economic literature, according to what we have said so far, online platforms act as two or multi-sided markets facilitating interactions and transactions among groups of users (at least two sets of them), differing from traditional pipeline business model because most of the value generated by the platform is raised by the same users rather than by the supply of a product or service and because they lean on positive network effects[82].

Therefore, "*In its purest form, an online platform simply offers a (virtual) transaction space where suppliers and consumers can meet. The platform does not intervene in the transaction, except by asking for a fee from one or multiple sides of the transaction in order to make a profit. A platform does not take control over the object of the transaction, meaning that it cannot dictate a product's price, but, on the other hand, it bears less risk compared to a reseller*[83]".

This notion could be, however, questionable, as it significantly narrows down the scope of online platforms and excludes from the category of digital platform other important online service providers (such as pure reseller) that, even if sharing similar characteristics,

[80] OECD (2019), *supra* note 73 at 21

[81] Bertolini A., Episcopo F., Cherciu N.A., "Liability of online platforms", Study, Panel for the Future of Science and Technology, 2021, at 13

[82] European Commission (2016), *supra* note 10, at 2

[83] *Id.* at 3. As Hagiu said, the main difference between two (or multi)- sided platforms and single-sided one lies in the degree of control exercised by the entity over the transaction. See Hagiu (2007), *supra* note 51.

have decided to use a different business strategy than that of serving different sides at the same time.

As an example, providers of Video on Demand (VoD) service, such as Netflix, which offer online streaming content in return of a monthly subscription, usually operate as one-sided providers that do not facilitate interactions between its users[84]. This clearly means that, for single-sided business model, direct network effects operate in a limited way (there is no direct interaction among customers), while indirect network effects are lacking because there is no relation between the customers and the content providers from which the platform acquires content. For this reason, one-sided entities are often not regarded as platforms, but considered as simple reseller[85].

Even if making such a distinction between entities acting as reseller and those offering a space for interactions and transactions may prove to be relevant for policy purposes, since the control exercised by the entity over the transaction changes depending on the business model adopted (resellers, unlike platforms operating as intermediaries, take full control over the inputs from suppliers, assuming most of the commercial risk), this should not lead to preclude one-sided entities from the scope of platform. Indeed, while these two business models can be seen as the two extremes of the same spectrum, several business models fall in a grey zone, depending on the level of control exercised on the overall operations[86].

Furthermore, given the existence of entities like Netflix, we should also take into the due consideration that a digital platform can be operated as a two-or multi-sided platform, "*but the operator of the platform may choose not to do so*[87]". As a matter of fact, the choice to operate a platform as a multi-sided entity is a strategic one that aims at generating and incorporating indirect network effects, but this business strategy may change over time[88]. Many digital undertakings have even adopted a hybrid solution, operating as intermediaries in some cases, as well as pure reseller in others. Thus, the economic model adopted by a company operating digitally cannot be used as a discriminatory criterion.

---

[84] van Eijk N. *et al.*, *supra* note 79, at 11.
[85] *Id*. at appendix C
[86] Bertolini A., Episcopo F., Cherciu N.A., *supra* note 81, at 14
[87] Batura O., van Gorp N., Larouche P., "*Online Platforms and the EU Digital Single Market. A response to the call for evidence by the House of Lord's internal market sub-committee*", e-Conomics, Rotterdam, 2015, at 2
[88] See Hagiu A., Wright J., "*Marketplace or Reseller?*" Management Science, Vol. 61, No. 1, pp. 184–203, 2015. Many digital undertakings have adopted different business strategy in their life. Amazon, as an example, started as a pure reseller but now operates as a marketplace as well.

In the light of the above, it would be preferable to adopt a broader notion of platform including also entities offering primarily or exclusively products/services acquired by third parties (or even self-produced) whenever, nevertheless, this operation can still be regarded as a facilitation of the connection between different groups, despite the lack of a direct interaction between them[89].

3.2 **Internet Service Providers and online platforms: the risk of an overinclusive classification**

By contrast, the risk of adopting an extensive definition of digital platform is that entities which, although they operate digitally, differ deeply from online platforms and could lead to different legal and economic concerns, would however fall within the scope of the mentioned definition. Internet Service Providers (hereinafter "ISPs") may be an evident example of this hazard.

ISPs are undertaking providing end-users with a data connection allowing access to the Internet and the associated services (World Wide Web, Email, Chat rooms and so on)[90]. ISPs may also provide local, regional, and/or national coverage for clients or provide backbone services for other Internet service providers. In other words, they are commercial entities that usually charge their users – whether households, businesses, or governments – a monthly fee on a contractual basis in order to have access to the Internet[91].

ISPs are frequently considered as a sub-category of platforms because they operate in a multi-sided market by connecting different group of users to the Internet and, as a consequence, to online content providers and to their services. Accordingly, this would, at a first sight, imply that ISPs operate as digital services facilitating interactions between two or more but interdependent sets of users who can interact through the service via the Internet (as required by the rough definition set out in the third paragraph).

Nonetheless, since ISPs merely allow, thanks to their infrastructures, communication over the Internet to which they provide access, they stand out from digital platforms which,

[89] Bertolini A., Episcopo F., Cherciu N.A., *supra* note 81, at 15
[90] OECD (2004), "*Access Pricing in Telecommunications*", OECD, Paris, Glossary of Terms, at 214
[91] Perset K., "*The Economic and Social Role of Internet Intermediaries*", OECD, Paris, 2010, at 11

on the contrary, build their own services on that offered by ISPs. That is to say, online platform and ISP should not be perceived as interchangeable terms, because the former offers to the market services generally known as "over-the-top" (hereinafter "OTT"), which are provided to the users over the Internet but independently from the control of the latter[92][93]. To that end, we could say that ISPs grant consumers with a first layer of interaction (i.e., the access to the Internet), whereas digital platforms provide them with distinct content, operating on top of the latter[94].

With all this in mind, building on a study published by the EU Parliament and written by Andrea Bertolini and other Authors, it is possible to review the preliminary platform definition suggested by OECD (and introduced in the 3rd paragraph of this chapter), by stating that online platforms are entities that "*offer (primarily) OTT digital services or infrastructures to users, are or can be operated as a two- or multi-sided market business model, but may choose not to do so, and allow the overall facilitation of interaction of the different sides of the market, even when there is no direct interaction among them*[95]".

In the opinion of the Author of the present contribution, this definition can be useful for correctly addressing and regulating such a complex phenomenon because it is sufficiently broad to encompass all kinds of entities offering digital services within the EU market (with any distinctions that may be required, as in the case of ISPs), their business models or strategies notwithstanding and, moreover, its scope is also easily adaptable to the never-ending innovations characterizing the digital environment. Also, it perfectly fits with legislation designed to regulate the overall phenomenon of online platforms and that aims at countering possible distortion of competition within the EU market, as well as risk for consumers or end-users.

---

[92] BEREC (2016), "*Report on OTT services*", BoR (16) 35, at 14

[93] It must be highlighted, however, that the expression "over-the-top" service may be misleading in some cases, as it is frequently used but not clearly defined. For the purpose of this contribution, we will use the term OTT service as "*service [that] is not a transmission network but is instead a service that runs over an Internet network; moreover, the OTT service provider is typically distinct from the operator of the underlying network*". See, in this respect, Godlovitch I. *et al.*, "*Over-the-Top (OTTs) Players: Market Dynamics and Policy Challenges*", European Parliament, Directorate for Economic and Scientific Policies, 2015, at 22

[94] Bertolini A., Episcopo F., Cherciu N.A., *supra* note 81, at 15

[95] Bertolini A., Episcopo F., Cherciu N.A., *supra* note 81, at 16

3.3 How to properly tackle individual services challenges: From a functional approach to service-based one

Therefore, when it comes to legislation designed to regulate the overall phenomenon of online platforms and to counter all possible distortions of competition within the EU market, the broad definition of online platform provided above should be taken with a functional approach.

Such an approach is not surely new in the EU law. The European Court of Justice (hereinafter "ECJ") has, for instance, assumed a functional approach when defining the scope of the concept of undertaking[96]. In a nutshell, the ECJ developed in its case-law the notion of undertaking[97] by highlighting that, when assessing whether an entity can qualify as an undertaking, its legal status, its institutional structure, or its purpose is not what really matters, but the relevant activity carried out in the market at stake[98].

In the case of online platforms, this attitude clearly implies that, for an entity to be called "platform", it is sufficient that it offers OTT digital services in the market, allowing the overall facilitation of interaction of the different sides of the market, even when there is no direct interaction among themselves. Therefore, the number of sides pursued (business model), the pricing strategies adopted, as well as the characteristics of the service offered, are not relevant.

Furthermore, this approach requires that EU or Member States Authorities, in assessing whether an entity can be defined as digital platform and therefore be subjected to the pertinent legislation, should perform a case-by-case assessment, evaluating whether the entity at stake actually offers an OTT service in the market, facilitating the interaction between different groups of users. If not, the entity, even if it operates digitally, cannot be

---

[96] Lorenz M., An Introduction to EU Competition Law, Cambridge University Press, 2013

[97] According to the ECJ wording, the concept of undertaking "*encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way it is financed*". See European Court of Justice (1991), case C-41/90, "*Höfner and Elser v Macroton GmbH*", paragraph 21.

[98] The ECJ has further developed the notion of undertaking in several cases. See, among others, European Court of Justice (2002), case C-309/99 "*Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*"; European Court of Justice (1993), joined Cases C-159/91 and C-160/91, "*Poucet v Assurances Générales de France*"; European Court of Justice (1997), Case C-343/95, "*Calì and Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG)*"; European Court of Justice (1994), Case C-364/92, "*SAT Fluggesellschaft mbH v Eurocontrol*"; European Court of Justice (2003), General Court Case T-319/99, "*Fenin v Commission of the European Communities*"; European Court of Justice (1996), Case C-73/95P, "*Viho Europe BV v Commission of the European Communities*"; European Court of Justice (2009), Case C-97/08P, "*Akzo Nobel NV and Others v Commission of the European Communities*".

classified as online platforms and, thus, does not fall within the scope of the relevant legislation (as in the case of ISPs).

It shall be said, however, that depending on the specific category of service offered by a platform, different issues and risks for end-users might rise (as an example, social networks and marketplaces could lead to distinct challenges for legislators). Furthermore, given the incredible variety of services today offered online (number that is set to increase in the next future), several social, economic, and ethical implications are at stake.

As such, when both EU and national institutions plan to govern a specific category of platform (e.g., search engines or social medias) and/or service offered in the market, the notion of platform provided above shall be tailored enough to allow sector-wide rules to apply. To this purpose, I would suggest interpreting the functional approach mentioned before as a "service-based approach" that takes into consideration the specific category of OTT service(s) offered by a platform in the market, which would be useful to sufficiently narrow the scope of application of sectorial rules applying to specific digital platforms/services.

As a matter of fact, even this kind of approach is not entirely new in the world of digital markets regulation. Indeed, as we will discuss in greater detail in the next Chapter, it has somehow been endorsed by the European Commission in order to narrow the scope of application of the Digital Markets Act[99].

To sum up, the European Commission has provided a list of digital services that qualify as "core platform service" and, thus, are subjected to the rules provided within the Digital Markets Act, while other categories of services do not fall within the scope of the Regulation[100].

4. **Preliminary observations**

Online platforms undoubtedly represent a multifaceted phenomenon involving several disciplines (e.g., Economics, Competition and Civil law etc.) that needs to be

---

[99] European Commission (2020), Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en

[100] As an example, article 1, point (3) of the DMA clearly explains that the Regulation does not apply to markets related to electronic communications networks or services.

understood as a unique, complex phenomenon, despite different characteristics, peculiarities and posed challenges.

It is mainly for this reason that both European and national Institutions, in trying to regulate such a tricky matter, should set aside all the different taxonomies and classifications proposed in these last two decades, since "*creating different legal rules for the same economic conduct depending* [just] *on whether the market can be described as one-sided or two-sided is a mistake that could lead to widespread confusion*[101]". Indeed, in the opinion of the Author of this contribution, excessively taking into account every specific feature of online platforms, would probably be useless and risky, since it could lead to neglect more relevant issues from which anti-competitive conducts, aiming at harming or even eliminating competition, might result.

To avoid this hazard, an essential definition of digital platform, like that offered in the second paragraph of the present Chapter, should be adopted as a guideline not only for the eventual future legislation related to digital markets, but also for the extant normative framework in this field which, as a matter of fact, has been frequently perceived as unclear.

CHAPTER 2: LEGISLATIVE TOOLS FOR REGULATING DIGITAL PLATFORMS CONDUCT

1. Digital markets and the challenges to the existing legal framework (preamble)

How highlighted in the previous Chapter, the peculiar features showed by digital markets can lead to important benefits for incumbent undertakings operating therein, particularly for bigger ones that have reached a dominant position thanks to the characteristics mentioned before (e.g., return to scale and scope, strong network effects, huge amount of user data collected). On the other hand, these same features can act as a threat against smaller undertakings or newcomers, for which it is frequently difficult, if not impossible, to challenge the bigger ones, because of a lack of resources and options. Indeed, dominant undertakings can easily exploit the positioning they gained to exclude and

[101] Carlton D.W., Winter R.A., "*Vertical MFN's and the Credit Card No-surcharge Rule*", 2018, at 29

eliminate actual and possible rivals from the market, resulting in anticompetitive conducts and risking to severely harm competition in the EU market.

On the grounds of these threats, both the European Commission and national competition Authorities (hereinafter "NCAs") have made important efforts to efficiently ward anticompetitive behaviours off digital markets, by attempting to properly apply the existing legal tools (namely Arts. 101 and 102 of the TFEU[102], as well as the EUMR[103]), designed for "traditional" markets, to online platforms operations.

As a matter of fact, in the last years, NCAs have struggled to protect competition among undertakings in the digital environment, by opening several investigations on digital platforms and imposing significant monetary sanctions on the former, due to their anticompetitive behaviours[104].

Nonetheless, under the extant legal framework, NCAs (along with the EU Commission) can only proceed *ex-post*, since they shall assess, on a case-by-case basis, whether the conditions for intervention are met. As an example, according to the wording of Article 101 TFEU, the precondition for an Authority to act is that it must prove that there has been explicit coordination (*i.e.*, an agreement or a concerted practice) among the undertakings at stake. Under Article 102 TFEU, the precondition for an administrative intervention is first to demonstrate that an undertaking has a dominant position in a relevant market and then, that the dominant entity under scrutiny is abusing of its positioning within the market to harm competition in several ways.

This because Article 102 does not prohibit dominance as such, since the dominant position of undertakings in the market is often the result of both their inventions and investments. Indeed, the same competition regime fosters such efforts by entrepreneurs as it can constitute the foundations of the competitive layout of our society[105]. Therefore, unless there is an abuse, there can be no findings of an infringement of EU antitrust law.

---

[102] The consolidated version of the Treaty on the Functioning of the European Union is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN

[103] The EU Merger Regulation, as we will see in the third Chapter, is the most important legal tool devoted to the control of concentrations between undertakings in the EU. The EUMR is available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF

[104] There are many instances of NCAs protecting competition in the EU market. See, among others: AGCM (2021), Decision A528-FBA Amazon, in bulletin n. 49 of 13th December 2021; Autorité de la concurrence (2021), Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector; Bundeskartellamt (2016), Decision B 9-121/13.

[105] Article 102 does not prohibit dominance as such. Therefore, unless there is an abusive conduct, there can be no finding of an infringement under article 102 TFEU. See Lorenz M., *supra* note 96, at 189

However, all these requirements dramatically limit the scope for intervention under EU competition law in digital markets. As a matter of fact, NCAs cannot simply assume that a provider of online platform services enjoys a dominant position within the meaning of Article 102 TFEU, even where some important indicators (e.g., high market shares, large turnover, great number of both business and end-users) would suggest so[106]. They rather must carry out a proper investigation aimed at defining the relevant market and the actual position of the undertaking under scrutiny therein, as well as assessing whether the conduct of the undertaking under scrutiny is genuinely infringing Competition law.

Yet, in digital markets making such an investigation is especially tough, since NCAs face at least four main obstacles[107]: (i) successfully defining the relevant market; (ii) correctly assessing the market power; (iii) finding whether the behaviour of an undertaking amount to an anticompetitive conduct; (iv) tracking mergers that are not notifiable under the EU law and assessing whether notified mergers can significantly impede effective competition (this topic will be dealt with in detail in Chapter three).

1.1 **Defining the relevant digital market: a thorny issue**

Market definition is probably the most important analytical tool for Authorities and Courts to examine and evaluate competitive issues[108]. Indeed, by defining a relevant market, then calculating and assigning market shares, competition authorities seek to assess the market power of undertakings, which is of utmost relevance in understanding competition impact. Additionally, defining the relevant market can be helpful to identify the market participant and to delineate its geographical boundaries, determining in this way the dimension of the area in which specific actors compete[109]. Moreover, one of the main purposes of market definition is to verify in a systematic way the competitive constraints that the involved undertakings have to face.

[106] Ibáñez Colomo P., "*The Draft Digital Markets Act: A Legal and Institutional Analysis*", in Journal of European Competition Law & Practice, Vol. 12, No. 7, pp. 561-575, 2021, at 566
[107] Puric S., *supra* note 3, at 300
[108] OECD (2012), "*Market Definition*", Best Practice Roundtables on Competition Policy, at 11
[109] *Id.* at 20

More in detail, the relevant market needs to be defined with a reference to relevant product/service and geographical markets that circumscribe the object and area in which competition takes place. The aim of this assessment is to "“*identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure*[110]*"*.

The relevant product/service market comprises all products or services that consumers consider substitutable with a view to their characteristics, price, and intended use[111]. At the same time, the relevant geographic market "*comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*[112]". Therefore, trying to sum up, the concept of the "relevant market" is thus a legal concept whose goal is to identify, within a set of market-based relations, those relations which are relevant in a given case[113].

Nevertheless, the general criteria for market definition (*i.e.*, product-side and geographic-side substitution) are, in principle, also applicable to digital markets. Still, the high speed at which digital markets are evolving and the inability to predict the future of digital innovation can pose particular challenges for assessing the relevant market both at a conceptual and a practical level[114]. As the EU Commission pointed out "*the methodology for defining technology markets follows generally the same principles as the definition of product markets. However, it can be more difficult to compare technologies, to assess their*

[110] European Commission (1997), "*Commission notice on the definition of relevant market for the purposes of Community competition law*", 97/C 372 /03, of 9 December 1997, para. 5, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN

[111] *Id*. para. 7. According to this paragraph, the basic criteria for identifying the relevant product market deal with "demand substitution" and "supply substitution". With regard to demand substitution, the determination of products that can be considered as substitutes by consumers is made by applying the so-called "small significant non-transitory increase in price test" (SSNIP test). The second criterion is, conversely, useful to determine the capability of undertakings operating in a specific market to quickly adjust their productive process in order to realize new products or services without incurring significant additional costs or risks in response to small and permanent changes in relative prices

[112] *Id*., para. 8. Again, the main principle to identify the relevant geographic market deals with substitution. Particularly, there will be substitutability under a geographic perspective when, since the increase in price of a product in a specific geographic area, either consumers of that area are willing to buy the product from other suppliers located in another area, or supplier are able to provide the product in the geographic area in which there was an increase in price.

[113] Federal Ministry for Economic Affairs and Energy (2019), "*A New Competition Framework for the Digital Economy: Report by the Commission 'Competition Law 4.0*", at 27, available at: https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3

[114] Crémer J. *Et al.*, *supra* note 26, at 47

substitutability or to take into account technologies that are currently only used in-house and/or are not or only to a very limited extent being licensed[115]".

One first challenge deals with product substitution. Indeed, while in traditional industry the definition of the relevant market is generally based on physical product having similar features, in the digital environment markets generally encompass a wider range of products or services which consumers can consider as substitutes. As a consequence, the traditional boundaries between products or services present in the traditional market economy have begun to vanish, mainly because of the continuous emergence of new technologies[116]. Thus, the identification of the relevant digital market needs to be more flexible, as different technologies may belong to the same market when consumers see them as interchangeable and, therefore, all providers of these different technologies might be considered as competing in the same market[117] . A guiding principle for Authorities, in this case, could be to not conclude that the relevant product market coincides with the product or technology offered by the undertakings under investigation[118].

Another important challenge in evaluating the relevant digital market is due to the multi-sidedness nature of digital platforms. In other words, the problem is to assess the number of markets in which platforms operate. As an example, in evaluating the market for payment card system, should Authorities consider that there is just a market for payment cards services or, vice-versa, that at least two separate markets (*i.e.*, a market for payment cards services to cardholders and one for the same service to merchants) are involved?

Scholars have long debated over this topic[119], trying to find a clarification on when Competition law analysis should start from the existence of separate markets on each side of the platform and when Authorities should assume the existence of one single market combining the different sides of a platform[120]. Indeed, adopting a narrow definition of the relevant market could result in missing important insights that need to be considered for the

[115] OECD (2012), *supra* note 108, at 339
[116] GSMA (2016), "*Resetting competition policy frameworks for the digital ecosystem*", at 15
[117]Peitz M., Schweitzer H., Valletti T., "*Market Definition, Market Power and Regulatory Interaction in Electronic Communications Markets*", Centre on Regulation in Europe study, 2014, at 40
[118] GSMA (2016), *supra* note 116, at 15
[119] See, among others: Filistrucchi L., Geradin D., Van Damme E., Affeldt P., *supra* note 53; Robertson V., "*Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy*", The Routledge Handbook of Smart Technologies: An Economic and Social Perspective, 2022, Chapter 21; Graef I., "*Data as Essential Facility, Competition and Innovation on Online Platforms*", Kluwer Law International BV, 2016;
[120] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 28. From this debate, two different main approaches have raised: the "single market approach", which defines the relevant market as encompassing both sides of a platform, and the "multiple market approach" that, conversely, highlights the need to find at least two distinct markets when dealing with online platforms operations.

analysis. By contrast, a broader definition, which consider the whole platform as covered, could be definitely more complex and difficult to achieve. The dispute is, however, still open since "*the question of whether one should define one or two markets therefore needs to be decided on a case-by-case basis*[121]".

A third issues in this context is related to products/services offered by online platform "free of charge" to consumers, a strategy that, as we said in the first Chapter, a platform can adopt to gain market share and attract a group of users ahead of potential late entrants. As an example, according to the Higher Regional Court of Düsseldorf, markets of this nature (where there is no payment for the services or goods acquired) cannot even "exist" in antitrust terms and that only the "side" that realizes the payment should be considered as the relevant market[122].

The German Competition Authority came, however, to a different conclusion, suggesting that, depending on circumstances, the side to which a platform does not charge a fee can still constitute a market under Competition law terms. Indeed, according to the German Authority, it would be possible to view the provision of data by a user in exchange for a service as sufficient to qualify as a market relationship (analogue to the payment of money)[123]. It also added that, not to define the side that does not pay as a market could be misleading, as the behaviour of consumers who do not pay for the platform services would be not taken in the due consideration, neglecting in this way the fact that there could be other competition parameters (besides that of price), such as quality or the degree of innovation, that may exercise a considerable influence on the consumers' choices[124].

Finally, a further challenge to market definition in the digital world pertains the application of the small significant non-transitory increase in price test[125] (hereinafter "SSNIP test") to digital markets. This test is of particular value for verifying the substitutability of two distinct products for customers. Indeed, the SSNIP test is implemented by observing whether a hypothetical small increase in price (in the range of 5% to 10%) on

[121] Bundeskartellamt (2016), *supra* note 27, at 6

[122]Higher Court of Düsseldorf (2015), decision of 9 January 2015, Ref. VI Kart 1/14 (V), para 43

[123] Bundeskartellamt (2016), *supra* note 27, at 8. As noted by the German Authority, the EU Commission has, in several cases, considered and examined several online markets although practically all of the services offered there were for free. See, among others, European Commission (2011), Case M. 6281, "*Microsoft/Skype*"; European Commission (2014), Case M. 7217, "*Facebook/ WhatsApp*"

[124] *Id*. at 10

[125] This test was firstly introduced in 1982 in the U.S. Department of Justice Merger Guidelines, while it was implemented in the EU in the Nestlé/Perrier case in 1992 and it has been officially recognised by the European Commission in its Commission's Notice for the Definition of the Relevant Market in 1997. See, European Commission (1997), *supra* note 110, paras 15-23

the product A would lead a significant number of consumers to switch to another product B (*i.e.*, the substitute product). If the number of consumers switching from product A to B would make the increase in the price of product A unprofitable because of the reduction in its sales (caused by the increase in its price), the two products at stake belong to the same market. Then, the test is repeated again until a set of products is identified for which a prise rise would not induce a sufficient substitution in demand[126].

This kind of trial was, however, designed for traditional markets (*i.e.*, in a single-sided market perspective). This is the reason why several issues could come to light in applying this test to multi-sided markets. As an example, when a two-sided platform charges two different prices to its sides, which one should be risen? Increasing one price without modifying the price on the other side, in fact, would not make much sense and, what is more, there is no clear theoretical guide to know which way price changes on both sides should be balanced[127].

To make matters worse, there are at least other two troubles in applying the SSNIP test to digital markets: the first one is that this test does not work with zero-price markets, as it focuses on the willingness of customers to switch providers in the event of a hypothetical price increase (while many digital platforms offer free access to their service). Thus, price might not be a reliable indicator to measure the substitutability of services in the online environment where providers compete on the basis of non-price dimensions such as quality and innovation[128].

The second one is that the SSNIP test does not take into the due account the existence of indirect network effects in digital markets. As a matter of fact, this test would not be able to account for the fact that a reduction of the number of customers on side A is likely to lead to a drop in the number of customers on side B. Given this, if the price on side B is kept constant, there would also be a loss in profits on side B. As such, the risk of applying a standard SSNIP test, which does not account for indirect network effects, is that in such cases the market will be defined too narrowly[129]. Hence, it has been argued that a test based on other indicator such as quality, like the "small but significant non-transitory decrease in quality test" (also known as SSNDQ test), could be a viable alternative basis for measuring substitutability of free services[130].

[126] *Id.*, para. 17
[127] Crémer J. *Et al.*, *supra* note 26, at 45
[128] Graef I., supra note 119, at 107
[129] Peitz M., Schweitzer H., Valletti T., *supra* note 117, at 42
[130] [130] Gebicka A., Heinemann A., "*Social Media & Competition Law*", world Competition 37, no. 2 (2014), pp. 149–172, at 156.

To sum up, digital markets, by virtue of their unique features, have raised new and tricky challenges related to market definition and both NCAs and Courts have to deal with them. It goes without saying that market definition is, still today, the corner stone on which antitrust analysis or regulatory are built and therefore the Notice on the definition of relevant market published in 1997 should be updated in order to provide Authorities with the necessary instruments correctly identify the perimeter of the digital market at stake.

1.2 **Assessing market power in digital markets**

Once the relevant market has been identified, the next step is to determine whether the undertakings involved in the proceedings hold a position of market power in the market at stake. Market power is, particularly, "*the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time*[131]". In other words, market power reflects the ability of an undertaking to behave in ways that could be detrimental to the interests of end users (for example, by setting excessive prices, delivering poor quality, or failing to innovate) or that might foreclose the market to more effective competition.

Market power is a crucial tool not only in assessing the existence of a dominant position by an undertaking under article 102 TFEU, but also in appraising mergers among firms[132]. Additionally, market power has a certain significance even under article 101 TFEU, as, for instance, block exemption can be granted only when specific market share thresholds are not surpassed, considering that low market shares are deemed to be evidence of a lack of market power[133].

Nevertheless, even if there is no definitive consensus over the requirements and modalities that should been taken into consideration in order to establish whether an

---

[131] European Commission (2005), "*DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*", para. 24, available at: https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

[132] As an example, Article 2 para. 3 of the EUMR explicitly enumerates the creation or strengthening of a dominant position as one of the main impediments of effective competition that can lead to the prohibition of a merger. For more info, see COUNCIL REGULATION (EC) No 139/2004, *supra* note 103

[133] Article 3 of the Regulation on the application of article 101(3) TFEU clearly states that for the exemption to apply, market shares of both buyer and supplier should not exceed the 30% threshold. See, European Commission (2010), Commission Regulation No 330/2010 on the 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, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF

undertaking has strong market power in a given market[134], traditionally Authorities have relied on quantitative measures to determine whether a firm is dominant (in the relevant market). Particularly, market power has usually been measured by market shares, *i.e.*, by the ratio of sales of a firm to the total sales in the market, and market dominance has been assumed when the market share was above a certain threshold[135].

The digital economy has, though, profoundly altered the legal, technical and economic fundamentals such that these quantitative measures are not so meaningful anymore. Indeed, in digital markets, branded by high dynamicity and disruptive innovation, market shares can be a transient phenomenon and, therefore, it could be inappropriate to establish market power solely on the basis of high market shares[136].

Indeed, as pointed out by the Office of Fair Trading (the former enforcer of both consumer protection and competition law in the UK) "*market shares alone might not be a reliable guide to market power, both as a result of potential shortcomings with the data […] In a market where undertakings compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective […] For example, effective competition in innovation might mean that, in order to stay ahead of its rivals, the market leader must improve its products and processes on a regular basis*[137]". The same idea was endorsed several times by the EU Commission[138].

---

[134] There are several theories and models that try to explain how to assess market power. As an example, while some Authors identify market power with the ability of an undertaking to raise prices, others regard commercial power as an indicator of market power. Still, some scholars argue that an undertaking has strong market power when it is able to hurt its competitors (for instance, raising a competitor's input costs for a product that is interchangeable with its own to exclude it from the relevant market). For more info on these theories see, among others: Monti G., "*The Concept of Dominance in Article 82*", in European Competition Journal 2(1), pp. 31-52, 2006; Abba P. Lerner, "*The Concept of Monopoly and the Measurement of Monopoly Power*", 27 J. Reprints Antitrust L. & Econ. 471 (1997); Krattenmaker G., Lande R.H., Salop S.C., "*Monopoly Power and Market Power in Antitrust Law*", 27 J. Reprints Antitrust L. & Econ. 585 (1997)

[135] The European Commission in its guidelines on the assessment of significant market power has tried to set some market shares thresholds which aim at simplifying the assessment by NCAs. For instance, when market shares exceed 70% an absolute presumption of dominance applies, and no other evidence should be necessary to prove the existence of dominance; on the other hand, market shares below 10% rule out the existence of a dominant position in a given relevant market. For more info on this topic see European Commission (2018), Communication from the Commission - Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507(01)&from=EN

[136] GSMA (2016), *supra* note 116, at 20

[137] Office of Fair Trading (2004), "*Assessment of Market Power*", OFT415, para. 4.4 and footnote 19

[138] See, among others, European Commission (2014), Case M. 7217, "*Facebook/ WhatsApp*", *supra* note 123, para. 99; European Commission (2011), Case No COMP/M.6281- "*Microsoft/ Skype*", *supra* note 123, para. 80; European Commission (2018), Case M. 8788, "*Apple/Shazam*", para 162

Thus, in highly dynamic markets, high market share does not automatically imply market power and, moreover, in digital markets incumbents are often and successfully challenged by new entrants, so that technological changes and innovation could erode undertakings' market share fairly quickly. The case of Blackberry, which lost its importance because of the emergence of multi-platform apps (such as WhatsApp) once Android and Apple devices were introduced in the market, is a clear demonstration of this phenomenon[139]. Therefore, other factors such as the role of big data as a source of market power should be investigated.

The question of whether data can contribute to gain market power has started attracting the attention of both scholars and policy makers. Indeed, "*the rise in the use of the Internet for e-commerce, online streaming, and social networking has made data collection a valuable strategic asset for market players in the digital ecosystem. In this fast-developing environment, providers of content and new data services have adopted a wide variety of business models that facilitate data collection, including pay-per-use, subscription services with no usage charges, and services which are free to access and funded by advertising income*[140]".

Due to the importance of data collection in digital markets, in assessing the extent to which data are able to enhance market power NCAs should at least take into consideration that: (i) their scope and variety is relevant for the competitive performance[141]; (ii) data can be easily replicated[142].

More in detail, having access to great data can amount to strong market power when other undertakings cannot freely and easily access these data, which means they cannot be substituted for or collected or purchased elsewhere. This phenomenon could even allow strong digital platforms to foreclose rivals by cutting off access to vital data[143].

[139] For more info see, Nazzini R.," Online Platforms and Antitrust: Where Do We Go from Here?", in Italian Antitrust Review, Vol. II, N. 1 (2018)
[140] GSMA (2016), *supra* note 116, at 21
[141] *Id*.
[142] This is because data are characterised by a peculiar economic feature: they are non-rivalrous goods, which implies that the collection of some piece of data from one entity does not preclude others from gathering the same information. As an example, consumers usually provide many market players with their personal information (*e.g.,* home address, phone number, date of birth, and so on), in order to have access to different services. These data can be, thus, used by different digital platforms at the same time. For further information see CMA, Report on the CMA's call for information, "*The commercial use of consumer data*", June 2015, at 75
[143] *Id*.

To make matters worse, the marginalization of smaller competitors due to differentiated data access might lead to a self-reinforcing loop: indeed, access to a larger amount of data may support better services, which in turn can attract more customers and more data (i.e., the so-called "snowball effect"). As a result, due to difference in market power and in the possibility to access data, larger undertakings are able to obtain higher revenues thanks to which they can fuel higher investments (such as new algorithms, new functionalities, entry on adjacent markets, etc.), attracting in this way even more customers and more data. Such a trend could actually harm competition by converging towards a monopolization of data-related markets[144].

Nonetheless, the extent of the impact of big data on market power depends on the product under scrutiny and needs to be assessed on a case-by-case basis, as highlighted by the English Competition Authority: "*larger online platforms may have some competitive advantage if there is proprietary data to which they have access. To the extent such data is inaccessible to rivals, it may confer a form of 'unmatchable advantage', making it hard for competitors to compete although this depends on the facts of the particular case*[145]".

It should be pointed out, however, that over the last ten years different Authorities have concluded that holding data does not necessarily imply that incumbent undertakings can successfully keep competitors out. Indeed, when data are widely available and competitors can easily access them, then greater access to data does not provide a competitive advantage[146]. As an example, in the *Google/DoubleClick* case[147] the EU Commission considered that the possibility of combining DoubleClick's and Google's data collections did not constitute an advantage to the new merged entity as competitors could easily access similar data, and there were already competitors (e.g., Microsoft and Yahoo!) that ran both a search engine and offered advertisement services. On those grounds, the Commission declared the merger as compatible with the common market[148].

---

[144] Autorité de la Concurrence & Bundeskartellamt (2016), *supra* note 6, at 13

[145] CMA (2015), response to the European Commission's Consultation *"on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy"*, at 6, para. 14. The English Competition Authority has also stressed that restrictions in the access to consumer data can generate barriers to entry and even lead to the creation of a dominant position in the market (or can, however, exacerbate an already existing position of market power), particularly where data can be considered as an important input in the production of a good or service

[146] GSMA (2016), *supra* note 116, at

[147] European Commission (2008), Case COMP/M.4731, "*Google/DoubleClick*"

[148] It is noteworthy that the Federal Trade Commission was of the same advice and authorized the merger between Google and Doubleclick since it would have not lessened competition. See Federal Trade Commission press-release of the 20th December 2007, available at: https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation

Therefore, given all the remarked criticalities in assessing market power in digital markets, it would be probably useful to clarify and more precisely define the concept of market power for use in the context of digital platforms, in order to allow NCAs to better counter possible abuses in the future[149].

1.3 **How to correctly evaluate abusive behaviour in digital markets**

Arts. 101 and 102 TFEU are, as said before, the spotlight in evaluating anti-competitive conduct of undertakings, as they provide an illustrative, yet non-exhaustive, list of unilateral and multilateral behaviours forbidden under EU Competition Law, that can be also adapted to the peculiarities of digital markets. Though, in some cases digital platforms might take advantage of such existing imperfect laws and regulations that, being designed for traditional markets, present loopholes that can help them to undertake abusive conduct without being sanctioned[150].

As far as multilateral behaviour is concerned, the application of Article 101 TFEU in digital markets does not appear to require, *prima facie*, supplementary efforts by enforcers, as anti-competitive agreements seem to have equivalent shapes both online and offline[151].

Article 101 TFEU has been, for instance, applied in assessing the negative outcomes from digital platforms' algorithms. Indeed, algorithms can, for instance, be used by online platforms for the purpose of dynamic pricing[152], a strategy that involves "*adjusting prices to changes in demand and supply, often in real time, not implying any kind of discrimination between consumers[153]*". Nevertheless, platforms liability under an antitrust perspective for such a behaviour usually depends on whether algorithms are leaned on in order to collude with other undertakings and their algorithms, in which case Article 101 TFEU can be applied[154].

---

[149] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 31. More specifically, the Competition Law 4.0 report calls for a separate Commission guidance on assessing market power in digital platforms and further research into cross-market foreclosure strategies in the digital economy

[150] Motta M., Peitz M., "*Intervention triggers and underlying theories of harm*", Expert advice for the Impact Assessment of a New Competition Tool, 2020, at 31

[151] Robertson V., *supra* note 119, at 12

[152] Autorité de la Concurrence & Bundeskartellamt, Algorithms and Competition (2019), at 4

[153] OECD (2018), Background Note by the Secretariat, "*Personalized pricing in the digital era*", at 9

[154] Robertson V., *supra* note 119, at 12

Article 101 TFEU came into play also in the case of Most Favoured Nation clauses (hereinafter "MFN clauses") implemented by online platforms in their contractual relationships with third parties. More in detail, MFN clauses are contractual terms agreed between firms at different levels of the value chain (in the digital markets online platforms and service providers or suppliers), which usually establish that a seller will offer its good or service to the counterparty on terms that are as good as the best terms offered to third parties[155]. However, the emergence of MFN clauses in digital markets, most notably in the online booking sector where online travel agencies[156] (hereinafter "OTAs") operate, has led to a number of antitrust investigations by NCAs, which resulted in the well-known *Booking.com* case[157].

Also, Article 101 has been applied to distribution agreements in the online sphere. As an example, the ECJ in a preliminary ruling of one of its cases highlighted that a supplier could not impose an absolute ban on online sales on its distributor, as this kind of contractual clause would generally amount to an infringement of Article 101 TFEU[158].

Nevertheless, as "*the growth of online sales and online platforms has had a significant impact on distribution models*[159]", the question of online distribution and its impact on competition has been highly debated and played a fundamental role in the revision of the Vertical Block Exemption Regulation[160] (hereinafter "the VBER"), which sets out the conditions under which agreements between suppliers and buyers are not considered as

---

155 Oxera (2014), "*Most-favoured-nation clauses: falling out of favour?*", in Agenda Advancing economics in business, available at the following link: https://www.oxera.com/insights/agenda/articles/most-favoured-nation-clauses-falling-out-of-favour/

156 OTAs are online platforms which allow consumers to book a hotel room, a flight, or even other categories of related services (such as car rental etc.). Generally, their business model is the agency one since OTAs act as online intermediaries operating in the middle between the suppliers of travel services and consumers, profiting from the commissions received. For further information on OTAs see Colangelo M., Zeno-Zencovich V., "*La intermediazione on-line e la disciplina della concorrenza: i servizi di viaggio, soggiorno e svago*", in Diritto dell'Informazione e dell'Informatica (Il), vol.1, 2015

157 Starting from 2010 several NCAs opened investigations into vertical agreements between hotels and OTAs which were suspected of being in breach of Art. 101 (1) TFEU. See, among others, OFT (2010) Case CE/9320-10, available at: https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation; AGCM (2014), Decision I779, "*Mercato dei servizi turistici-prenotazioni alberghiere on line*", available at: https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/660EE2E99780F7B5C1257E350039D1CD/$File/p25422.pdf;

158 European Court of Justice (2011), Case C-439/09 "*Pierre Fabre Dermo-Cosmétique*"

159 European Commission (2020), Commission Staff Working Document "Executive Summary Of The Evaluation of the Vertical Block Exemption Regulation", at 2, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-EU-competition-rules-on-vertical-agreements-evaluation_en . For a detailed insight into this topic, see also: European Commission (2020), Commission Staff Working Document "Evaluation of the Vertical Block Exemption Regulation", available at the same link

160 European Commission (2010), *supra* note 133

anticompetitive. The VBER establishes, particularly, a "safe harbour" for vertical agreements within the meaning of the Regulation, when the market shares held by the supplier and the buyer entered into an agreement on the relevant markets do not exceed the thresholds set out in Article 3 of the Regulation (*i.e.*, 30% of the relevant market in which they act) and the agreement does not include any of the hardcore restrictions set out in Article 4 of the Regulation[161].

Nevertheless, in the updated version of the VBER published in 2022[162], with reference to digital markets the EU Commission stated that, even if "*agreements relating to the provision of online intermediation services are vertical agreements and should therefore be able to benefit from the block exemption*[163]", the rationale of exempting some kinds of vertical agreements should not be applied to "*vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services is also a competing undertaking on the relevant market for the sale of the intermediated goods or services* [given that] *providers of online intermediation services that have such a hybrid function may have the ability and the incentive to influence the outcome of competition on the relevant market for the sale of the intermediated goods or services*[164]".

Furthermore, the VBER has shed some light on the issue related to the MFN clauses in the digital environment, in an attempt to provide an explanation on when such clauses (also referred to as "parity obligations") can benefit from the exemption provided by the VBER, as they do not always restrict competition. Indeed, with the only exception of the so-called "across-platform retail parity clauses" (also referred to as "wide parity clauses") within the meaning of Article 5(1), point d of the VBER[165], in principle all types of parity obligation in vertical agreements (defined as "narrow parity clauses") can benefit from the

[161] This Article includes a comprehensive list of hardcore restrictions that remove the benefit of the block exemption because of the harm that they can cause to consumers. The VBER identifies different types of such restrictions: (i) Resale price maintenance (also known as "RPM"); (ii) Restrictions related to exclusive distribution, selective distribution and free distribution; (iii) Restrictions of the sales of spare parts

[162] European Commission (2022), Commission Regulation (EU) 2022/720 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, available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN

[163] *Id*. Recital 10

[164] *Id*. Recital 14.

[165] Retail parity obligations relate to the conditions under which goods or services are offered to end users. These obligations are often imposed by providers of online intermediation on the buyers of their intermediation services. According to the quoted Article of the VBER, "*any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services*" included in vertical agreements cannot benefit from the exemption provided by the same Regulation

exemption provided by Article 2(1) of the VBER. However, in order to provide NCAs with guidance on cases where the block exemption does not apply to MFN clauses in online intermediation services[166], the EU Commission has published some Guidelines on vertical restraints[167] that can be helpful for the assessment of such obligations. In greater detail, these guidelines not only identify some categories of parity obligations often applied in online intermediation services but also several factors that NCAs should take into the due account in assessing their potential harm on competition. Among the parity obligations applicable in digital markets, it is possible to mention:

- Retail parity obligations relating to direct sales channels, which are usually imposed by providers of online intermediation services relating to direct sales channels and prevent buyers of the services from offering prices and conditions on their direct sales channels that are more favourable than the conditions that they offer on the platform of the provider of online intermediation services that imposes the obligation[168]. In assessing their potential harm on competition, NCAs should evaluate, among other things, whether the investments made by the provider create objective benefits and whether the particular type and scope of parity obligation is indispensable for the achievement of the objective benefits;
- Upstream parity obligations, imposed by providers of online intermediation services relating to the conditions under which goods or services are offered to undertakings other than end users. In such a case, to assess the potential detriment to competition, NCAs should also take into account the conditions of competition downstream (*i.e.*, among the undertakings that purchase goods or services via the online intermediation service at stake)[169];
- Most favoured customer obligations typically imposed by manufacturers, wholesalers or retailers relating to the conditions under which they purchase goods or services as inputs from suppliers. This category of parity clauses

[166] According to Article 1, letter e of the VBER, online intermediation services can be defined as services that allow undertakings to offer goods or services: (i) to other undertakings, with a view to facilitating the initiating of direct transactions between those undertakings, or (ii) to final consumers, with a view to facilitating the initiating of direct transactions between those undertakings and final consumers, irrespective of whether and where the transactions are ultimately concluded

[167] European Commission (2022), Communication from the Commission "*Commission Notice Guidelines on vertical restraints*", 2022/C 248/01, p. 78, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01)

[168] *Id*. at 79

[169] *Id*. at 81

may lessen the incentives of input suppliers to compete and, as a consequence, raise input prices. As the guidelines highlight, "*Relevant factors for the assessment of these obligations include the relative size and market power of the supplier and buyer that agree the parity obligation, the share of the relevant market covered by similar obligations, and the cost of the input in question relative to buyers' total costs*[170]".

However, the fact that the revision process of the mentioned regulation has taken in great consideration the existence of online channels to provide goods and services is a clear indicator of how the extant antitrust legal framework could need to be somehow update, under certain circumstances, to efficiently address competition issues in the digital environment.

It must be stressed, however, that studies and reports on the topic under scrutiny almost exclusively focus on abuses of a dominant position in digital markets more than on anti-competitive agreements, in attempt to understand whether Article 102 can fully capture the peculiarities of digital platforms and intermediaries.

In the past, the EU Commission has actually been able to face abuse of dominance in the digital sphere to maintain a contestable competition therein, by leaning on traditional categories of abuse or even establishing new ones[171]. As an example, in the *Google Shopping* case[172], the EU Commission found that Google was exploiting its dominance in the market of general online search to implement a self-preferencing strategy (*i.e.*, putting its own comparison-shopping service at the top of the search result and downgrading, at the same time, rival services in the generic results of its search engine). According to the Commission, this practice would have hindered competition by granting Google with an unfair advantage and foreclosing concurrent shopping comparison search engines. Although the Commission Decision was in some respect controversial[173] and even appealed by Google, the General

[170] *Id*.
[171] Robertson V., *supra* note 119, at 16
[172] European Commission (2017), Case AT.39740 "*Google Search (Shopping)*", Commission Decision of 27 June 2017, C (2017) 4444 final, para. 344, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf
[173] According to some authors, by favouring its own service, Google was merely competing on the merits and, thus, self-preferencing as a theory of harm would not have been compatible with Article 102 TFEU. See, in this respect, Vesterdorf B., "*Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin*", Competition Law & Policy Debate, Volume 1, Issue 1, February 2015. Others have accused the EU Commission for not having spelt out in a clear way the legal test against which the lawfulness of self-preferencing was assessed. See, as an example, Ibáñez Colomo P., "*Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*", Chillin'Competition Blog, 2019

Court stated that it correctly found harmful effects on competition and, hence, upheld the fine of €2.42 billion imposed on Google[174].

Google has been, furthermore, recently fined by the EU Commission for abusing of its dominant position on other occasions as well. As an example, in the *Google/Android*[175] case of 2018, the EU Commission imposed on Google a fine of € 4.34 billion for anticompetitive restrictions it had imposed, since 2011, on mobile device manufacturers and network operators to cement its dominant position in general internet search. According to the Commission, aiming at ensuring that traffic was directed to Google Search, Google had infringed Article 102 TFEU by imposing on both mobile device manufacturers and network operators three different kinds of restrictions, namely:

- Firstly, Google required manufacturers to pre-install Google Search and the Chrome browser on devices running on the Android mobile operating system as a condition for licensing Google's app store (the Play Store);
- Second, Google paid manufacturers and network operators to make sure that only Google Search was pre-installed on such devices;
- Finally, Google obstructed the development of competing mobile operating systems by preventing manufacturers wishing to pre-install Google apps from selling even a single smartphone running on alternative versions of Android that were not approved by Google.

On these grounds, the Commission concluded that the abuses mentioned above were part of an overall strategy by Google to strengthen its dominant position in general internet search, at a time when the importance of mobile internet was growing significantly[176].

[174] European Court of Justice (2021), Case T-612/17 "*Google and Alphabet v Commission (Google Shopping)*". For a summary of the case See General Court of the European Union (2021), Press Release No 197/21, Luxembourg, 10 November 2021, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf

[175] European Commission (2018), Case AT.40099 "*Google Android*", Commission Decision of 18 July 2018, C(2018) 4761 final, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf

[176] For further information on this case, see: European Commission (2018), Press Release of 18 July 2018 "*Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581

Google, decided, however, to challenge the Commission's Decision before the European Court of Justice[177] that, at the end, largely confirmed the Commission's findings.

Additionally, in 2019, the Commission fined Google € 1.49 billion for abusing its market dominance by imposing a number of restrictive clauses in contracts with third-party websites which prevented Google's rivals from placing their search adverts on these websites[178]. In the Commission's view, Google had put in place a ten-years strategy in order to prevent its rivals from placing their search adverts on these websites. Accordingly, after having reviewed hundreds of agreements negotiated by google with the mentioned third parties, the EU Commission found that Google, since 2006 imposed an exclusive supply obligation, which prevented competitors from placing any search adverts on the commercially most significant websites. Such an obligation was then replaced in 2009 by the so-called "relaxed exclusivity" strategy through which Google aimed at reserving for its own search adverts the most valuable positions and at controlling competing adverts' performance. In the Commission's opinion such a strategy by Google was abusive because "*Google's rivals were not able to compete on the merits, either because there was an outright prohibition for them to appear on publisher websites or because Google reserved for itself by far the most valuable commercial space on those websites, while at the same time controlling how rival search adverts could appear*[179]". Even in this case Google challenged the Decision of the EU Commission before the ECJ[180] seeking for annulment, and the case is currently pending before the General Court.

It is noteworthy, also, that the EU Commission is still engaged, *inter alia*, in several ongoing investigations related to potential abuse of dominant position by large big-tech undertakings, such as: (i) the *Google/Adtech* case[181] involving a possible anticompetitive conduct by Google that would have favoured its own online display advertising technology

[177] European Court of Justice (2022), Case T-604/18 "*Google LLC v European Commission*", available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=81202

[178] European Commission (2019), Case AT.40411 "*Google Search (AdSense)*", Commission Decision of 20 March 2019, C(2019) 2173 final, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf

[179] European Commission (2019), Press Release of 20 March 2019 "*Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770

[180] European Court of Justice (2019), Case T-334/19 "*Google and Alphabet v Commission*", available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216769&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=4510448

[181] European Commission (2021), Case AT.40670 "*Google - Adtech and Data-related practices*"

services in the so called "ad tech" supply chain, to the detriment of competing providers of advertising technology services, advertisers and online publishers[182]; (ii) the *Apple - App Store Practices (music streaming)* case[183], an investigation launched to assess whether Apple's rules for app developers on the distribution of apps via the App Store violate EU competition rules[184].

Even NCAs have taken actions against potential abuse of dominant positions by very large digital platforms. As an example, the Italian Competition Authority has recently fined Amazon over € 1.128 billion[185] for having infringed Article 102 TFEU. In greater detail, according to the AGCM Amazon leveraged its dominance in the Italian market for intermediation services on marketplace in order to favour the adoption of its own logistics service - Fulfilment by Amazon (FBA) - by sellers active on Amazon.it, to the detriment of the logistics services offered by competing operators, as well as to strengthen its own dominant position. Indeed, Amazon tied to the use of FBA the access to a set of exclusive benefits essential for gaining visibility and increase sales on Amazon.it., among which it is possible to cite the "Prime" label, which made easier to reach the 7 million consumers members of Amazon's loyalty program. At the same time, Amazon forbidden third parties from associating the "Prime" label with offers not managed with FBA. Therefore, the AGCM found that, pursuing such a strategy, Amazon would have "*harmed competing e-commerce logistics operators, preventing them from presenting themselves to online sellers as providers of services of comparable quality to Amazon's FBA and thus capable of ensuring high visibility on Amazon.it*[186]". As a result of the mentioned strategy, considered

---

[182] For further insights on this ongoing investigation, see: European Commission (2021), Press Release of 22 June 2021 "*Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143 . See, also: European Commission (2023), Press Release of 14 June 2023 "*Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207#:~:text=Antitrust:%20Commission%20sends%20Statement%20of,practices%20in%20online%20advertising%20technology&text=The%20European%20Commission%20has%20informed,industry%20('adtech').

[183] European Commission (2020), Case AT.40437 "*Apple - App Store Practices (music streaming)*"

[184] See, in these respects: European Commission (2020), Press Release of 16 June 2020 "*Antitrust: Commission opens investigations into Apple's App Store rules*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073; European Commission (2021), Press Release of 30 April 2021 "*Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061

[185] AGCM (2021), *supra* note 104

[186] AGCM (2021), Press Release of 9 December 2021 "*Amazon fined over € 1,128 billion for abusing its dominant position*", available at the following link: https://en.agcm.it/en/media/press-releases/2021/12/A528

by the Italian Competition Authority as particularly serious and capable of harming competition in the involved market, the AGCM sanctioned Amazon.

However, despite the fact that the experience of both the EU Commission and NCAs with abuse of dominant position in digital markets suggests that Article 102 TFEU may be able to adapt to the digital market environment in many instances, in other scenarios the application of the same article might be a reasonable and viable solution in principle, but either it would not permit a quick response or the investigation carried out under it would be very challenging and might lead to uncertain results[187].

This phenomenon is presumably related to the specificities of digital platforms. Indeed, in dynamic and fast-changing markets, as the digital ones, where big online platforms by creating entire digital ecosystems can leverage their market power from one market into adjacent or even rather distant markets[188], the enforcement of *ex post* legislation such as Article 102 TFEU in order to sanction abuse of dominance may take probably too long and, "*if harm had been made, it could not be undone*[189]".

Thus, given all the challenges in applying the existing Competition legal tools to online platforms practices in digital markets, many scholars have called for a revision of the extant legal framework along with the introduction of new *ex ante* juridical instruments to catch up with the current digital landscape[190]. Others, by contrast, have stressed out the necessity to shift the focus of the debate from the *ex ante* regulation to the need of evolving and adapting the *ex post* enforcement toolkit, as to avoid the risks associated with hurried *a*

[187] Motta M., Peitz M., *supra* note 150, at 31

[188] As explained by the German Federal Ministry for Economic Affairs and Energy in its report, "*One common strategy of platform providers is to enhance their intermediation services with additional functionalities and to bundle these with the intermediation service – for instance, voice control, SmartHome connectivity, payment services, cloud storage, etc. If the platform operator is dominant in the intermediation market, this can lead to a transfer of market power to neighbouring markets, especially if there are no open interfaces for competing providers*". *See* Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 47

[189] Motta M., Peitz M., *supra* note 150, at 32

[190] Some reports, for instance, ask for the introduction of a binding "code of conduct" to complement antitrust enforcement with a clearer and more easily applicable set of standards that define the boundaries of anti-competitive conduct in digital markets. See Digital Competition expert panel (2019), *supra* note 8, at 9 and Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 50. On the debate over the necessity of a new regulation for tackling digital platforms conduct see also: Libertini M., "*Digital markets and competition policy. some remarks on the suitability of the antitrust toolkit*", Orizzonti del Diritto Commerciale, Special Issue, 2021, pp. 337-358

priori provisions of antitrust law[191]. Which begs the question: Which of the two lines of thinking could work best?

1.4 Is *ex ante* regulation of digital platforms the way to go?

The enforcement of *ex ante* regulation, as an alternative to "traditional" *ex post* competition law, on conduct undertaken in digital markets has always been a very complex topic. Indeed, while both categories of legislative tools may address concerns such as market failures or abuses, they however imply different forms of intervention on the markets respectively.

The main difference between these two approaches to regulation is, broadly, that, while *ex ante* statutory provisions are "prescriptive" (*i.e.*, they impose positive obligations on market actors, requiring them to perform specific actions), *ex post* rules, likewise competition law, are "proscriptive" (*i.e.*, they impose negative obligations on market players, preventing them from carrying out certain operations)[192]. This entails that *ex ante* regulation is usually designed to prevent market failures from occurring, whereas competition law (and, thus, *ex post* regulation) is typically applicable on a case-by-case basis once competition issues or abuses arise.

Nevertheless, the rationale for proposing *ex ante* regulation essentially relies on two of its main features: the first one deals with the ability to tackle structural problems that cannot be addressed by existing competition law; the other is speediness.

With reference to the first feature, as discussed before in a nutshell, a number of competition cases have been brought against the large platforms in recent years. This clearly shows how much both the EU Commission and NCAs particularly have strived and also succeeded to address the behaviour of digital operators by applying established solutions to new problems specific to digital ecosystems[193].

---

[191] Chisholm A., Jung N., "*Platform regulation — ex-ante versus ex-post intervention: evolving our antitrust tools and practices to meet the challenges*", in Competition Policy International, Volume 11, No.1, 2015, at 6

[192] Akman P., "*Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*", European Law review 85, 2022, at 16

[193] NCAs have undoubtedly the merit to have curbed - or even eliminated - the competitive dangers within their domestic markets arising from the conduct of emerging digital platforms, through a diverse range of

This fact notwithstanding, it is commonly believed that antitrust Authorities have also experienced several challenges in using conventional competition instruments for handling new competition concerns in the digital field[194]. This phenomenon has been mostly a consequence of the characteristics of digital markets, namely network effects, large data gathering, economies of scale and scope and so forth.

Hence, to ensure that markets stay contestable (*i.e.*, to deal with market contestability issues such as, among others, barriers to entry, multi-homing, switching cost), carefully designed *ex ante* rules have been lately perceived as a better suit than *ex post* ones, "*because they relate to the operation and features of the markets, and not necessarily to the conduct of particular undertakings*[195]".

As to speediness, just consider that the EU Commission investigation on Google's abusive practices took a very long period (7 years for *Google Shopping case* and 6 years for *Google AdSense*), during which Google's business model – and the market itself – changed considerably. This clearly implies that the industry had evolved considerably during the investigation and, by the time the Commission issued its Decision, its structure was completely different from what it used to be at the beginning of the investigation, so that the damage suffered by competitors might not have been fully restored.

From the above, it seems that the dissatisfaction with the efficiency and quickness of competition law enforcement, due to the fact that *ex post* solutions may result ineffective and not timely, has favoured the demand for *ex ante* regulation to take prompt and effective action against structural barriers and the risks of anti-competitive practices in fast-changing digital platform markets[196]. The EU Commission openly shared this view by declaring: "*existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms*[197]".

Can we be sure, though, that the implementation of *ex ante* regulation to the challenges posed by digital markets is the best course of action? As a matter of fact, the

---

instruments, including interim measures, behavioural and structural remedies, commitments by the undertakings concerned as well as fines.

194 OECD (2021), "*Ex ante regulation in digital markets – Background Note by the Secretariat*", DAF/COMP(2021)15, at 11

195 Akman P., *supra* note 192, at 17

196 OECD (2021), *supra* note 194, at 11

197 European Commission (2020), *supra* note 99, recital 5

enactment of "prior regulation" might involve the possible occurrence of certain risks that should not be taken lightly.

The first and probably trickiest risk is related to the likelihood of a rapid obsolescence of such a kind of legislation due to the features of digital markets, characterised by high dynamicity and disruptive innovation[198]. Therefore, the threat is that *ex ante* rules, which provide *a priori* lists of specific prescriptions to determined targets, may be ineffective when applied to the online world, due to material changes in fact[199] (*i.e.*, because of a rapid change in the structure of markets that are inherently fast-moving or in the business-model of the players acting therein).

According to other authors, a second risk in this field deals with the potential ossification of evolving market structures through strict codification. This phenomenon could be the outcome of the imposition by *ex ante* regulation of normative burdens on market actors that, yet also newcomers have to face. Indeed, when "*digital giants — once innovative firms — get entrenched in their positions as a result of ex-ante regulation and do not face credible threats due to the higher barriers for new entrants, they will also tend to pass up opportunities to innovate and invest. Today's plucky innovators are tomorrow's sleepy incumbents who'll soon be calling for — or willingly succumbing to —regulation to protect their rents[200]*".

Even if the EU Commission was quite aware of these risks it has nonetheless decided to propose an *ex ante* legal framework applying to the biggest online platforms acting in the European market[201]. And it was not wrong, in my personal opinion. Indeed, given the great importance and influence that platforms, and particularly the so-called "GAFAM[202]", have acquired in the last two decades, a specific set of rules directly applicable to their conduct was reasonably needed.

Thus, to my advice, the question should not be whether *ax ante* regulation would be a better suit than *ex post* one to appropriately address the threats posed by digital platforms

[198] Kobayashi B.H., Wright J.D., "*Antitrust and Ex-Ante Sector Regulation"* The Global Antitrust Institute Report on the Digital Economy 25, 2020, at 872

[199] The same Legislative Financial Statement linked to the DMA proposal admits that this actually is a possible risk of *ex ante* regulation. See, European Commission (2020), *supra* note 99, Legislative Financial Statement, at 64

[200] Chisholm A., Jung N., *supra* note 191, at 6

[201] European Commission (2020), *supra* note 99

[202] This is an acronym thar refers to the most dominant companies in the information technology industry (*i.e.*, Google, Amazon, Facebook, Apple e Microsoft)

to competition, but whether the proposed *ex ante* Regulation by the Commission is actually a well-designed tool to tackle such threats[203]. Will this be the case of the DMA?

2. The strategy of the EU Commission towards a better regulation of digital markets: the Digital Services Act Package – how the story unfolded

In the last eight years, the EU Commission as well acknowledged the necessity of adjusting the European normative framework to the peculiarities shown by digital markets. This urgency was stressed in the Commission Communication "*Shaping Europe's digital future*" which considered that, "*based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations*[204]". Additionally, it also announced that the EU Commission would have further examined "*ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants*[205]".

Based on the assumptions quoted above, the EU Commission started a thorough revision of its own Internet policy in 2015 with the adoption of the Digital Single Market Strategy[206]. A year later, a new document by the EU Commission came out[207]. In this Communication, the Commission both highlighted the growing importance of online platforms in the digital economy[208] and stressed the necessity of a balance and harmonised

[203] As an example, to efficiently avoid the risks discussed in this paragraph, an *ex ante* regulation should be able to correctly balance the trade-offs between speed and accuracy, and flexibility and legal certainty.
[204] European Commission (2020), Communication from The Commission to the European Parliament, the Council, the European Economic And Social Committee And the Committee of the Regions "*Shaping Europe's digital future*", COM(2020) 67 final, at 9, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0067&from=IT
[205] *Id*., at 10
[206] European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and he Committee of the Regions "*A Digital Single Market Strategy for Europe*", COM(2015) 192 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN
[207] European Commission (2016), *supra* note 56
[208] *Id*. pg. 2

legal framework to cope with them[209]. In February 2020, with the already mentioned Communication "*Shaping Europe's digital future*", the Commission made it clear that, in addition to *ex ante* rules aiming at maintaining markets fair and contestable, it would have also introduced "*new and revised rules to deepen the Internal Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms' content policies in the EU*[210]".

The whole process ended on 15th December 2020 with the proposal of the so-called Digital Services Act Package, a new set of rules which intend 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 foster innovation, growth, and competitiveness, both in the European Single Market and globally*[211]".

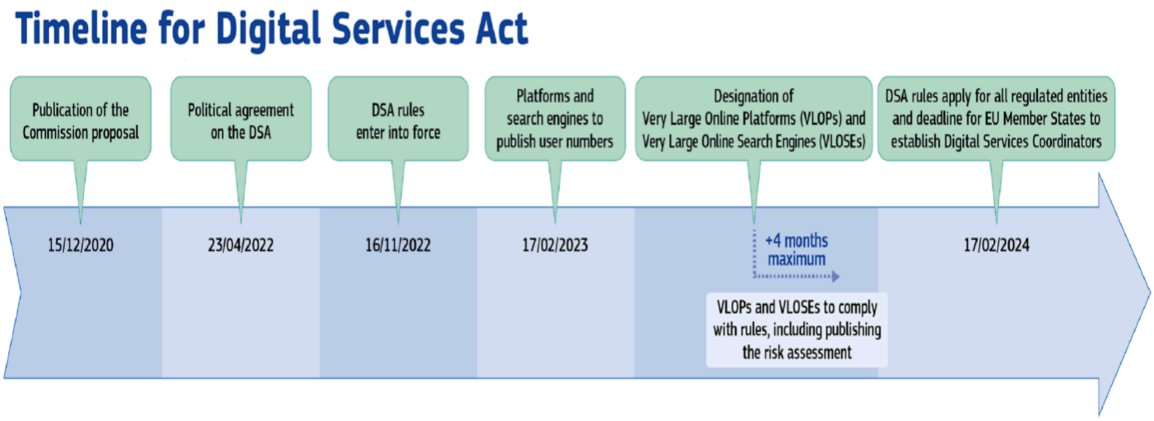
More in detail, the package is composed of two separate proposals for *ex ante* regulations, the Digital services Act[212] (hereinafter "DSA") and the Digital Markets Act[213] or DMA (which will be the specific object of our further investigation) that aim at rebalancing the balance of power of the largest digital platforms operating within the European Economic Area in order to provide a set of harmonised mandatory rules to ensure contestable and fair digital markets featuring the presence of gatekeepers within the internal market.

The two regulations have gone through an extensive amendment process during the "trilogue negotiations[214]". Nevertheless, following the adoption of the Digital Services Package in the first reading by the European Parliament in July 2022, both the Digital Services Act and Digital Markets Act have been adopted by the Council of the European Union and signed by the Presidents of both institutions.

---

[209] *Id*. pg. 4
[210] European Commission (2020), *supra* note 204, at 12
[211] For further information, see https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package
[212] European Commission (2020), 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, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=IT
[213] European Commission (2020), *supra* note 99
[214] Trilogues are informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission. Their purpose is to reach a provisional agreement on a text acceptable to both the Council and the Parliament. They may be organised at any stage of the legislative procedure and can lead to what are known as 'first reading', 'early second reading' or 'second reading' agreements, or to a 'joint text' during conciliation. For further information, see https://www.europarl.europa.eu/olp/en/interinstitutional-negotiations

The final drafting of the DSA[215] has been published in the Official Journal as of 27 October 2022 and came into force on 16 November 2022. The DSA will be directly applicable across the EU and will apply fifteen months or from 1 January 2024, whichever comes later, after entry into force. Timeline for DSA is as follows[216]:



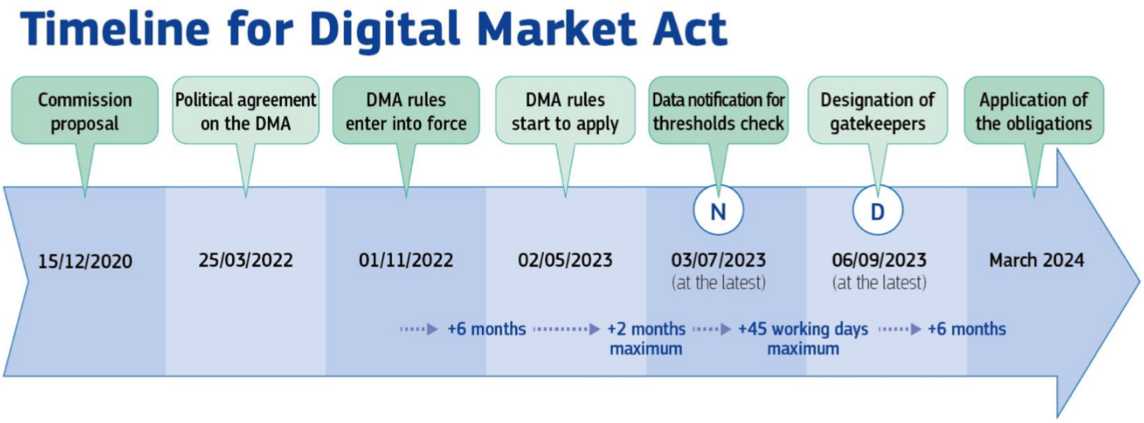
As of 12 October 2022, the amended text of the DMA[217] was published in the Official Journal and entered into force on 1 November 2022. As we will discuss later (§3.4), on 3 July 2023, digital undertakings provided the Commission with information about their number of users so that the Commission was able to designate "gatekeepers" (*i.e.*, the entities to which the provisions set out in the regulation apply) on 6 September 2023. The designated gatekeepers will then have until March 2024 to ensure that they follow the obligations of the DMA. The roadmap for DMA is the following[218]:

[215] European Commission (2022), Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065&from=EN

[216] See *supra* note 211

[217] European Commission (2022), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925&from=EN

[218] European Commission (2020), *supra* note 204



2.1 **The Digital Services Act Package in a nutshell**

The two pieces of legislation included in the abovementioned Package have as their main objective the regulation of different profiles of online platforms. Indeed, The DSA sets a renewed horizontal legal framework related to the liability of providers of digital platforms by deleting Arts. 12-15 in the E-commerce Directive[219] (*i.e.*, the former pillar of liability regime for information society service providers) and reproducing them in the Regulation[220].

Thus, the DSA is not concerned with Competition law issues such as unfair business practices by big online platforms and their negative consequences (as in the case of the DMA), because it mainly focuses on matters related to the liability of online intermediaries for contents hosted on their own websites, the online safety of users and the protection of fundamental rights[221].

Furthermore, the DSA aims at complementing existing sector-specific legislation without affecting the application of existing EU laws regulating certain aspects of the

[219] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, "*on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*" (Directive on electronic commerce), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN
[220] European Commission (2020), *supra* note 99, *Explanatory memorandum*, at 3
[221] *Id.*, at 1 *et seq*.

provisions of information society services (such as the Audiovisual Media Services Directive[222] or the *copyright* Directive[223]), which apply as *lex specialis*[224].

However, based on the European Commission's estimates, the entry into force of the DSA will have a positive impact "*on the single market and on competition, estimated to lead to a 1-1.8% increase of cross-border digital trade. Asymmetric rules will ensure that smaller emerging competitors are boosted helping competitiveness, innovation, and investment in digital services, while targeting specific harms emerging through large platforms. Transparency and safety online, as well as the protection of fundamental rights will improve. Enhanced cooperation between Member States and the EU level governance will improve enforcement and provide an up-to-date supervisory system for digital services*[225]".

On the other hand, through the enforcement of the DMA the EU Commission shall aim to ensure the proper functioning of the internal market by promoting effective competition in digital markets as well as their fairness and contestability[226]. The DMA is, hence, the branch of the regulatory package that is more concerned with the market, rather than with content, as it looks at the business behaviour of online services and their effects on markets and welfare.

As a matter of fact, the EU Commission has pointed out that a small number of large digital platforms (defined as "gatekeepers") have emerged with considerable economic power as they intermediate most transactions among business users and end users. Some of these providers exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient these may be. This situation leads to important negative effects (e.g., detriment of prices, quality, choice and innovation) which,

---

[222] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018, "*amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities*", available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=it

[223] 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*", available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=IT

[224] European Commission (2020) *supra* note 212, *Explanatory memorandum*, at 4

[225] European Commission (2020), Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the document 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, at 2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0349&from=IT

[226] European Commission (2020), *supra* note 99, Recital 8

as discussed in the next paragraph, existing *ex post* Competition rules are not always able to tackle[227].

Therefore, the DMA deals with such issues by "*laying down harmonised* [ex ante] *rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users*[228]". Also, it will complement the enforcement of Competition law, without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to the EUMR[229].

With reference to the impact of the DMA on the EU market, as foreseen by the EU Commission, the enactment of the DMA should "*increase the contestability of digital markets and help businesses overcome the barriers stemming from market failures or from gatekeepers' unfair business practices. It will add a tailored regulatory solution where a gap currently exists. This will foster the emergence of alternative platforms, which could deliver quality innovative products and services at affordable prices. The associated benefit of the preferred option would be a change in consumer surplus estimated at EUR 13 billion per year. A substantial decrease in internal market fragmentation is also expected, thus freeing the growth potential of the Digital Single Market*[230]". In addition, SMEs, not being targeted by the Regulation, should be allowed to grow throughout the internal market as a result of the removal of important barriers to entry and expansion[231].

Will the DMA succeed? To figure this out, in the next sections, firstly the key provisions laid down in the Digital Markets Act will be deeply assessed; then the most debated criticalities will be scrutinized trying also to provide suggestions for possible improvements; finally, some considerations will be drawn. The provisions contained in the DSA will not be part of the following examination as its legal measures and objective falls outside the scope of the present dissertation that is essentially focused on Competition law issues[232].

---

[227] *Id.*, Recital 3-9

[228] European Commission (2022), *supra* note 217, Article 1, paragraph 1

[229] European Commission (2020), *supra* note 99, Recital 9

[230] European Commission (2020), Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), at 2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0364&from=IT

[231] *Id.*

[232] For an insight on the DSA and its provisions see Giordano G., "*La responsabilità degli intermediari digitali nell'architettura del Digital Services Act: è necessario che tutto cambi affinché tutto rimanga com'è*?", in Comparazione e Diritto Civile, vol.1, 2023, pp. 193-222

3. **The Digital Markets Act as an instrument for preventing gatekeepers from harming competition within the Internal Market – structure, key provisions and most debated issues**

Taking a look at its structure, the DMA is made up of 109 recitals and 54 Articles divided into six different Chapters. The first Chapter (Articles 1-2) deals with subject matter, scope and definitions; The second one (Articles 3-4) is devoted to gatekeepers (*i.e.*, entities to which the regulation apply) and their status; the third Chapter (Articles 5-15) addresses practices of gatekeepers that limit contestability or are unfair; the fourth one (Articles 16-19) is related to market investigation; the fifth Chapter (Articles 20-43) sets out investigative, enforcement and monitoring powers; finally, the sixth Chapter (Articles 44- 54) introduces some final provisions.

Even if the DMA openly recognizes the benefits that online platforms generally bring to social welfare and cross-border trade[233], it is also concerned about the indisputable nature some digital services have reached in the last decade and, we have to point it out again, the unfair business conduct of the incumbent players offering such services in the European market. These services are frequently offered through a multi-sided intermediation among business users and end users by one or very few large digital platforms that (i) set the commercial conditions with considerable autonomy; (ii) can act as gateways for business users to reach their customers and vice-versa; and (iii) are able to exploit their gatekeeper power by means of unfair behaviour vis-à-vis economically dependent business users and customers[234].

As a consequence, the DMA does not automatically apply to all kinds of online services available on the market, but just to so-called "core platform services" responding to the features cited before. The regulation lists ten categories of such services[235]:

(a) online intermediation services;

(b) online search engines;

(c) online social networking services;

[233] European Commission (2022), *supra* note 217, Recital 1
[234] European Commission (2020), *supra* note 99, *Explanatory Memorandum*, at 2
[235] European Commission (2022), *supra* note 217, Article 2 paragraph 2

(d) video-sharing platform services;

(e) number-independent interpersonal communications services;

(f) operating systems;

(g) web browsers;

(h) virtual assistants;

(i) cloud computing services;

(j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i);

This roster is not crystallised over time as it may be broadened in the future by the EU Commission through a market investigation pursuant Articles 17 and 19 DMA[236].

Nevertheless, since this Regulation primarily targets large undertakings with considerable economic power rather than medium-sized, small or micro enterprises[237], the DMA further restricts its provisions' addressees via the introduction of both qualitative and quantitative criteria to designate them as *gatekeepers*, that is to say the undertakings to which the regulation, in the end, applies[238].

Thus, to be defined as gatekeeper, an undertaking should meet both the qualitative and quantitative conditions established in Article 3, paragraphs 1-2:

(i) it must have a significant impact on the internal market, meaning that it has achieved, in each of the last three financial years, an annual Union turnover equal to or above EUR 7.5 billion or its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year;

(ii) it provides a core platform service which is an important gateway for business users to reach end users, *i.e.*, has at least 45 million monthly active end users

[236] Indeed, according to the wording of both Articles, the Commission is empowered to conduct a market investigation "*in order to identify the core platform services to be listed in the designation decision*" or "*for the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services laid down in Article 2, point (2)*".

[237] European Commission (2022), *supra* note 217, Recital 24

[238] Pursuant Article 1 paragraph 1, the rules set out in the regulation applies to "*core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service*".

established or located in the Union and at least 10 000 yearly active business users established in the Union;

(iii) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future, so has to reach the thresholds of (ii) in each of the last three financial years.

Furthermore, when an undertaking meets the requirements set out in the Article 3 paragraph 1 (*i.e.*, it is a provider of core platform services that has an important impact on the market thanks to its powerful position), but not the economic thresholds laid down in the second paragraph, the EU Commission can however take into account qualitative elements such as network effects, economies of scale and scope, number of both business users and end users benefitting from the offered core platform service, users lock-in, switching costs, etc. to designate that undertaking as gatekeeper[239].

Once designated, a gatekeeper status shall be reviewed by the EU Commission at least every three years; the Commission shall also, on a yearly basis, examine whether new core platform services offered by the gatekeeper under scrutiny needs to be amended[240]. Additionally, the EU Commission is empowered to reconsider, upon request or *motu proprio*, amend or repeal at any moment a designation decision adopted pursuant to Article 3 when (i) the facts that led to the designation have substantially changed, or in the case (ii) the designation proceedings was based on incomplete, incorrect or misleading information[241]. Finally, The Commission must periodically publish an updated list of gatekeepers and the list of the core platform services for which they need to comply with the obligations laid down in the third Chapter[242].

The whole Chapter three, indeed, provides for several obligations the designated gatekeepers must comply with. Article 5 DMA entitled "*obligations for gatekeepers*", lists self-executing obligations[243] for gatekeepers such as, *inter alia*, prohibitions to: (i) process third parties data for online advertising purposes; (ii)restrict business user in the modalities, channels, prices and conditions they promote and sell their products via other online platforms; (iii) restrict consumer from using software applications of business users though the core platform service; (iv) require both end users and business ones to use, to offer, or to

[239] European Commission (2022), *supra* note 217, Article 3, paragraph 8

[240] *Id*. Article 4, paragraph 2. This annual examination has also to assess whether new undertakings providing core platform services satisfy the requirements for being designated as gatekeepers

[241] *Id*. paragraph 1

[242] *Id*. paragraph 3

[243] Chiarella M.L., "*Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment*", Athens Journal of Law 2022, 9: 1-25, at 8

interoperate with, an identification service, a web browser engine or a payment service, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services[244]; (v) non-providing information to both publishers and advertisers about prices, fees and remuneration paid, as well as the metrics on which each of the prices, fees and remunerations are calculated.

Article 6 DMA provides, moreover, gatekeepers with a catalogue of banned behaviours that are, however, susceptible of being further specified (in accordance with the procedure foreseen in Article 8 DMA) by or in cooperation with the EU Commission. This list includes forbidden strategies such as:

I. using competitor generated data, i.e., when gatekeepers compete with business users, they shall refrain from using any non-publicly accessible data generated through the commercial activities (related to the core platform service) of such professional users (Article 6, paragraph 2);
II. bundling of software, meaning gatekeepers must allow end-users to uninstall any software applications pre-installed on their core platform service unless they are essential for the functioning of the service and cannot technically be offered by third-parties suppliers (Article 6, paragraph 3);
III. implementing exclusivity clauses of software or software application stores, i.e., gatekeepers shall and technically enable the installation and effective use of third-party software applications or software shops that use or interoperate with its operating system (Article 6, paragraph 4);
IV. Self-preferencing in ranking services, that means treating more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall also apply transparent, fair and non-discriminatory conditions to such classification (Article 6, paragraph 5);
V. Strategic incompatibilities, i.e., technically limit the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper (Article 6, paragraph 6);
VI. Restraining service providers and hardware suppliers from interoperating free of charge and effectively with the same hardware and software functions

[244] This kind of prohibition encompasses the request by a gatekeeper to its users to subscribe or register with other further core platform services

accessible or controllable through the operating system or virtual assistant (Article 6, paragraph 7);

VII. Precluding access to business-relevant advertising-related data, i.e., gatekeepers shall provide advertisers and publishers, upon request and free of charge, with access to the gatekeeper's performance measurement tools and information necessary for advertisers and publishers to conduct their own independent verification of ad inventory (Article 6, paragraph 8);

VIII. Hindering data portability for end-users, with reference to data provided or generated by the end-user through the activity of the end user in the context of the use of the relevant core platform service (Article 6, paragraph 9);

IX. Rejecting access to business-relevant data, meaning that gatekeepers shall provide business users and third parties authorised by a business user, at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data, generated in the context of the use of the relevant core platform services (Article 6, paragraph 10);

X. Refusal of data sharing, i.e., gatekeepers must not decline from providing to any third-party undertaking providing online search engines, at its request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search engines (Article 6, paragraph 11);

XI. Applying unfair, discriminatory, unreasonable, and untransparent conditions of access for business users to its software application stores, online search engines and online social networking services (Article 6, paragraph 12);

XII. Adopting general conditions for terminating the provision of a core platform service that are disproportionate (Article 6, paragraph 13).

Furthermore, the list of obligations for gateekepers is concluded by Article 7 that deals only with platform services and obligations related to the interoperability of number-independent interpersonal communications services. Whereas in the draft proposal of the DMA, these obligations were not separated from the ones listed in Arts. 5 and 6, they have finally been provided in a distinct provision (the reason why this alternative path was chosen is not entirely clear)[245]. Article 7(1) states "*where a gatekeeper provides number-*

[245] Díez Estella F., "*The DMA: a new Regulation for -or against- Digital Markets in the EU*?", January 2023, at 17

independent interpersonal communications services that are listed in the designation decision pursuant to Article 3(9), it shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider offering or intending to offer such services in the Union, by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge"[246].

In addition to this mandatory interoperability of basic functionalities, Article 7(2) sets out a roadmap, depending on the functionality at stake, for gatekeepers to comply with the previous obligations: (i) immediately for end-to-end text messages between end users as well as for sharing of images, voice messages, videos, and other attached files; (ii) within two years from the designation, in the case of end-to-end text messaging within groups of individual end users and sharing of images, voice messages, videos, and other attached files within group chats; (iii) within four years from the designation for and-to-end voice calls between end users, end-to-end video calls between end users, voice calls within group chats, and video calls within group chats[247].

However, it is important to highlight, as stated above, that the catalogue of conduct listed in Article 6 can be susceptible of being further determined according to the procedure set out in Article 8. More in detail, this last-mentioned article leaves compliance with obligations up to the gatekeepers, that must also provide the Commission (within six months from the designation, as established by Article 11) with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations laid down in Articles 5, 6 and 7.

Nevertheless, where the obligations are lacking in specificity (as in the case of Arts. 6 and 7), the Commission can adopt an implementing act (Article 8, paragraph 2), specifying the measures that the gatekeeper concerned is to implement in order to effectively comply with the obligations. Article 8(2) established, additionally, a form of collaboration between the Commission and gatekeepers, as the latter may request an opening of the proceedings, pursuant Article 20, leading to an implementing act. Moreover, gatekeepers may request (Article 8, paragraph 3) that the Commission engages in a process of determining whether

[246] Article 7 (1) DMA

[247] According to article 7(6), an extension of these time limits is possible, upon reasoned request of the gatekeeper and when it demonstrates that this is necessary to ensure effective interoperability.

the measures they intend to implement or have implemented are sufficient to ensure compliance with all the obligations set out in Arts. 6 and 7[248].

The obligations for an individual core platform service may be suspended, in whole or in part, in exceptional circumstances (Article 9); exemption can be granted also on grounds of public interest, namely public health and public security reasons (Article 10). The obligations laid down in Arts. 5, 6 and 7 can also be updated, via a delegated act adopted by the Commission pursuant Article 49, in accordance with Article 12.

Finally, Chapter three includes a strict non-circumvention provision that refrain any undertaking providing core platform services from segmenting, dividing, subdividing, fragmenting or splitting those services through contractual, commercial, technical or any other means in order to circumvent the quantitative thresholds for gatekeeper designation (Articl3 13). It also stipulates an obligation for gatekeepers to inform about concentrations (Article 14) that will be further analysed in the next Chapter.

The European Commission is empowered to oversee the execution of obligations and related implementing measures, as in the provisions contained in both Chapter IV and V DMA, in a perspective of an unconventional, centralised model.

Chapter IV, more in depth, lays down rules about market investigation (Article 16), providing for three different categories of such investigations:

1. Market investigation for the designation of a gatekeeper (Article 17), through which the Commission can examine whether an undertaking providing core platform services should be designated as a gatekeeper pursuant to Article 3(8), or identify the core platform services to be listed in the designation decision pursuant to Article 3(9);
2. Market investigation into systematic non-compliance (Article 18), meaning that the Commission can assess whether a gatekeeper has systematically infringed one or more of the obligations laid down in Article 5, 6 or 7 and has maintained, strengthened or extended its gatekeeper position in relation to the requirements set out in Article 3(1). If so, the Commission may adopt an implementing act imposing on such gatekeeper any behavioural or structural

[248] In its request, the gatekeeper shall provide a reasoned submission to explain the measures that it intends to implement or has implemented. The gatekeeper shall furthermore provide a non-confidential version of its reasoned submission that may be shared with third parties pursuant to paragraph 6

remedies which are proportionate and necessary to ensure effective compliance with the Regulation;

3. Market investigation into new services and practices (Article 19), a procedure that allows the Commission to conduct an investigation for the purpose of examining whether one or more services within the digital sector should be added to the list of core platform services[249].

The Commission also benefits from extensive powers with respect to investigative, enforcing and monitoring tools, as provided for in Chapter V. First of all, the Commission can request any kind of information – even access to undertakings data and algorithms – (Article 21); it can also carry out interviews, take statements and conduct inspections (Articles 22 and 23 respectively). The Commission can also adopt interim measures against a gatekeeper on the basis of a prima facie finding of an infringement of Article 5, 6 or 7, in case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers (Article 24). It is also entitled with the capacity to adopt an implementing act making commitments, offered by a gatekeeper to ensure compliance with the obligations laid down in the Regulation, binding on that gatekeeper and declare that there are no further grounds for action (Article 25).

The mentioned Chapter also set out rules dealing with monitoring powers: the Commission must monitor effective compliance by gatekeepers with obligations laid down in the DMA[250] (Article 26), also relying on information by third parties about any practice or behaviour by gatekeepers that falls within the scope of the DMA[251] (Article 27). Furthermore, a compliance function for gatekeepers is implemented by Article 28, according to which this kind of function shall be independent from operational functions of the gatekeepers and composed of one or more compliance officers, including the head of the

[249] According to the same Article, an investigation can be opened even for or the purpose of detecting practices that limit the contestability of core platform services or that are unfair, and which are not effectively addressed by the DMA. In its assessment, the Commission shall take into account any relevant findings of proceedings under Articles 101 and 102 TFEU concerning digital markets as well as any other relevant developments.

[250] In order to exercise its supervision on gatekeepers' compliance, the Commission may impose an obligation on them to retain all documents deemed to be relevant to assess the implementation of, and compliance with, obligations and decisions pursuant the DMA.

[251] Third parties may inform NCAs or the Commission directly about gatekeepers' conduct, but there is no follow-up obligation on the information received, i.e., the cited Authorities retain full discretion as to what to do in response.

compliance function. The main task of such a function is to organise, monitor, and supervise compliance with the provisions contained in the DMA.

The Commission is entrusted with a wide-ranging set of instruments with regard to case of non-compliance. Indeed, it can:

- Adopt a non-compliance decision (pursuant article 29), the Commission shall order the gatekeeper to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with that decision;
- Impose fines in the non-compliance decision (pursuant Article 30) on a gatekeeper, not exceeding 10% of its total worldwide turnover in the preceding financial year[252];
- Impose periodic penalty payments (pursuant Article 31) that should not exceed 5% of the average daily worldwide turnover in the preceding financial year per day, calculated from the date set by that decision.

It must be stressed out, nevertheless, that the DMA introduces also some procedural safeguards for protecting fundamental rights[253], such as limitation periods for financial penalties (that, pursuant Article 32, cannot exceed a 5-year limitation period) and administrative time limits for Commission actions (that are subject, according to Article 33, to a limitation period of 5 years). Additionally, before a decision is adopted against them, undertakings (including gatekeepers) and associations of undertakings have a right to be heard on the Commission's preliminary findings and the measures it might plan to take (Article 34, paragraph 1). They are also entitled to access the Commission's file and to have their confidential information protected under arts.34(4) and 36, respectively.

Even if "*The Commission is the sole authority empowered to enforce this Regulation*[254]" and, thus, the DMA foresees a centralised inforcement system, the fifth Chapter also governs forms of cooperation with national Authorities of EU Member States (Article 37), NCAs (Article 38), national Courts (Article 39), coupled with the introduction of the so-called "high-level group" (Article 40), that is composed of different European

[252] fines to undertakings and associations of undertakings are not to exceed 1% of the total turnover in the preceding financial year
[253] Chiarella M.L., *supra* note 243, at 10
[254] European Commission (2022), *supra* note 217, Recital 91

bodies and networks – including the European Competition Network[255] (hereinafter "ECN") – that will provide the Commission with:

- Advice and recommendations for any general matter of implementation or enforcement of the DMA;
- Expertise, in the context of market investigations into new services and practices, on the need to amend, add or remove rules in the DMA.

EU Member States will assist the Commission, additionally, by participating to the "Digital Markets Advisory Committee" (Article 50), whose advice will, however, be non-binding[256]. Another modality of cooperation among Member States and the Commission deals with the possibility, for three or more Member States, to request the Commission to open a market investigation (Article 41, paras. 1 and 2), when they consider that there are reasonable grounds to suspect that an undertaking should be designated as a gatekeeper or that one or more services within the digital sector should be added to the list of core platform services[257].

Finally, Chapter VI contains general provisions such as:

- An obligation to publish an identified set of individual decisions adopted under the Regulation (Article 44);
- The reviewing function of the ECJ with respect to decisions by which the Commission has imposed fines or periodic penalty payments[258] (Article 45);
- The possibility to adopt implementing provisions (Article 46), guidelines (Article 47), standardization (Article 48) as well as delegated acts (Article 49) to amend the Regulation.

---

[255] The European Competition Network creates a forum for discussion and cooperation among its participants, both in cases where the application of Articles 101 and 102 TFEU is required, as well as in matters relating to control over concentrations, with the aim of tackling cross-border practices restricting competition to the detriment of consumers. The legal basis of the ECN can be found in Regulation (EC) No. 1/2003, which provides for the possibility for NCAs and EU Commission DG for Competition to cooperate and exchange information. For more information on this topic, see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Chapter IV, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001

[256] European Commission (2011), Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ L55/13, art. 4, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0182

[257] The same Article also provides for the possibility to request the opening of a market investigation even by a single Member State – or more – when there are reasonable grounds to suspect that a gatekeeper has systematically infringed one or more of the obligations laid down in Articles 5, 6 and 7 and has maintained, strengthened or extended its gatekeeper position

[258] The ECJ may, indeed, cancel, reduce or increase the fine or periodic penalty payment imposed.

After having illustrated the structure and provisions of the DMA, it must be clarified, nevertheless, that since its proposal in 2020 a very rich debate over its flaws, as well as possible improvements, has been raised up, and it has engaged numerous scholars and experts all over the EU. In the next paragraphs, the efforts of the present contribution will be devoted to this topic.

3.1 **Digital Markets Act: discussion on its legal foundation**

As a general rule, the institutions of the European Union are allowed to legislate only within the distinct boundaries of the powers granted to them by the EU Treaties. Article 5(2) of the Treaty on the European Union (hereinafter "TEU"), indeed, clearly specifies that "*under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*[259]". This means that each single legislative proposal must have a specific legal foundation openly provided for by such Treaties. What is more, the choice of the legal basis, for a new legislative instrument is of utmost importance, as it determines not only the relevant legislative procedure but also the scope for EU Authorities operation.

In proposing the DMA, the Commission opted for Article 114 TFEU as its legal basis. The rationale of this choice lies in the fact that the mentioned Article empowers EU Authorities to enact ""*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*[260]". Indeed, as per the Commission's statement, the DMA pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, which is to ensure that markets where gatekeepers are present are and remain contestable and fair. This entails that the DMA aims to protect a different legal interest from that protected by Competition law. This is the reason why, acting as a complement to the enforcement of Competition law, the Regulation

[259] Treaty on European Union (TEU) consolidated version, available at the following link: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

[260] Treaty on the Functioning of the European Union (TFEU) consolidated version, Article 114(1), available at the following link: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

should apply without prejudice to Articles 101 and 102 TFEU and to the corresponding national competition rules[261].

Since its proposal, however, commentators have raised several concerns over the legal basis of the DMA[262]. They argued that the claim that the Regulation in analysis is not a Competition law instrument notwithstanding, the substance and scope of the DMA seems to perfectly intersect with the substance and scope of EU competition law[263]. This is because the Regulation provides for a list of obligations that sounds like, *prima facie*, derived from past and current antitrust cases involving digital platforms[264]. What is more, this kind of overlap between the Regulation and Competition law could be attributable also to the fact that, originally, the Commission had envisaged to adopt a proper "new competition tool[265]".

On those grounds, scholars have argued that Article 103 TFEU would have been a better fit for the legal basis of the DMA[266], as it enables the effective enforcement Competition law and the principles laid down in Art. 101 and Art. 102 TFEU. Nevertheless, the reason why the Commission did not opt for the latter Article is probably "political". Indeed, as Article 103(1) TFEU undoubtedly states, "*the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament*[267]". Therefore, had the Commission chosen this legal basis, the European Parliament would merely have had a consultive function rather than a truly a co-decision right. In addition, the Council could have adopted the Commission's proposal only by qualified majority (as set out by Article 16, paragraph 3 TEU) but, had it wanted to amend the proposal, it would have needed unanimity to further amend the proposal[268] (how established by Article 293, paragraph 1 TFEU).

---

[261] European Commission (2022), *supra* note 217, Recitals 10 and 11

[262] See, among others, Schweitzer H., "*The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*", in ZEuP issue 3, pp. 503-544, 2021; Akman P., *supra* note 192

[263] Akman P., *supra* note 192, at 2

[264] Caffarra C., Scott Morton F., "*The European Commission Digital Markets Act: A translation*", VoxEU, 5 January 2021, available at the following link: https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation

[265] European Commission (2020), Inception Impact Assessment, Ares(2020)2877634, available at the following link: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en

[266] Basedow J., "*Das Rad neu erfunden: Zum Vorschlag für einen Digital Markets Act (Reinventing the Wheel: The Proposal for a Digital Markets Act)*" Zeitschrift für Europäisches Privatrecht (ZEuP), Vol. 29, 2021

[267] Treaty on the Functioning of the European Union (TFEU), *supra* note 260, Article 103(1)

[268] Witt A.C., "*The Digital Markets Act – Regulating the Wild West*" Common Market Law Review, vol. 60, issue 3, 2023, pp. 625-666.

Some authors have even suggested that the DMA, since it is legally based on Article 114 TFEU, might be "illegal"[269]. This is because, Article 114 TFEU does not confer on the EU institutions a general power to regulate the internal market and, additionally, as set out by the ECJ, relying on such a legal basis is justified only when the legislative act at stake (i) is genuinely designed to improve the conditions for the establishment of the internal market via the approximation of national rules, and (ii) it has as its main object to prevent the emergence of obstacles to trade resulting from regulatory fragmentation[270].

By virtue of what mentioned above, the DMA would not appear to fulfill the requirements established by the ECJ for its reliance on Article 114 TFEU to be legitimized, as it would not be perfectly designed to prevent legislative fragmentation and it would seem to violate the principle of proportionality[271].

As for the first issue, even if the Commission has identified sources of actual or future regulatory fragmentation in its assessment on the potential impact of the DMA[272], since the Regulation is designed as a complementary instrument to Competition law tools, "classic" antitrust rules remain applicable, although their application should not affect the obligations imposed on gatekeepers[273]. Furthermore, Article 1(5) DMA prohibits Member States from imposing further obligations on gatekeepers, but new rules can be introduced by Member States that are simply extensions of their national competition laws, and they are still free to do so.

Accordingly, in January 2021 Germany has launched a reform of its national Competition law, introducing newfound provisions targeting undertaking holding paramount significance for competition across markets[274]. One year later, Italy has

---

[269] Lamadrid de Pablo A., Bayón Fernández N., "*Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It*", Journal of European Competition Law & Practice, Volume 12, Issue 7, 2021, pp. 576–589

[270] European Court of Justice (2010), Case C-58/08, "*Vodafone, O2 et al. v Secretary of State for Business, Enterprise and Regulatory Reform*", paras. 32-33

[271] Lamadrid de Pablo A., Bayón Fernández N., *supra* note 269, at 4

[272] European Commission (2020), Commission staff working document "*Impact assessment report accompanying the document proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act)*", Part 2/2, pp. 109-117, available at the following link: https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act

[273] Article 1(6) DMA

[274] Bundeskartellamt (2021), Press Release "*Amendment of the German Act against Restraints of Competition*", available at the following link: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html . For an understanding of the German Competition law system see: Fabbio P., "*Competition law in germany: some observations and evaluations from european perspective*", Orizzonti del Diritto Commerciale, Vol. 3, 2019, pp. 549-588

implemented new rules related to economic dependence that aims at safeguarding weaker business parties against the superior bargaining power exerted by digital intermediaries[275].

Since, due to its institutional design, the DMA would not be able to affect the two pieces of legislation mentioned before, it would also not be capable of concretely limiting the ability of EU Member States to establish new and potentially divergent rules[276]. This phenomenon would, according to this approach, lead to even more regulatory fragmentation, because of divergent national legal provisions[277], compromising, therefore, the legal basis of the DMA.

With reference to the second issue on the DMA legal basis, namely that it might violate the principle of proportionality[278], the Commission observed that the provisions laid down in the DMA would be proportionate as they achieve their objective by only imposing a burden on undertakings in the digital sector in a targeted manner[279]. Furthermore, proportionality would be guaranteed since the provided measures applies only to those providers that meet clearly defined criteria for being considered a gatekeeper and because "*the list of obligations foreseen by the proposal has been limited to those practices (i) that are particularly unfair or harmful, (ii) which can be identified in a clear and unambiguous manner to provide the necessary legal certainty for gatekeepers and other interested parties, and (iii) for which there is sufficient experience*[280]".

However, even if the Explanatory Memorandum correctly acknowledges that the principle under scrutiny requires that the DMA's scope of application should be limited by definite criteria, the provisions contained therein and related, as an example, to the designation of an undertaking as gatekeeper (Article 3, paragraph 1 DMA) would grant the Commission whit a significant margin of discretion to define which digital firms shall

---

[275] Italian Parliament (2022), Law 5 August 2022, No. 118, "*Legge annuale per il mercato e la concorrenza 2021*", in Gazzetta Ufficiale n.188, 12 August 2022, Article 33, available at the following link: https://www.gazzettaufficiale.it/eli/id/2022/08/12/22G00126/sg

[276] Lamadrid de Pablo A., Bayón Fernández N., *supra* note 269, at 7

[277] See, in this respect: Meyring B., "*Germany's gatekeeper rules: the start of divergence for gatekeepers*?", Linklaters, 2021, available at the following link: https://techinsights.linklaters.com/post/102gox7/germanys-gatekeeper-rules-the-start-of-divergence-for-gatekeepers ; Jens-Uwe F., Peitz M., "*Taming Big Tech: What Can We Expect From Germany's New Antitrust Tool?*!, Oxford Business Law Blog, 2021, available at the following link: https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/02/taming-big-tech-what-can-we-expect-germanys-new-antitrust-tool

[278] This principle is laid down in Article 5(4) of the Treaty on European Union and states that "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*". Under this principle, EU measures: (i) must be suitable to achieve the desired end; (ii) must be necessary to achieve the desired end; and (iii) must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved (proportionality in the narrow sense).

[279] European Commission (2020) *supra* note 212, *Explanatory memorandum*, at 6

[280] *Id*.

qualify as gatekeeper[281]. This would imply, therefore, that the rules governing the assessment by the Commission in this regard would not be actually circumscribed by "limited" criteria.

What is more, the objective thresholds set out in Article 3(2)[282] notwithstanding, the Commission is, nonetheless, empowered to exempt from the scope of the DMA undertakings that meet the mentioned thresholds when they provide sufficiently substantiated arguments that they do not meet the requirements set out in Article 3(1)[283]. Moreover, since when an undertaking meets the requirements set out in the Article 3 paragraph 1 (*i.e.*, it is a provider of core platform services that has an important impact on the market thanks to its powerful position), but not the economic thresholds laid down in the second paragraph, the EU Commission can, however, take into account other qualitative elements[284] to designate that undertaking as gatekeeper, there would be not sufficient rules constraining the Commission's discretion on such a designation process. This lack could result, according to this theory, in an impossibility for certain undertakings to foresee in a sufficiently reliable way whether they would fall within the scope of the DMA[285].

It is important to highlight, also, that, as per the study mentioned above, a viable alternative to mild the legal risks related to the choice of Article 114 as the DMA's legal basis would have been that of adopting the Regulation under Article 352 TFEU[286]. Indeed, Article 352 allow EU Member States to agree unanimously to the creation of new powers to attain one of the objectives set out in the Treaties, when such Treaties have not provided the necessary powers[287].

In Addition, the opportunity to use Article 352 TFEU as a legal basis for EU legislation dealing with Competition issues is made clear by Protocol (No. 27) on the internal market and competition (which is annexed to both TEU and TFEU), which states

---

[281] See, in this respect: Camera dei Deputati (Italian Parliament), Legge sui mercati digitali (Digital markets act), in Dossier No. 52 del 18 maggio 2021, p. 7, available at the following link: https://documenti.camera.it/Leg18/Dossier/Pdf/ES052.Pdf ; Lamadrid de Pablo A., Bayón Fernández N., *supra* note 269, at 10

[282] See *infra*, pp.47-48

[283] DMA, Article 3(5)

[284] Such as, for instance, network effects, economies of scale and scope, number of both business users and end users benefitting from the offered core platform service, users lock-in, switching costs, etc.

[285] Lamadrid de Pablo A., Bayón Fernández N., *supra* note 269, at 11

[286] *Id*., at 16

[287] Article 352 (1) TFEU states: "*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament*".

"*Considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, […] to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union*[288]".

Nevertheless, as for Article 103 TFEU, the reason why Article 352 TFEU would have not been chosen as the legal basis for the DMA could be political. Indeed, whereas Article 352 TFEU empowers the Commission with the possibility to create new competences, powers and obligations, it also requires unanimity of EU Member States and would dispossess the European Parliament of its co-legislative powers[289].

The concerns arising from the DMA's argued legal basis are not just theoretical, as the choice of the EU Commission, coupled with possible overlap between the DMA and national rules, could be responsible for a certain degree of legal uncertainty and fragmentation in the post-DMA scenario.

3.2 **The risk of double jeopardy and the principle of *ne bis in idem***

The DMA claims, as we already discussed, to pursue a legal objective (namely contestability of and fairness in digital markets) that, even if complementary, differs from that of Competition law (*i.e.*, protect competition as a means of enhancing consumer welfare[290]). As a consequence, the legal interests safeguarded by the respective set of rules shall be different.

Nevertheless, as shown in the previous paragraph, gatekeepers' conduct falling within the scope of the DMA are not completely immune from liability under Arts. 101 and 102 TFEU or national equivalent laws[291]. Therefore, the parallel application of the aforementioned legal instruments could lead to a digital platform being subjected to

[288] Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition, available at the following link (pg. 309): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2008:115:FULL

[289] Lamadrid de Pablo A., Bayón Fernández N., *supra* note 269, at 2

[290] See, as an example, European Commission (2004), Communication from the Commission Notice "*Guidelines on the application of Article 81(3) of the Treaty*", O.J. 2004, C101/97, para. 13, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)

[291] This is clearly provided by Article 1(6) DMA, which states that the Regulation is without prejudice to the application of EU and national Competition law, as well as by Article 1(5) DMA that allows Member States to introduce rules that are simply extension of their national Competition law

cumulative proceedings for the very same conduct, facing risks of double, or even triple and quadruple jeopardy[292].

This phenomenon would possibly result in a breach of the *ne bis in idem* principle, which is consecrated by Article 50 of the Charter of Fundamental Rights of the EU ("hereinafter CFREU"), according to which "*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*[293]". Although Article 50 CFREU makes unequivocal reference to "criminal proceedings", this term has been defined by reference to criteria that extend the principle to areas other than criminal law, including competition law[294].

For the *ne bis in idem* principle to apply two distinct conditions must be met: the first one is the "*bis*" condition (*i.e.*, there must be a prior final decision on the facts under question); the second one deals with the "*idem*" condition (*i.e.*, the previous final decision must refer to the same person and the same offense).

However, until recently, there has been some confusion about the meaning of the word "idem" contained in the principle, and the case law on the matter has been not so consistent on whether the idem condition refers to the same person, the same facts and the same protected legal interest (*i.e.*, the approach that has been followed in rulings concerning competition law proceedings) or only the same person and the same facts (that is the approach that has been adopted in rulings concerning other areas of law)[295].

Because of a certain degree of uncertainty in the application of the *ne bis in idem* principle, in 2022 the ECJ tried to shed some light on the matter by issuing two milestone rulings on the principle, namely the *bpost*[296] and the *Nordzucker*[297] cases, in which the EU Court addressed the above inconsistency and aligned the approach to Competition law

[292] Colangelo G., "*DMA begins*", Journal of Antitrust Enforcement, Volume 11, Issue 1, March 2023, pp. 116–122, at 5

[293] Charter of Fundamental Rights of The European Union, 2012/C 326/02, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT

[294] Bania K., "*Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause*", European Competition Journal, 19:1, pp. 116-149, 2023, at 142

[295] *Id*.

[296] European Court of Justice (2022), Case C-117/20, "*bpost SA v Autorité belge de la concurrence*", EU:C:2022:202, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020CJ0117

[297] European Court of Justice (2022), Case C-151/20, "*Bundeswettbewerbsbehörde v. Nordzucker AG and Others*", EU:C:2022:203, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020CJ0151

proceedings with that underpinning the application of the principle in question in other areas of law.

In *bpost*, the tariffs set by the incumbent postal service operator were condemned by the postal regulator based on sector-specific rules first and, at a later stage, also by the NCA on the basis of a finding of abuse of dominance. Thus, Bpost challenged the legality of the second legal proceedings before the ECJ for breach of the principle of *ne bis in idem*. More in detail, the Court was asked whether it is compatible with this general principle of EU law for a NCA to fine business conduct that had already been investigated and fined by a sector regulator.

This leading case is of utmost importance for several reasons. First, in its ruling the Court ended the threefold test implemented in Competition law litigations to the application of the *ne bis in idem* principle (*i.e.*, same person, same facts, same protected legal interest), by stating that, for the aforementioned principle to apply, it needs to be assessed whether the material facts are identical[298], while "*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, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another*[299]". This means that now, the twofold test[300] applied in other area of EU law (*i.e.*, same offender, same facts) applies also to Competition law matters, as the scope of the protection conferred by Article 50 CFREU cannot vary from one field of EU law to another[301].

Additionally, the Court established that, for the *ne bis in idem* principle to be enforced simply establishing that the offender and the underlying facts are the same it is not sufficient. Indeed, since in the present case the involvement of each of the national Authorities concerned was claimed to give rise to a duplication of proceedings and penalties (phenomenon that would have amounted to a violation of Article 50 CFREU), the ECJ held that, for the enforcement of the mentioned principle, it must be evaluated whether a limitation of the right guaranteed by Article 50 CFREU may be justified on the grounds of Article 52(1) CFREU[302].

---

[298] European Court of Justice (2022), Case C-117/20, *supra* note 296, para. 33
[299] *Id.*, para. 34
[300] The ECJ tailored this kind of test in the following leading case: European Court of Justice (2018), Case C-524/15, " *Tribunale di Bergamo* v *Luca Menci*", available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0524
[301] European Court of Justice (2022), Case C-117/20, *supra* note 296, para. 35
[302] According to this Article *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the*

Therefore, in the Court decision, for double jeopardy (meaning duplicate proceedings) to be legitimate, the following requirements must be fulfilled:

- Duplicate proceedings must be provided for by the law and respect the rights and freedoms recognised by the CFREU[303];
- Duplicate proceedings must respect the essence of Article 50 CFREU and, therefore, national legislation must not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but it should provide only for the possibility of a duplication of proceedings and penalties under different legislations[304] pursuing distinct legitimate objectives of general interest[305]:
- The duplication of proceedings must comply with the principle of proportionality, meaning that it must "*not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation*[306]". Furthermore, as regards to compliance with principle of proportionality, the following conditions should be met: (i) there must be 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 different authorities; (ii) the two sets of proceedings must have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe; (iii) any penalty that may have been imposed in the proceedings that were first in time must be taken into the due account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication must be limited to what is strictly necessary and the overall penalties imposed should correspond to the seriousness of the offences committed[307].

On those grounds, the Court ruled that, with reference to the *bpost* case, duplication of proceedings was permissible, subject to the principle of proportionality, insofar as they were mandated by separate laws (*i.e.*, sectoral rules and Competition law) that pursued

principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

[303] European. Court of Justice (2022), Case C-117/20, *supra* note 296, para. 41

[304] *Id.*, paras 41 and 43

[305] *Id.*, para. 44

[306] *Id.*, para. 48

[307] *Id.*, para. 51

different legitimate objectives[308]. More in detail, it found that the objective of the sectoral legislation under scrutiny was the liberalisation of the internal market for postal services[309], which stays distinct, though complementary to that of Competition law (that pursues the goal, fundamental for the correct functioning of the internal market, of ensuring that competition is not distorted in the EU market[310]).

The Court concluded, therefore, that it was legitimate for a Member State pursuing the liberalisation of the domestic market for postal service, while ensuring the proper functioning of the market, to punish infringements, on the one hand of sectoral rules concerning the liberalisation of the relevant market and, on the other hand, of the rules applicable to competition law[311]. Finally, the ECJ added that "*public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned*[312]".

In *Nordzucker*, a case dealing with duplicate proceedings brought by the Austrian and German Competition Authorities under Article 101 TFEU, the ECJ was essentially asked to provide guidance, for the first time, in a circumstance regarding the application of *ne bis in idem* principle when two NCAs applied both EU and national Competition law in two sets of proceedings relating to the same facts and same offender[313].

Following the approach set in *bpost*, the Court held that legal classification under national law of the facts and the legal interest protected were not relevant for the purposes of establishing the "idem" condition[314], so that the relevant criterion for assessing the existence of the same offence was the identity of the material facts, defined as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned[315].

Thus, in order to correctly understand whether the facts are the same, the ECJ stated that "*the question whether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract,*

308 *Id.*, para. 44
309 *Id.*, para. 45
310 *Id.*, para. 46
311 *Id.*, para. 47
312 *Id.*, para. 49
313 European Court of Justice (2022), Case C-151/20, *supra* note 297, para. 25
314 *Id.*, para. 39
315 *Id.*, para. 33

but must be examined with reference to the territory and the product market in which the conduct in question had such an object or effect and to the period during which the conduct in question had such an object or effect[316]".

The Court noted that, however, it is for national Courts, which alone have jurisdiction to rule on the facts, to determine whether a dispute before them relates to the same facts as those which led to the adoption of a final decision, having regard to the territory, product market and period covered by that decision[317].

Nonetheless, in order to provide the referring Court with guidelines related to the application of the *ne bis in idem* in parallel proceedings brought under Article 101 TFEU, the ECJ held that "*Article 50 of the Charter must be interpreted as not precluding an undertaking from having proceedings brought against it by the competition authority of a Member State and, as the case may be, fined for an infringement of Article 101 TFEU and the corresponding provisions of the national competition law, on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State, even though that conduct has already been referred to by a competition authority of another Member State, in a final decision adopted by that authority in respect of that undertaking following infringement proceedings under Article 101 TFEU and the corresponding provisions of the competition law of that other Member State, provided that that decision is not based on a finding of an anticompetitive object or effect in the territory of the first Member State*[318]".

Nevertheless, both *bpost* and *Nordzucker* case are of utmost importance in our analysis on the flaws enshrined in the DMA, and in particular on those related to potential overlap between the enforcement of its provisions with that of national rules. Indeed, by explicitly stressing that the legal objectives of the DMA are distinct, yet complementary, to that of Competition law, the Commission has likely tried to preclude future arguments by gatekeepers that the parallel application of Competition law (both at EU and national level) and the DMA's conduct rules would be incompatible with the principle of *ne bis in idem*[319].

---

316 *Id.*, para. 41

317 *Id.*, para. 42

318 *Id.*, para. 58. For further information on the *Nordzucker* case see, among others: Rizzuto F., "*Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism Concerning the Principle of Ne bis In Idem*", European Competition and Regulatory Law Review (CoRe) 6, No. 2 (2022): 154-166; Dobosz K., "*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*", Yearbook of Antitrust and Regulatory Studies 26 (2022): 157-174

319 Witt A.C., *supra* note 268, at 26

The efforts of the EU Commission notwithstanding, it is not possible to completely exclude an overlap between the DMA and Competition law, as NCAs and national Courts may decide to apply antitrust provisions to the same conduct that may have already been subject to DMA proceedings. As a matter of fact, "*it is one thing for the DMA to formally declare it is not competition law. It is another whether the DMA, taken as a whole, reflects this declaration. The DMA talks the talk, but it might not walk the walk*[320]" and, as a consequence, the mere declaration that the two mentioned pieces of legislation pursue different legal interests will not prevent Courts from evaluating the real objectives at stake to assess the consistency of a duplication of proceedings with the *ne bis in idem* principle[321]. Thus, the situation remains (still) uncertain.

Nevertheless, the risk of overlap between the DMA and Competition law is relevant also with regard to two other specific topics that will be further examined in the following paragraphs: the first one deals with the institutional design of the Regulation (*i.e.*, the role of EU Member States and Commission in enforcing the new set of rules). As a matter of fact, even if the EU Commission has strived, since the very proposal of the DMA in December 2020, to be the sole enforcer of its provisions, in the aftermath of *bpost* and *Nordzucker* the final version of the Regulation needed to be amended to explicitly comply with the *ne bis in idem* principle[322]. This is because, as explained above, in order to cope with the requisites required for compliance with the principle of proportionality for duplication of proceedings to be legal, the two sets of proceedings must have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe. Therefore, as will be explained in further detail in the next paragraph, the final version of the DMA provides for some forms of cooperation among the Commission and the 27 EU Member States[323].

[320] Moreno Belloso N., Petit N., "T*he EU Digital Markets Act (DMA) A Competition Hand in a Regulatory Glove*", in European Law Review, 2023, issue 4, at 29

[321] Colangelo G., "*The European Digital Markets Act and antitrust enforcement: a liaison dangereuse*", in European Law Review, vol. 47 (2022), p. 597, at 17

[322] Cappai M., Colangelo G., "*Applying ne bis in idem in the aftermath of bpost and Nordzucker: the case of EU competition policy in digital markets"*, Common Market Law Review, vol. 60, issue 2, 2023, pp. 431-456, at 12

[323] Recital 86 DMA expressly states that, to comply with the *ne bis in idem* principle, "*The Commission and the relevant national authorities should coordinate their enforcement efforts in order to ensure that those principles are respected. In particular, the Commission should take into account any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other Union or national rules, so as to ensure that the overall fines and penalties imposed correspond to the seriousness of the infringements committed*".

the second relevant topic for the interplay between the DMA and Competition law is mainly referred to the designation process of gatekeepers envisaged in the Regulation.

3.3 The role of National Competition Authorities in enforcing the DMA: from centralisation to cooperation

As already mentioned above, in the 2020 DMA proposal not only the EU Commission was the sole Authority competent for designating digital entities as gatekeepers, but it was given also all the investigative, enforcement and monitoring powers coupled with the possibility to impose fines in case of non-compliance[324]. As a consequence, the role of EU Member States was, *de facto*, restricted to some marginal functions[325] such as assisting the Commission by participating to the Digital Markets Advisory Committee – whose advice would have been non-binding[326] – or the possibility to request to the Commission the opening of an investigation, but only when at least three of them reasonably considered that a provider of core platform services had to be designated as gatekeeper. Thus, the DMA proposal was firstly called into question because of its centralisation of powers in the hands of the EU Commission[327] that did not rely on the traditional principle of indirect administration which, generally, is typical of EU law[328].

According to some Authors, the tendency of the EU Commission towards a centralisation of powers would have guaranteed the success of the DMA, allowing the new set of provisions to achieve the goals underpinning its adoption (*i.e.*, overcoming all the weaknesses entrenched in the extant Competition rules, such as the delays of antitrust proceedings and the lack of effectiveness in imposing remedies). Moreover, among the arguments in favour of a centralised model for the enforcement of the DMA, such Authors included: (i) the global dimension of the potential gatekeepers, which would have made the European level the most effective in implementing the rules on digital markets; (ii) the

[324] European Commission (2020), *supra* note 99, Chapter V

[325] Monti G., "*The Digital Markets Act Improving Its Institutional Design*", European Competition and Regulatory Law Review, vol. 5, issue 2, 2021, pp. 90-101.

[326] Regulation 182/2011, *supra* note 256, Art. 4.

[327] Larouche P., de Streel A., "*The European Digital Markets Act: A Revolution Grounded on Traditions*", Journal of European Competition Law & Practice, vol. 12, issue 7, 2021, pp. 542-560, at 23.

[328] Under this principle, which stems directly from the principle of proportionality, legislation is issued at the EU level but enforced by national Authorities. For further information on the principle of indirect administration see, as an example: Hofmann H.C.H *et al.*, "*General Principles of EU law and EU administrative law*", in C. Barnard and S. Peers (eds.) European Union Law, Oxford University Press, 2014

limited number of stakeholders affected by the Regulation; (iii) the excessive burden, in terms of costs and resources, for a single NCA to realize an effective monitoring of gatekeepers' compliance with the provisions of the DMA[329].

These arguments notwithstanding, both the Italian Competition Authority and the other NCAs cast doubt over such a centralised procedure of public enforcement that could have led, according to them, to relevant risks as[330]:

- Unreasonable inefficiencies due to underutilization of existing resources;
- Enforcement bottlenecks;
- Significant delays caused by the impossibility for the EU Commission alone to provide sufficient resources to enforce all the obligations and prohibitions referred to in the DMA[331];

Therefore, in an attempt to cope with all the potential criticalities related to a centralised enforcement of the Regulation, two distinct models of execution have been proposed by the literature. The first one, known as "*minimalist*" model, provides for a centralised enforcement procedure in the hands of the Commission, entrusting the NCAs with a supporting role[332]. This model was rooted on the idea that close cooperation with and between the competent independent Authorities of the Member States would have been crucial and that the final draft of the DMA would have needed to reflect this necessity[333].

Accordingly, as enforcing the DMA would have involved (and still involves) a wide variety of tasks, which require both sound expertise and appropriate resources, according to the minimalist model the EU Commission should have relied on the valuable experience of national Authorities, that could have supported the EU institutions with (among others):

- The establishment of a complaint desk in each Member States in order to lower the barriers for both business and end-users to find relevant information

[329] De Streel A., Feasey R., Krämer J., Monti G., "*Making the Digital Markets Act more resilient and effective*", Recommendations paper, Centre on Regulation in Europe (CERRE), 2021, pp-72-73

[330] See, in these respect, AGCM (2022), "*Annual report 2021*" (Relazione annuale sull'attività svolta nel 2021), available at: https://www.agcm.it/dotcmsdoc/relazioni-annuali/relazioneannuale2021/Relazione_annuale_2022.pdf

[331] As stated by the EU Commission in the Explanatory memorandum to the DMA proposal, the number of FTEs foreseen for monitoring the execution of the DMA was of only 80 people, a contingent that, *prima facie*, did not seem sufficient at all

[332] Body of European Regulators for Electronic Communication (BEREC-2021), "*For a swift, effective and future-proof regulatory intervention: BEREC Opinion on the European Commission's proposal for a Digital Markets Act*", BoR 21(35)

[333] *Id.*, at 6

about the Regulation and, consequently, to file a claim. Such complaints, in case of well-grounded reasons, could have been filed to the EU Commission for further actions;

- Acting as an intermediary in managing a mechanism for resolving disputes between gatekeepers and their business users. The added value of national Authorities' assistance in this case would have been dual: Firstly, For SMEs, the proximity of national regulators would have represented a major advantage; secondly, the use of resources at national level would also have alleviated the administrative burden at EU level[334];

- Using their expertise and experience to support the Commission in further specifying the obligation stemming from the execution of the DMA. This would have been possible because, as a matter of fact, several national Authorities have sound expertise in dealing with digital platforms and algorithms, as well as with some of the obligations laid down in the Regulation, such as interoperability, access to data or their portability[335].

However, the proposal made by the supporters of the minimalist model has been criticised at least for two reasons: (i) entrusting Member States with just a supporting role would have not been sufficient to prevent the staff (only 80 people at the time of the proposal) of the Commission from being completely overwhelmed by the huge workload generated by the entry into force of the Regulation[336]; (ii) granting an enforcement monopoly to the Commission could have created the risk of an enforcement procedures insufficiently dynamic[337].

---

[334] According to BEREC "*To be designated as such, gatekeepers must have more than 10.000 yearly active business users. Given the relevance of the concerns addressed by the DMA, it is very likely that a significant number of disputes will be filed over the years*". This circumstance would have made the assistance by national Authorities of utmost importance as to avoid a shutdown in the enforcement procedures of the DMA.

[335] De Streel A., Feasey R., Krämer J., Monti G., *supra* note 329, at 75

[336]Giordano G., "*Il Digital Markets Act e la centralizzazione dei poteri in capo alla Commissione europea: quale ruolo per le Autorità antitrust nazionali?*", in Comparazione e Diritto Civile, Vol. 3, 2022, pp. 979-1000

[337] Geradin D., "*DMA proposal: Should there be a greater role for the Member States?*", The Platform Law Blog, 2021. According to the Author "*the risk of granting an enforcement monopoly to a given body, especially when the latter is insufficiently staffed, is that it may deliver a sub-optimal level of enforcement. This problem can be partly addressed when enforcement is shared between different Authorities*", as in the case of EU Competition law, which can be enforced at both EU and national level

The second model that has been proposed in order to amend the DMA's provisions related to public enforcement is known as "*maximalist*" model[338]. It provided for an enforcement procedure according to which the DMA would have been enforced centrally by the Commission, but it could have also been enforced locally by national authorities. NCAs were the main sponsor of the latter model, that is the reason why they even published a joint paper in which they stressed out the importance of their cooperation with the EU Commission in enforcing the Regulation[339].

In the mentioned contribution, the 27 NCAs proposed a model of enforcement based essentially on three main points:

3.5 The primary application of the DMA by the Directorate General for Competition ("DG Competition") at the European Commission;

3.5 A complementary possibility of enforcement of the DMA by NCAs;

3.5 The establishment of a mechanism for close coordination and cooperation among these agencies, as well as with national Courts implementing both the DMA and Competition law[340].

To sum up, according to this version of the maximalist model, "*The center of gravity for the enforcement of the DMA should be at EU level and the European Commission should have sole jurisdiction on some of the powers outlined in the DMA, such as the power to designate gatekeepers or decide on exemptions. However, enforcement powers should in specific instances be shared with national competition authorities on a voluntary basis*[341]". The powers shared with NCAs should have been the following: (i) to initiate or enforce proceedings against gatekeepers on the basis of the DMA; (ii) to carry out certain investigative actions at the request of the Commission, when the NCAs would have been well placed to deal with the case; (iii) to request he Commission to open proceedings or market investigations.

---

[338] It must be highlighted that there have been proposed distinct versions of this model, depending on a greater or lesser degree of involvement of national Authorities and of the powers relating to the application of the DMA granted to them.

[339] European Competition Network (ECN-2021), Joint paper of the heads of the national competition authorities of the European Union, "*How national competition agencies can strengthen the DMA*", ECN Directors General's meeting of 22 June 2021

[340] *Id.*, at 6

[341] *Id.*, at 8.

Even the German, French and Dutch Governments took part in the debate on the maximalist model, by proposing their own paradigm and concretely highlighting how NCAs could have assisted the Commission in the DMA enforcement[342]. According to this proposal, NCAs should have been allowed to employ, *motu proprio*, the relevant investigative and monitoring powers provided for by the DMA. Moreover, a referral mechanism (similar to that currently in use in merger control) was introduced as part of the proposal, so that NCAs should have been able to properly support the Commission and contribute with their capacities in the DMA enforcement[343].

The same proposal, additionally, suggested that NCAs and the EU Commission should have strictly cooperated, also coordinating their action, via the ECN[344], a system that would have ensured that the DMA could have been swiftly and effectively enforced, the workload optimally allocated at European and national levels, and that Commission and NCAs would have had adequate leeway to set own enforcement priorities. At the same time, this approach would have guaranteed the coherent enforcement of the Regulation across the whole Single Market as the initiation of proceedings by the Commission should have relieved NCAs of their competence under the DMA[345].

It is noteworthy that the implementation of such a system of coordination and cooperation would have not been unprecedented, as it is still into force a well-established mechanism of collaboration among the Commission, NCAs and national Courts that provides for a system of "mutual assistance" in the application of European competition rules (namely Arts. 101 and 102 TFEU) by Member States jurisdictions[346]. The legal foundation of such mechanism of assistance is Article 4, paragraph 3 of the TEU, according to which "*pursuant to the principle of sincere cooperation, the Union and the Member States*

[342] Proposal by French, German and Dutch Ministers of Economic Affairs (2021), "*Letter and proposal: Strengthening the Digital Markets Act and its Enforcement*".
[343] *Id.*, at 2
[344] It is worth recalling that, in 2018, the European Competition Network has been strengthened through the provisions laid down in the so-called ECN+ Directive, which has provided NCAs with more effective enforcement powers as to safeguard the correct functioning of the EU market. For further information, see Directive (EU) 2019/1 of The European Parliament and of The Council of 11 December 2018, "*to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*", L 11/3, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001
[345] See *supra*, note 342, at 2
[346] European Commission (2004), "*Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*", (2004/C 101/04), available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(03)

shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"[347].

Nevertheless, during the trilogue negotiations, even the Council of the EU, in adopting its general approach, endorsed the mentioned system of cooperation and coordination, by recognising the role of ECN and also proposing to entrust NCAs with the power to conduct investigations into possible infringements of the DMA and, if the case, transmit their findings to the Commission[348]. The Council proposed, also, a mechanism of coordination with national Courts[349].

That said, the final version of the DMA makes a clear effort to find a compromise among all the instances discussed before. Indeed, even though the Commission remains the sole Authority empowered to enforce the Regulation, it is also openly acknowledged the necessity for cooperation and coordination between the Commission and national competent Authorities in order to ensure that the principles of proportionality and *ne bis in idem* are respected (avoid the risk of overlapping investigations) and to guarantee the coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers[350].

This cooperation mechanism laid down in the final version of the DMA allows, for instance, the Commission to request, while carrying out on-site inspections, the assistance of the NCA in whose territory the inspection is to be conducted[351]. At the same time, the Commission shall inform the relevant Authority of a Member State in whose territory an interview of a legal or natural person is taking place and, if that Authority so requests, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview[352].

Furthermore, in enforcing Competition law rules Member States and the Commission shall cooperate with each other and inform each other about their respective enforcement

---

[347] According to an extensive interpretation of this paragraph, the Commission should assist national Courts in the application of EU law, while the latter might be required to assist the Commission in carrying out its own tasks.

[348] Council of the European Union (2021), "*Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) - General approach*", 2020/0374(COD), Article 32a, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13801_2021_INIT

[349] *Id.*, Article 32b

[350] European Commission (2022), *supra* note 217, Recitals 86, 90, 91 and Article 37

[351] *Id.*, Article 23, paragraph 3

[352] *Id.*, Article 22, paragraph 2

actions through the ECN[353]. What is more, under article 38 (7) DMA, a national competent Authority of the Member States enforcing the rules mentioned above may even, on its own initiative, investigate on a case of possible non-compliance with Articles 5, 6 and 7 DMA on its territory by an undertaking. The Authority must, nevertheless, inform the Commission in writing before taking a first formal investigative measure[354]. Additionally, the starting of investigation proceedings by the Commission pursuant to Article 20 DMA on the undertaking in question will automatically relieve the Authority of the possibility to conduct such an investigation.

Finally, not only EU Member States will assist the Commission through the aforementioned Digital Markets Advisory Committee[355] , but also article 40 DMA sets the introduction of a "high-level group[356]" composed of different European bodies and networks –including the ECN– that will provide the Commission with:

- Advice and recommendations for any general matter of implementation or enforcement of the DMA;
- Expertise, in the context of market investigations into new services and practices, on the need to amend, add or remove rules in the DMA.

In light of the above, it is possible to say that the final version of the DMA, for its implementation, has replaced the traditional decentralised paradigm with a new hybrid model characterised by both centralisation of enforcement powers and cooperation (along with coordination), in terms of assistance, with national and European Authorities. It is important to stress that, according to some Authors, this somehow unusual enforcement procedure, however, might not be sufficient to ensure the achievement of the goals of the Regulation and to avoid risks of fragmentation stemming from friction with competition Law.

Indeed, the mentioned scholars sustained that the risk of double jeopardy could be fostered also by the designation process of gatekeepers laid down in the DMA, as it could be over-inclusive, resulting in the designation of more than the limited number of digital

[353] *Id.*, Article 38, paragraph 1
[354] *Id.*, paragraph 2
[355] *Id.*, Article 50
[356] According to Article 40, paragraph 4, the high-level group shall be chaired by the Commission (that will take part to its meeting) and shall meet upon request of the Commission at least once per calendar year. Moreover, the Commission shall also convene a meeting of the group when so requested by the majority of the members composing the group in order to address a specific issue.

undertakings foreseen by the Commission[357]. Thus, in the next paragraph we will scrutinise in depth this topic in order to assess whether the mentioned designation process has actually led to such a scenario.

3.4 **The loopholes in gatekeepers' designation process**

To wrap up what has already been extensively analyzed before (§3), an online platform offering core platform services in the market is designated as a gatekeeper according to a two-stage procedure: (i) first of all, it should meet cumulatively the three qualitative criteria laid down in article 3(1) DMA (*i.e.*, it has a significant impact on the internal market, it serves as an important gateway for business users to reach end-users, and it enjoys an entrenched and durable position in its operations or its foreseeable that it will enjoy such a position in the near future); (ii) secondly, these qualitative criteria are presumed to be satisfied when some quantitative thresholds, as provided by Article 3(2) are met.

Furthermore, the Commission, following a market investigation pursuant Article 17, may designate as gatekeeper any undertaking meeting the qualitative requirements above but not the quantitative ones. Finally, in an effort to avert market tipping[358] (*i.e.*, "*the increase in a firm's market share dominance caused by indirect network effects*[359]"), the DMA entrusts the EU Commission with the power to designate as gatekeeper an emerging platform that meets the qualitative criteria of being an important gateway and having a

[357] For further insights on forecasts given by the Commission related to the impact of the DMA see: European Commission (2020), "*Digital Markets Act Impact Assessment Support Study*", available at the following link: https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1/language-en

[358] Recital 26 of the DMA stresses the necessity to intervene against this tricky phenomenon as "*once an undertaking providing the core platform service has obtained a certain advantage over rivals or potential challengers in terms of scale or intermediation power, its position could become unassailable, and the situation could evolve to the point that it is likely to become entrenched and durable in the near future. Undertakings can try to induce this tipping and emerge as gatekeeper by using some of the unfair conditions and practices regulated under this Regulation. In such a situation, it appears appropriate to intervene before the market tips irreversibly*".

[359] Dubé J.P., Dube, Hitsch J.G., Chintagunta P. K., "*Tipping and Concentration in Markets with Indirect Network Effects*", Chicago GSB Research Paper No. 08-08, 2008, at 1

significant impact on the market, while the criteria of having an entrenched and durable position in the market is just foreseeable[360].

According to some Authors, the fact that the mentioned qualitative and quantitative criteria seem not to be intended to apply in a strict combination (as the former are "presumed" to be met when the latter are satisfied) could result in the DMA capturing a larger number of platforms than if such criteria were to be applied cumulatively[361]. As an example, it appeared that some large undertakings (such as Oracle and SAP), although they do not seem to have any gatekeeping position on the core platform service they offered, could nonetheless be listed as gatekeeper because they met the quantitative thresholds provided by the DMA[362]. As a result, the DMA designation process might be over-inclusive, leading to a stronger degree of friction with Competition law (*i.e.*, the higher the number of designated gatekeepers, the greater the risk of parallel proceedings under both DMA and national legislations).

Based on the consideration above, the risk of over-inclusiveness could have been limited by circumscribing the scope of the DMA just to ecosystem-related issues, meaning that its application should have been limited to a restrict number of digital platforms capable of orchestrating an ecosystem[363], which can be defined as "*an ensemble of services, some complementary, connected to another through private APIs* [application programming interface] *which are APIs accessible only to services from the same ecosystem*[364]". This is because, today competition in digital economy is increasingly a competition among ecosystems, phenomenon that may lead to digital markets that are highly concentrated, incline to tipping and not fairly contestable[365]. Accordingly, the very rationale of the proposal of the DMA was to tackle the emergence of a few large platforms acting as gateways or gatekeepers between business users and end users and enjoying an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services[366].

---

[360] Petit N., "*The Proposed Digital Markets Act (DMA): A Legal and Policy Review*", Journal of European Competition Law & Practice, Volume 12, Issue 7, 2021, pp. 529-541, at 11
[361] Geradin D., "*What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?*", 2021, at 13
[362] Caffarra C., Scott Morton F., *supra* note 264
[363] Colangelo G., "*The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy*", International Center for Law and Economics (ICLE) white paper 2022-03-23, at 5
[364] Crémer J. *Et al*, *supra* note 26, at 34
[365] *Id.*
[366] European Commission (2020), *supra* note 99, *Explanatory Memorandum*, at 1

Nevertheless, in the opinion of the Authors criticising the gatekeepers' designation process, the final version of the DMA would have somehow departed from its previous rationale because, even if the definition of contestability as protected legal interest openly makes reference to ecosystems[367], the designation process is still primarily based on quantitative criteria that could be misleading in providing indications on the fact that some digital platforms actually act as "*gateways for a large number of business users to reach end users everywhere in the Union and on different markets*[368]".

Furthermore, while the DMA proposal provided for a rebuttable presumption by means of which platforms meeting the quantitative criteria already discussed could escape from designation as gatekeeper if they were able to sufficiently demonstrate that they did not satisfy the qualitative criteria necessary for maintaining a gatekeeping position[369], the final draft of the Regulation has made this procedure more difficult as undertakings fulfilling the quantitative requirements listed in Article 3, will be able to rebut the presumption of having a gatekeeping position only in "*exceptional circumstances*"[370].

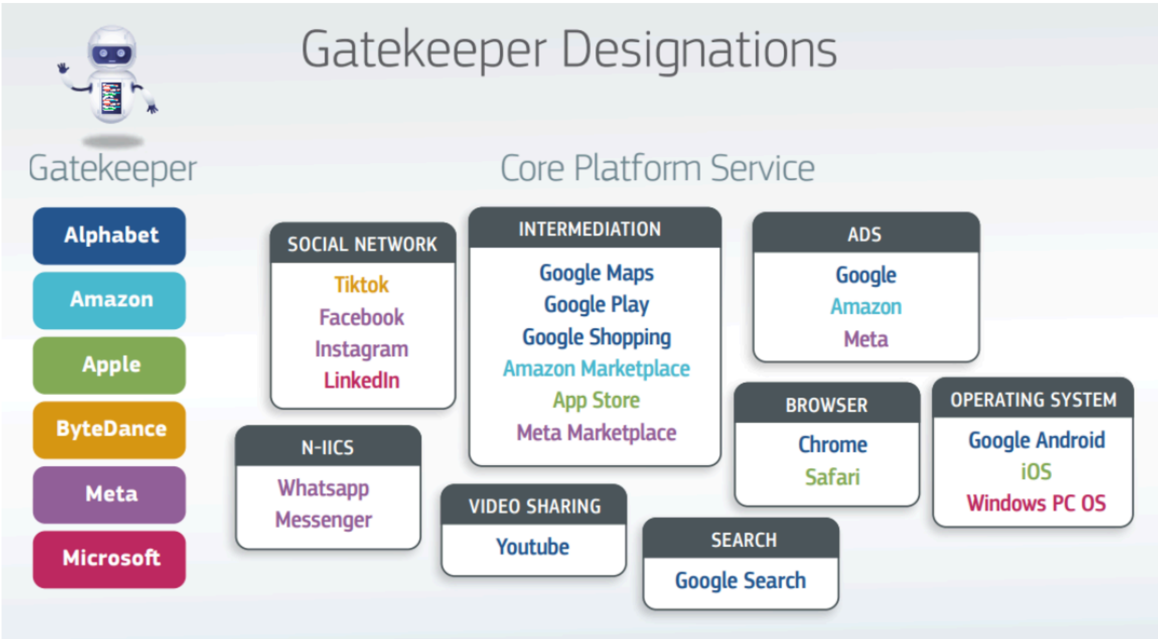
Additionally, in the assessment of the evidence and arguments produced by the undertaking under question, the Commission should take into account "*only those elements which directly relate to the quantitative criteria, namely the impact of the undertaking providing core platform services on the internal market beyond revenue or market cap, such as its size in absolute terms, and the number of Member States in which it is present; by how much the actual business user and end user numbers exceed the thresholds and the importance of the undertaking's core platform service considering the overall scale of activities of the respective core platform service; and the number of years for which the thresholds have been met*[371]". Thus, in this assessment no other qualitative elements should be considered.

Even if the concerns related to gatekeepers' designation may be consistent and can actually occur in the future, the story at the time of writing has proven different. Indeed, on 3 July 2023 only 7 digital undertakings, namely Alphabet (*i.e.*, the parent company of Google), Amazon, Apple, ByteDance (owner of "TikTok"), Meta, Microsoft and Samsung, have notified the Commission that they meet the gatekeeper thresholds laid down in the

---

[367] European Commission (2022), *supra* note 217, Recital 32
[368] *Id.*, Recital 6
[369] European Commission (2020), *supra* note 99, Article 3, paragraph 4
[370] European Commission (2022), *supra* note 217, Article 3, paragraph 5
[371] *Id.*, Recital 23

DMA[372]. Following a 45-day review process conducted by the EU Commission after the notification by the mentioned undertakings of their potential status as gatekeepers, on 6 September 2023 the Commission has designated, for the first time, 6 gatekeepers (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft) under the Digital Markets Act[373], a number which is far from that feared by some Authors. In total, 22 core platform services provided by gatekeepers have been designated. A chart provided by the same Commission is useful to keep in mind both the gatekeepers and the core platform services identified:



Following their designation, pursuant Article 3(10) gatekeepers have six months to comply with the full list of obligations under the DMA, as they have to ensure and demonstrate effective compliance. To this end, they have 6 months to submit a detailed compliance report in which they outline how they comply with each of the obligations of the DMA[374].

---

372 For further information, see https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en#:~:text=Content%20and%20Technology-,Potential%20gatekeepers%20notified%20the%20Commission%20and%20provided%20relevant%20information,Article%203%20of%20the%20DMA.

373 Further information on the topic can be found at the following link: https://ec.europa.eu/commission/presscorner/detail/%20de/ip_23_4328

374 Indeed, pursuant Article 11 DMA "*Within 6 months after its designation pursuant to Article 3, and in accordance with Article 3(10), the gatekeeper shall provide the Commission with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations*

Moreover, in its statement the Commission declared that, although Gmail, Outlook.com and Samsung Internet Browser meet the thresholds under the DMA to qualify as a gatekeeper, Alphabet, Microsoft and Samsung provided sufficiently justified arguments, pursuant Article 3(5) showing that these services do not qualify as gateways for the respective core platform services. Therefore, the Commission decided not to designate Gmail, Outlook.com and Samsung Internet Browser as core platform services. Consequently, Samsung has not been designated as gatekeeper with respect to any core platform service. Thus, the fact that Samsung succeeded to prove that it was not holding a gatekeeping position for the interested core platform service seems to suggest that, even if the rebuttable presumption discussed above should operate only in "exceptional circumstances", it could however be suitable for countering potential false-positive cases.

The list of core platforms services could, nevertheless, be expanded in the near feature as the Commission has already opened four market investigations in order to assess Microsoft's and Apple's submissions arguing that, despite meeting the thresholds, some of their core platform services (notably Bing, Edge and Microsoft Advertising for the former, and iMessage for the latter) do not qualify as gateways[375]. Additionally, pursuant Article 17(1) the Commission has opened a market investigation to further assess whether Apple's iPadOS should be designated as gatekeeper, despite not meeting the thresholds. Under the DMA, this investigation should be completed within a maximum of 12 months.

Thus, against the suggestion that the DMA should have been narrowed by addressing only ecosystem-related problems, thus designating as gatekeepers only those platforms able to orchestrate an ecosystem, the restrict number of digital entities identified as gatekeepers seems to have averted, at least for the time being, the risk associated with an overinclusive designation procedure. On the other hand, as we will discuss later, the potential threat could turn up to be the ability of the EU Commission to effectively ensure compliance with the DMA's obligations for all the core platform services designated (considering that this number could rise up to 27 in the near future). The Commission, as a matter of fact, will almost certainly need more than the 80 FTEs foreseen in 2020 to assess the correct execution of the Regulation.

laid down in Articles 5, 6 and 7." Furthermore, the gatekeeper shall publish and provide the Commission with a non- confidential summary of that report that it must update annually. Finally, the Commission shall make a link to that non-confidential summary available on its website.

[375] Pursuant Article 17, paragraph 5, this kind of investigation should be completed within a maximum of 5 months

3.5 **Some considerations on the DMA and suggestions for its improvement**

Since its proposal in 2020, giant digital companies put lot of efforts on lobbying activities in an attempt to induce both the EU Parliament and the Council to soften the scope of the DMA[376]. Yet, comparing the initial legislative proposal to its final version, it seems that these efforts were not successful. Indeed, the final version of the DMA provides for even stricter rather than looser obligations on gatekeepers, having tightened compliance deadlines, extended the scope of the Regulation to further core platform services, added other obligations and penalties and increased fines[377]. As an example, having endorsed the amendment proposed by the EU Parliament, the deadline for notifying the Commission of meeting the quantitative thresholds for being designated as a gatekeeper (Article 3, paragraph 3), has been lowered from three to two months[378].

The final version of the DMA imposes, nonetheless, also higher burdens on the EU Commission than the original legislative proposal[379]. Indeed, the current version of the Regulation provides for new duties for the Commission such as: (i) the obligation to report annually to the EU Parliament and Council on the implementation of the Regulation and on the progress made towards achieving its objectives (Article 35 DMA); (ii) the duty to review exemption decisions on an annual basis (pursuant Article 10, paragraph 2); (iii) the requirement to re-examine the effectiveness of remedies imposed in cases of systematic non-compliance regularly (Article 18, paragraph 8) and, finally, to consult (pursuant to Article 40 DMA) the high-level group (chaired by the same Commission, to which it should also provide secretariat services).

---

[376] Deutsch J., "*Big Tech Shadow Lobbying Campaigns Under Fire in EU Parliament*", Bloomberg, 5 July 2022

[377] Witt A.C., *supra* note 268, at 22

[378] European Parliament (2022), Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 — C9-0419/2020 — 2020/0374(COD)), (2022/C 251/33), amendment 85. Document available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021AP0499 . Other important amendments incorporated in the final version of the DMA are, among others: the addition of web browsers to the list of core platform services (amendments 64 and 65); the insertion of the interoperability obligation for number- independent interpersonal communication services (amendment 127); the introduction of higher fines for repeat infringements (DMA Article 30, paragraph 2).

[379] Witt A.C., *supra* note 268, at 23

It is self-evident that, due to the amendments mentioned above, enforcement costs have been risen not only for gatekeepers, but, also for the European Commission itself. Whereas, in its initial assessment – we have been over this yet – the Commission forecasted that the burden to its institutional body would have been low (consisting mainly in a redeployment of existing job position) if compared to the advantages for the whole economy[380], this prevision is likely to be not so accurate because the Commission, to comply with all the obligations laid down in the DMA and to achieve an efficient level of enforcement of the same Regulation "*will need to increase* [its] *staffing levels and build up specific expertise, in particular in data science and algorithms*[381]".

With reference to public enforcement, the choice of a centralised procedure (yet with some degree of cooperation with national Authorities and interinstitutional bodies) was justified with the necessity to ensure uniformity of the implementation conditions of the Regulation[382]. Still, enforcing the DMA will be both resource and time costing and, as a consequence, the odds of the Commission, as the sole enforcer of the DMA, pursuing all the presumed gatekeeper violations seems to be low. This phenomenon entails the risk of underenforcement which, in turn, could undermine the same rationale of the Regulation.

Indeed, by choosing of centralising all the enforcement powers in its own hands, the Commission has forgone the chance to share enforcement costs with NCAs, which already have gained significant experience in enforcing antitrust rules against conduct by digital dominant undertakings and that would be keen to enforce the DMA in their territories. The hope is, therefore, that in the near future the degree of involvement of Member States in the execution of the DMA will be increased, possibly envisaging a system of parallel enforcement between them and the EU Commission. This would probably ward-off the likelihood of an underenforcement of the Regulation.

As for private enforcement, even if the DMA (pursuant Article 39) provides for a system of cooperation between the Commission and national Courts, it does not directly empower them to apply the relevant conduct rules. More in detail, it does not expressly state whether its rules can be privately enforced through actions seeking for compensation by third

---

380 European Commission (2020), *supra* note 265, at 48 and 62
381 European Commission Press Corner, "*Sneak peek: how the Commission will enforce the DSA & DMA*", blog of Commissioner Thierry Breton, 5 July 2022, available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_4327. Accordingly, the staff dedicated to the DG connect will have over 100 full time staff.
382 European Commission (2022), *supra* note 217, Recital 99

parties damaged by a conduct in breach of an obligation set out in the DMA. It must be said, nevertheless, that even Arts. 101 and 102 TFEU do not openly recognize such a possibility, but their application is anyhow possible by national Courts to compensate the claimed damages by a natural or legal person[383]. Indeed, in accordance with EU law "*Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions*[384]".

The same reasoning should be, therefore, applied also to the DMA, considering that it implicitly seems to acknowledge private enforcement of its rules, as the cooperation system with national Courts provided by Article 39 appear to suggest.

However, as the burden of proof on private parties looking for compensation could be disproportionate (as the plaintiff must prove not only the infringement and the consequent loss, but also the causality between them, and the information for proving these elements are likely to be under gatekeepers' control[385]) and the rules of the damages Directive alleviating such a burden of proof[386] cannot by applied to actions based on the DMA, The EU legislator will possibly need also to amend the Regulation as to ensure an efficient degree of private enforcement.

Even if the DMA was proposed and recently enacted to complement EU Competition law that, being applied *ex post*, is considered not able to effectively address challenges in digital markets, the Regulation does not contain any substantive provision to assess mergers

---

[383] 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), available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104 . According to Article 3(1) of the damages Directive "*Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm*".

[384] *Id.*, Recital 3

[385] Witt A.C., *supra* note 268, at 34

[386] As an example, Arts. 13 and 14 of the damages Directive

among digital undertakings[387]. This lack could significantly reduce, *prima facie*, the possibility for the Commission to ensure contestability of digital markets.

However, this topic will be discussed in great detail in the next Chapter, as it will be mostly devoted to the phenomenon of the so-called "killer acquisitions" that can be considered as a typical trait of the digital environment.

4. **Closing statements**

The introduction of *ex ante* regulation to tackle challenges coming from digital markets has been a hot topic of discussion among several parties in last years. Indeed, even if in the last decades NCAs have successfully strived to safeguard competition in digital markets, when I was apprenticed to the Italian Competition Authority, I had the chance to see first-hand how difficult the implementation of "traditional" Competition law provisions to conduct by digital undertaking can be for an NCA (we analysed all the issues related to this topic at the very beginning of the present Chapter), both in terms of resources and time. This is the reason why, since its very proposal in 2020, I welcomed the idea of a new Regulation consisting of *ex ante* rules capable of directly addressing potentially harmful conduct by online platforms acting in the EU market.

Will the DMA succeed? It probably stands a good chance. Indeed, by stipulating rigorous obligations for gatekeepers, the DMA has the potential to be a fresh start for a more competitive and contestable functioning of digital markets in the EU and, maybe, all over the world if the "Brussels effect[388]" strikes again[389].

[387] The only two provisions of the DMA related to mergers between gatekeepers are the obligation to inform about concentration pursuant Article 14 and the prohibition for gatekeepers of entering into concentrations for a limited period, when they are found "guilt" of systematic non-compliance, as provided by Article 18(2)
[388] This expression coined by Anu Bradford refers to a peculiar phenomenon by which multinational undertakings have an incentive to standardize their production globally and to adhere to a single rule, thereby converting the (often strict) EU rule into a global rule, the so-called "*de facto* Brussels effect". Additionally, after these export-oriented undertakings have adjusted their business practices to meet the EU's standards, they often have the incentive to lobby their domestic governments to adopt these same standards in an effort to level the playing field against their domestic, non-export-oriented competitors, a phenomenon that ca be defined as "*de jure* Brussels effect". For more info on the Brussels effect see: Bradford A., "*The Brussels effect*", Northwestern University Law Review, Vol. 107, No. 1, 2012, at 6
[389] For a discussion on the potential "Brussels effect" stemming from the implementation of the DMA see: Blockx J., "*The Digital Markets Act: fostering innovation 'made in Europe'?*", 31 March 2023

Nevertheless, far from being flawless as discussed in the previous paragraphs, a crucial factor in its success will be the degree of cooperation between the EU Commission and other national and supra-national institutions, implemented by using the mechanisms set out in the Regulation. As we have shown, the enforcement mechanism laid down in the DMA's proposal has shifted from a full centralization of power in the hands of the Commission to a cooperation with NCAs (as provided by the final version of the Regulation). Thus, for a full realization of its goals, it is to be hoped that NCAs' involvement in the enforcement procedure will be enhanced to benefit from national agencies' expertise and enforcement resources, once the Commission will be able to issue guidelines for a uniform European approach.

Another important element for the DMA's effectiveness, we have repeatedly said this, will surely be related to the appropriate number of resources of the correct kind to properly enforce the Regulation. This should imply not only the right number of tools but also of personnel, which should include both lawyers, experts in data, computer science, artificial intelligence and behavioural insights expertise, due to the consumer-facing nature of digital markets[390].

Finally, another fundamental ingredient capable of hindering the positive outcome of the DMA is that the foreseen results may not be achieved by following its conduct rules. Indeed, even if the Regulation contains some corrective mechanisms (as an example, quantitative gatekeeper presumptions are rebuttable) allowing the Commission to rectify provisions that are failing to fulfil their objective by means of implementing acts, regulatory dialogue and updates[391], the Commission's ability to accurately surveil the DMA's effect on the market and to promptly intervene in case of misfunctioning will undoubtedly play a major role in the DMA's success in the next future.

[390] Turner V., "*The EU Digital Markets Act–A New Dawn for Digital Markets?*", Antitrust Magazine, Vol. 37, No. 1, 2022, pp. 42-50, at 48
[391] Witt A.C., *supra* note 268, at 41

CHAPTER 3: MERGERS AND KILLER ACQUISITIONS IN DIGITAL MARKETS: HOW TO TACKLE SUCH A TRICKY ISSUE?

1. How to tackle mergers and acquisitions of nascent undertakings in digital markets – the case of killer acquisitions (preamble)

The rationale for the interest experienced in the last years towards merger and acquisitions (hereinafter "M&A") involving innovative start-ups is probably related to the fact that they are usually considered as crucial players in competitive markets, because they are sponsors of new ideas, products, services and business models that contribute to foster disruptive innovation. Start-ups can also help to break up highly concentrated markets, reducing market inequality and fostering less efficient players to improve their strategy and business or exit. This is particularly true in digital markets, where young small undertakings owning considerable access to data, as well as important resources for increasing the degree of innovation in the market, may potentially become relevant players and, as such, be attractive targets for large incumbent digital platforms and, specifically, for gatekeepers wishing to acquire them[392].

It is important to note, however, that start-ups can be "*particularly vulnerable both to exclusionary unilateral conduct and to the distortionary effects of rent seeking by incumbents that lobby for subsidies, anticompetitive regulation, or trade protection. Competition agencies are therefore often keen to ensure that such nascent firms enjoy a level playing field and the opportunity to compete on the merits without the threat of exclusionary behaviour from dominant incumbents*[393]".

This fact notwithstanding, the relevance of this kind of players to merger control activities from both the Commission and NCAs has been, at least until recent years, somehow limited, probably because they had little turnover and, therefore, did not fall within the scope of the merger review system established by the EU Merger Regulation[394] (hereinafter "EUMR").

---

[392] As shown by a study from Bruegel, in the period 1987-2020 the so-called GAFAM acquired more than 800 undertakings, with Google having the greatest average number of acquisitions per year. For more info, see Parker G., Petropoulos G. and M. Van Alstyne, "*Platform mergers and antitrust*", Working Paper 01/2021, Bruegel

[393] OECD (2020), "*Start-ups, Killer Acquisitions and Merger Control – Background Note*", at 5, available at the following link: https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf

[394] EUMR, see *supra*, note 103

Indeed, in 2004 the EUMR introduced a peculiar system for M&A control, based on specific turnover thresholds, that entrusts the EU Commission with the necessary powers to review M&A taking place in the Union territory. Particularly, the EUMR provides for a mandatory notification system for merger operations, where jurisdiction is based on the following specific turnover thresholds[395]:

- The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
- The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million (unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State).

Therefore, when a concentration meets the abovementioned thresholds, it is considered as having a "Community dimension" and is, as a consequence, subjected to the pre-notification obligation laid down in the EUMR[396]. If these thresholds are not met, the concentration under scrutiny is considered as however having a Community dimension when the following requirements are fulfilled:

- The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

- In each of at least three Member States, the combined aggregate worldwide turnover of all the undertakings concerned is more than 100 million;

- In each of at least three Member States included for the purpose of the previous point the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

- The aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million (unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State)[397].

Thus, after having received the notification, the Commission must examine it by assessing whether it raises serious doubts as to its compatibility with the common market.

---

395 *Id.*, Article 1, paragraph 2. For an overview on the topic of M&A in the EU see: Meli V., "*Concentrazioni [dir. comm.]*", Enciclopedia Giuridica Treccani online, Istituto della Enciclopedia Giuridica Italiana, Roma, 2015
396 *Id.*, Article 4
397 *Id.*, Article 1, paragraph 3

The Commission can, at this stage of the assessment, declare the operation compatible with the common market or, on the other hand, initiate proceedings. If, after the proceedings, the Commission finds the merger under scrutiny incompatible with the common market, it can, by means of a decision, ban the transaction in question or, when the merger has already been implemented, it can require the undertakings concerned to dissolve the concentration or, however, order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision[398].

Nonetheless, being the EU Commission a supra-national institution, the thresholds established by the EUMR have also the purpose of allocating merger review cases between the Commission and NCAs. Indeed, when a merger does not fulfil the EU thresholds it can, nevertheless, face merger control in each of the EU 27 Member States. This means that "*the thresholds as such are designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation* […] *They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable*[399]".

Moreover, as we will examine in greater detail later in this Chapter, alongside with the turnover thresholds, the EUMR provides for a referral mechanism allowing NCAs to refer a notified transaction to the EU Commission when certain conditions are fulfilled[400]. The existence of such referral mechanism was considered, at least until mid-2010s, as providing a certain degree of flexibility that would have avoided the need for a change to the thresholds established in the EU. And, maybe, this could have been true for "traditional" markets. But, as we already said, the way competition works in innovative and fast-changing markets is often extremely different from that of traditional ones.

The first wake-up call related to the EUMR's actual ability to tackle potential harmful M&A operations when it comes to acquisitions in highly innovative markets was the well-known *Facebook/Whatsapp* case[401]. Indeed, in 2014 Facebook acquired Whatsapp for USD 19 billion even if, at the time of the merger, Whatsapp had a low turnover (but over 600

---

398 *Id.*, Article 8, paras. 1-4

399 European Commission (2008), "*Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*", 2008/C 95/01, paragraph 127, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)

400 EUMR, Article 22. Furthermore, it must be highlighted that, according to Article 9 EUMR, even the Commission has the possibility to refer the notified concentration to the competent Authority of the Member States whose markets could be significantly threatened by the operation at stake. See *supra*, note 103

401 European Commission (2014), Case M. 7217, "*Facebook/ WhatsApp*", *supra* note 123

million users world-wide). Since the operation did not meet the turnover thresholds set out in the EUMR, the Commission could review the merger thanks to a referral made by three Member States[402].

Given all the issues related to the review of the *Facebook/Whatsapp* case, the EU Commission in 2014 adopted a White paper on mergers' review[403], then launching a public consultation in 2016 on "Evaluation of procedural and jurisdictional aspects of UE Merger Control[404]", where stakeholders involved highlighted that the existing turnover-based jurisdictional thresholds might not be able to allow the Commission to successfully review M&A operations that, even if being under such thresholds, could however be able to have an impact on the EU market, especially when realized in the digital environment[405]. Accordingly, the *Facebook/Whatsapp* case would have made blatant that "*high value/low turnover transactions* [review] *would depend on the existence of non-turnover based notification thresholds in at least some Member States*"[406], factor that would have suggested the possibility of an enforcement gap at EU level if Member States would have not adopted thresholds, not only effective in ensuring that potentially anti-competitive mergers involving undertakings with low turnover but very high value (*i.e.*, start-ups or nascent undertakings), but also able to plug such a gap[407].

However, even if the issue of acquisitions involving nascent undertakings, such as innovative start-ups in high-tech markets, had started to be taken into consideration by stakeholders, "*raising concerns over the acquisition of start-ups with risky but potentially important innovative products would have been* [still] *seen as speculative, prone to over-enforcement risk (and judicial challenge)*[408]".

Nevertheless, this tendency abruptly changed in 2018 when research in the pharmaceutical sector (which is a high-tech sector just as the digital one) by Cunningham *et al.* showed that small innovating firms are often acquired by incumbents, typically in the early stages of product development, "*simply to shut down the start-up's projects and*

---

[402] Such a possibility was clearly provided by Article 4(5) EUMR

[403] European Commission (2014), White paper "*Towards more effective EU merger control*", Brussels, 9.7.2014 COM(2014) 449 final, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449

[404] European Commission (2016), Consultation on "*Evaluation of procedural and jurisdictional aspects of EU Merger Control*"

[405] Vessia F., "*Big data: dai vantaggi competitive alle pratiche abusive*", in Giurisprudenza Commerciale, issue 6, 2018, p. 1064, at 16

[406] OECD (2020), *supra* note 393, at 13

[407] *Id.*

[408] *Id.*, at 5

thereby stem the gale of creative destruction of new inventions[409]", a phenomenon that was labeled as "killer acquisition". According to the mentioned study, a number between 5.3 % and 7.4 % of all acquisitions considered by the authors of the research in their sample (or about 46 to 63 pharmaceutical acquisitions per year) were killer acquisitions[410]. To make matters worse, according to the study, these acquisitions would have disproportionately occurred just below thresholds for antitrust scrutiny, factor that would have suggested the need for antitrust policy to start closely scrutinizing the impact of such acquisitions on corporate innovation, in particular when such acquisitions plausibly could have prevented the development of future competing products and technologies[411]. Finally, the authors of the study argued that the mentioned acquisitions could be regarded as the primary form of start-up exit across various industries, suggesting that the potentially damaging consequences might have reached beyond the pharmaceutical sector[412].

This last suggestion was endorsed by a following study of 2019 that showed that, in digital markets, near the 60% of M&A operations made by the largest incumbent players (such as Google, Amazon and Facebook) involved targets that were only four years old or younger[413]. Even in this case, authors estimated that "*most of this M&A activity occurs below the radar of competition authorities, as the large majority of transactions carried out by digital companies do not meet the relevant thresholds for merger control*[414]".

Therefore, the outcome of the discussed research encouraged concern that there could have been an overly permissive approach to enforcing merger control rules on acquisitions of nascent undertakings. Indeed, scholars started arguing on to what extent antitrust authorities should have been concerned about startups' acquisitions in high-tech markets, given also the fact that they could even result in killer acquisitions.

Nevertheless, assessing whether a transaction could amount to a killer acquisition is somehow speculative and depends on the moment in which the acquisition is realized, as well as on the potential growth, innovation and disruptive ability associated to the target involved. This degree of uncertainty has clearly contributed to making decisions on whether and how to deal with this sort of transactions even more complex. Also, it must be considered

---

[409] Cunningham C., Ederer F., and Ma S., "*Killer Acquisitions*", Journal of Political Economy, Vol. 129, No. 3, pp. 649–702, at 2
[410] *Id.*, at 5
[411] *Id.*, at 44
[412] *Id.*, at 43
[413] Argentesi E., *et al.*, "*Merger Policy in Digital Markets: An Ex-Post Assessment*", CESifo Working Paper No. 7985, 2019, at 19
[414] *Id.*, at 13

that, when dealing with such operations in digital markets, "*the specificities of innovation markets and, consequently, of acquisitions involving innovative entrants also demand a reflection on the applicability and effectiveness of the tools normally used by antitrust authorities to handle this type of deal and on the necessity of different review and intervention models by antitrust authorities*[415]". Consequently, the efficiency of the existing legal tools (such as the EUMR) on the matter has started to be increasingly questioned.

The debate over this topic has especially focused on three main questions: (i) is there any need to provide for new theories of harm to identify such problematic mergers? (ii) should extant notification thresholds for merger control be reconsidered? (iii) even when notification thresholds are triggered, are the actual legal standards of review appropriate for assessing mergers happening in high-tech markets, such as the digital ones, characterised by technological innovation and radical shifts in business models?

Answering these questions is not so easy as reviewing the discussed mergers involves two distinct risks: (i) from the one hand the risk of excessive market intervention that could hinder innovation in fast-moving markets as the digital ones; (ii) from the other hand, the risk of underenforcement that could harm competition[416]. Therefore, policies adopted by EU institutions on this topic should be able to find a balance between the need of intervention and protection of innovation. Thus, this last Chapter of the present dissertation essentially represents an attempt to shed some light on such a thorny issue, trying also to provide answers to the previous questions.

2. **Killer Acquisitions: from the pharmaceutical sector to the digital one**

To enhance comprehension on what would amount to a killer acquisition in the digital environment, we need to examine the specific implications that arise from this expression that originated in the context of mergers in the pharmaceutical industry.

As said at the very beginning of this Chapter, a killer acquisition is described by Cunningham *et al.* as a case where the strategy underpinning the acquiring undertaking of a

[415] Silva L.R., Garrido, M.P., Bueno C.D., Souza M., Chakmati, S., "*Killer acquisitions: startups, disruptive innovation and antitrust intervention – Where are we and where are we heading to?*", 2019, at 5
[416] *Id*.

nascent firm is merely "*to discontinue the target's innovation projects and preempt future competition*[417]". Thus, the study provides for a model according to which an incumbent 'kills' (*i.e.*, shut down) the development or production of a product of a nascent undertaking that poses a potential risk to its own established product line. As an alternative, the acquirer might kill-off its own internal efforts to develop a competing product as to remove a potential risk to the newly acquired product, a transaction sometimes defined as "reverse killer acquisition[418]".

The rationale under such a market strategy of the incumbent undertaking is usually that, in some circumstances, it might find it more profitable to buy and shut down a nascent firm's product, rather than: (i) bearing the revenue's loss which is expected to occur when the product of the nascent firm at stake matures; or (ii) acquiring and/or investing funds in further developing the purchased product, or however operate it, despite the potential for its own sales to be cannibalized[419].

Nevertheless, as Cunningham *et al.* found, approximately 6% of all acquisitions in the pharmaceutical sector would have resulted in the discontinuation of competing innovative products, a number that might not appear such relevant at a first glance but that should be considered in strict correlation with the loss in consumer welfare and related benefits occurred because of such acquisitions. Furthermore, since in the market of pharmaceutical products prices are often volatile and subjected to spikes, the concern of public authorities regarding possible innovation deficit due to acquisitions of nascent undertakings in this sector is not groundless, particularly when such mergers could end-up with higher prices under quasi-monopoly conditions[420].

The conclusions laid down in Cunningham *et al.* study seems, therefore, a perfect fit for a sector, like the pharmaceutical one, that is characterised not only by a peculiar category of monopoly, that is circumscribed in time due to patents on drugs[421], but also by a structured and quite transparent product pipeline, which consists of several stages monitored by

---

[417] Cunningham C., Ederer F., and Ma S., *supra* note 409, at 1
[418] Caffarra C., Crawford G., Valletti T., "*How Tech Rolls: Potential competition and 'reverse' killer acquisitions*", VoxEU, 11 May 2020, available at the following link: https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions
[419] OECD (2020), *supra* note 393, at 6
[420] Alexiadis P., & Bobowiec Z., "*Eu merger review of "killer acquisitions" in digital markets - threshold issues governing jurisdictional and substantive standards of review*", Indian Journal of Law and Technology, 16(2), 64-102, 2020, at 68
[421] As an example, in the EU, according to Article 63 of the Convention on the Grant of European Patents (European Patent Convention) of 1973, "*The term of the European patent shall be 20 years from the date of filing of the application*". The text of the Convention is available at the following link: https://www.epo.org/en/legal/epc/2020/convention.html

competent authorities and that must end with their approval for new drugs to enter the market. Thus, in such a case, the strategy of an incumbent undertaking could be that of acquiring a nascent firm, then shutting down the acquired product in order, as an example, to artificially extend the expiring time of its patent monopoly.

However, the story is unlikely to be the same in digital markets where the process at the roots of production of goods and services is definitely less structured and the pace of innovation creates much more issues. Indeed, "*while the threat of generic drug entry in the pharmaceutical industry can be clear and calculable, it can be anything but scientific determining which innovations in high-tech fields might constitute a genuine competitive threat and which others might be little more than a noble (or ignoble) marketplace failure*[422]". Therefore, the label "killer acquisition" in digital markets could simply refer to the acquisition of nascent undertakings developing products or services whose competitive significance is highly uncertain[423].

Moreover, according to some studies, in digital markets many acquisitions of young undertakings from gatekeepers have been conglomerate mergers[424] just aiming at expanding the acquirer's ecosystem by integrating the target's product or service in the gatekeepers' platforms[425]. Thus, because of their main purpose, usually NCAs do not review

[422] Alexiadis P., & Bobowiec Z., *supra* note 420, at 69

[423] When assessing the acquisition of a nascent undertaking one of the biggest challenges is related to the significant uncertainty over the development of the target's product. Indeed, both the EU Commission and NCAs, in their investigation, should be able to answer questions such as: (i) will the product benefit from access to network effects? or (ii) will the product bring new competition with rival products? Even if answering these questions could be considered merely speculative, the questions themselves cannot be avoided if an Authority seeks to determine whether the acquisition of a nascent firm could harm competition or even amount to a killer acquisition.

[424] As explained by the EU Commission in its Guidelines on non-horizontal mergers, "*Conglomerate mergers are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in closely related markets (2) (e.g., mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use)*". See, European Commission (2008), *"Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*", 2008/C 265/07, paragraph 91, available at the following link:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF

[425] According to a study from Christophe Carugati which encompasses 1149 mergers, from 1987 to July 2022 the acquisition strategies of potential gatekeepers span many economic sectors, from security, payments and eBooks, to geospatial. This would suggest that gatekeepers have tried to diversify their economic activities by acquiring the target's product/service to complement, rather than compete with, its core products/services. For further information, see Carugati C., "*Which mergers should the European Commission review under the Digital Markets Act?*", in Policy Contribution 24/2022, Bruegel

conglomerate mergers, as they are perceived as not problematic and not leading to competition issues[426].

It must be stressed out, however, that even if the integration of complementary products or services may, at first sight, be considered as a pro-competitive operation, "*in a market environment characterised by a few large firms with highly entrenched positions of dominance in some core markets and which simultaneously serve as a focal point of an expanding digital ecosystem […] the acquisition of a start-up may lead to the strengthening of the dominance of the ecosystem even if the overlap is not within the more narrowly defined product market where the acquirer is dominant, or if the overlap in this separate product market as such would not raise competitive concerns*[427]". This would, in turn, make it harder for competitors to compete. Also, conglomerate mergers might hinder competition in case of acquisitions of unrelated complementors (*i.e.*, targets that complement the acquirer's main product and/or service while allowing for growth in an unrelated market), especially when the expansion in the unrelated market allows gatekeepers to dominate a critical market[428]. This is probably one of the reasons why the EU Commission has recently started discussing the importance of keeping merger regulations fit for purpose in the digitalised economy[429].

Thus, given all the issues in assessing mergers of start-ups in digital markets, according to some scholars it is likely that the theory of harm[430] used as backbone in assessing such kinds of acquisitions (particularly that applied to examine potential killer acquisitions) should be considerably different from that applied in the pharmaceutical sector[431]. The question would be, therefore, whether traditional theories of harm applied in assessing mergers in digital markets are able not only to avoid the risk of over/under

---

426 *Id*.

427 Crémer J. *Et al.*, *supra* note 26, at 112. In this respect, see also, Witt A.C., "*Big Tech Acquisitions: The Return of Conglomerate Merger Control?*", Concurrences, N ° 3-2020

428 Carugati C., *supra* note 425, at 10

429 European Commission, press release of 13 October 2022, "*Competition: Second EU-US Joint Technology Competition Policy Dialogue consolidates international cooperation on competition policy and enforcement in technology sector*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6167

430 In Competition law, a theory of harm aims at explaining the reason why a certain conduct constitutes a breach of competition law with reference to the relevant legal tests, making also clear why that conduct causes harm to competition and, therefore, should be prohibited by the competent Authority. For further information, see Digital Freedom Fund (2020), "*Theories of harm in competition law cases*", available at the following link: https://digitalfreedomfund.org/wp-content/uploads/2020/05/4_-DFF-Factsheet-Theories-of-harm-in-competition-law-cases.pdf

431 Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 69

enforcement, but also to contain the phenomenon of killer acquisitions. In other words, is there any need to formulate alternative theories of harm?

3. Traditional theories of harm and their application in the digital environment

Traditionally, there have been two main forms of theory of harm applied in merger control: (i) harm to potential competition (also referred to as "loss of potential competition"); and (ii) harm to innovation (also known as "loss of innovation"). These conventional theories of harm have been applied in several investigations involving digital undertakings.

In greater detail, loss of potential competition theory of harm aims at understanding whether the merging parties would significantly constrain one another, even if at the time of the merger they do not do so. This clearly implies that applying such a theory of harm would usually require a dynamic analysis[432] from NCAs and the Commission, which should take into consideration:

- The identification of possible existing substitute products in the geographical area where the two merging entities compete[433];
- The existence of competitors of the merging firms[434];
- The degree of concentration of the market at stake;
- The presence of barriers to entry and/or exit the market.

With reference to the application of the discussed theory of harm in digital markets, the *Google/Doubleclick* case[435] represents a good example. At the time of the merger, both

---

[432] OECD (2020), "*Merger Control in Dynamic Markets*", available at the following link: https://web-archive.oecd.org/2020-03-10/546724-merger-control-in-dynamic-markets-2020.pdf

[433] As the OECD suggests, given the fact that undertakings usually produce multiple products at different development stages and sell them in a variety of regions, it would be impossible to correctly assess the competitive outcome of the merger under scrutiny for all the products and areas involved. Thus, a potential solution could be that of taking into consideration just the "close substitutes" that account for an important part of the merging entities' business model.

[434] Even in this case, the analysis should focus first on close competitors and, just when reliable information is available, it might be possible to consider potential or future competitors wishing to enter the market within a relatively short timeframe.

[435] European Commission (2008), *supra* note 147

the merging parties were active in the online advertising sector. Google was a seller of advertising spaces of its search engine, and it provided also advertising intermediation services through its network. On the other hand, Doubleclick offered a display advertising technology, holding a leading position on both the advertiser and publisher side of the market[436]. In its merger investigation the EU Commission, applying the potential loss of competition theory of harm, assessed whether (i) Doubleclick could have become a provider of advertising intermediation services; and (ii) Google could have become a provider of display advertising serving tools, factor that would have made both merging parties direct competitors and, in turn, the merger potentially anticompetitive. Even if, during the proceedings, the Commission found that Doubleclick was already planning to enter the market for advertising intermediation service, potentially becoming an effective competitor of Google in such a market, it concluded that it was however likely that a sufficient number of other competitors would be left in the market exercising competitive pressure to the resulting post-merger entity[437]. As a consequence, the EU Commission did not forbid the operation.

It must be said, nevertheless, that applying such a theory of harm in digital markets "*is not without risk [...] given the vast range of companies that could actually be considered 'potential competitors' in highly dynamic and interconnected digital industries*[438]". Indeed, if the concept of competitors is widened, there might be a risk of underestimation of the market power of the incumbent in its core market as the estimate of the number of potential competitors would be significantly increased. It may then be difficult to show that the number of other potential competitors remaining in the market after the merger would not exert sufficient competitive pressure in the future[439]. This could, consequently, lead to under-enforcement and to the rising of killer acquisitions.

As for loss of innovation theory of harm, the EU Commission has specified in its Guidelines on horizontal mergers that a merger may increase the undertakings' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on

[436] Argentesi E., *et al.*, *supra* note 413, at 7
[437] *Id.*, at 8
[438] Turgot, C., "*Killer acquisitions in digital markets: evaluating the effectiveness of the eu merger control regime*", European Competition and Regulatory Law Review (CoRe), 5(2), 112-121, at 113.
[439] Crémer J. *Et al.*, *supra* note 26, at 119. According to this report, the risk of broadening the concept of potential competition could be that of a high number of "false negatives".

rivals to innovate in that market[440]. Conversely, "*effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with 'pipeline' products related to a specific product market[441]*". Thus, in high-tech markets as the digital ones, innovation may constitute a key parameter of competition.

Having said this, traditionally the loss of innovation theory of harm is applied by the EU Commission from the perspective of the identified product pipeline, *i.e.*, by assessing whether the merger would remove products of the merging parties which are able to exercise a substantial constraint in the market at stake. However, since only products that are about to be launched on the market might be found capable of exerting a certain degree of competitive constraint over already available product of the acquirer, usually just these kinds of products in a late stage of development have been considered by the Commission in reviewing merging operations[442]. Accordingly, a merger with a potential competitor could result in a harm for competition when two cumulative conditions are met:

- First, the potential competitor considerably restricts the freedom of behaving of incumbent undertakings in the market; and
- There is a lack of other competitors capable of maintaining a sufficient degree of competitive pressure after the merging operation is realised[443].

Nevertheless, loss of competition theory of harm has, till now, "*not been prevalent in the assessment of digital mergers and it remains to be seen if and how they will be[444]*". One of the rare instances of such a theory of harm being specifically employed in a digital merger is the review by the UK Office of Fair Trading (hereinafter "OFT), that has been superseded in 2014 by the Competition and Markets Authority, on the *Google/Waze[445]* acquisition. Indeed, in its assessment, the OFT developed a theory of harm whereby the merger might have dampened Google's incentives to innovate and improve quality as the

[440] European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03), paragraph 38, available at the following link:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:en:PDF
[441] *Id.*
[442] Todino M., Van de Walle G., Stoican L., "*EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation)*", The Antitrust Bulletin 2019, Vol. 64(1) 11-30, 2018, at 16
[443] *Id.*
[444] OECD (2023), "*Theories of Harm for Digital Mergers*", OECD Competition Policy Roundtable Background Note, at 31, available at the following link: https://www.oecd.org/daf/competition/theories-of-harm-for-digital-mergers-2023.pdf
[445] Office of Fair Trading (2013), Decision ME/6167/13 "*Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited*", available at the following link:
https://assets.publishing.service.gov.uk/media/555de2cfed915d7ae2000027/motorola.pdf

result of the loss of a disruptive rival. However, even if the OFT acknowledged that Waze was rapidly and successfully growing in the market, thanks also to strong network effects, it did not find that there was evidence that Waze was becoming a significant competitor in the UK or a disruptive force in the market. Thus, the OFT ultimately cleared the Acquisition of Waze by Google[446].

Nevertheless, as evidence from digital markets are still lacking, the *Dow/Dupont* decision[447], albeit it does not concern a digital merger, may however provide helpful insights on how to review acquisitions threatening innovation as well as on the measures that Authorities can adopt in order to eliminate the related eventual anticompetitive outcome.

The *Dow/Dupont* decision is important because it was formulated by applying for the first time the loss of innovation theory of harm by examining innovation from an industry-wide standpoint, *i.e.*, by adopting a general assessment of harm to innovation which is unrelated to a specific product market[448]. The case involved a transaction where two important players in the crop protection by chemicals market would have created a new market leader. Indeed, the merging parties competed as vertically integrated producers of pesticides, a highly concentrated market where innovation is considered as of utmost importance because of the fact that farmers are always looking for products which can be less toxic and/or more effective against pests. In addition to competition in the relevant product market, the EU Commission was also concerned about competition in innovation areas[449]. As the investigation showed that the merging parties had some overlapping R&D capabilities, coupled with some overlapping lines of research in the discovery stage as well as other overlaps across the different stages of a product, the Commission concluded that the parties were competing head-to-head in terms of innovation in specific crop protection areas, and that they had plans to decrease their R&D efforts post-merger. Therefore, according to

[446] According to Lear, appointed by the Competition and Markets Authority for an Ex-post Assessment of Merger Control Decisions in Digital Markets, the OFT may have been too cautious in its approach faced with the uncertainty in future market developments, factor that might probably have led to a gap in the analysis undertaken by the Authority that has, in turn, resulted in the clearance of the operation. For further information, see: Lear (2019), "*Ex-post assessment of merger control decisions in digital markets*", paras. 138-142, available at the following link:
https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf

[447] European Commission (2017), Commission Decision of 27.3.2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7932 – Dow/DuPont), available at the following link: https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf

[448] Todino M., Van de Walle G., Stoican L., *supra* note 442, at 20. By contrast, traditionally the EU Commission looked at harm to innovation on a specific product market in which parties are developing similar pipeline products

[449] Argentesi E., *et al.*, *supra* note 413, at 9

the Commission "*Post-Transaction the merged entity would have incentives to reduce innovation efforts on overlapping lines of research and early pipeline products thus leading to a significant impediment to effective innovation competition on the innovation spaces where the Parties currently compete*[450]" and, furthermore, "*the merged entity would have lower incentives to achieve the same overall level of innovation as the Parties pre-Transaction thus leading to a significant loss of effective innovation competition in the industry*[451]". As a consequence, the Commission imposed the divestment of DuPont's global pesticide business, together with its R&D division, before granting clearance for the merger, hoping that DuPont's competitive constraint would have been replaced by the purchaser of the mentioned divestment package. In this way, the number of players in the innovation spaces where DuPont was active before the merging operation would have remained unchanged[452].

The revised loss of innovation theory of harm introduced by the Commission in *Dow/DuPont* decision has raised concerns both from an economic and legal perspectives[453]. Indeed, from an economic point of view the uncertainty of predicting the success of innovation efforts would not be suitable for a solid merger control decision. At the same time, under a legal viewpoint, as the revised theory of harm used by the Commission in its decision can be seen as a novelty in its legal practice, there is concern with reference to on which legal basis this latter theory of harm should be grounded[454].

Concerns related to the application of both loss of potential competition and loss of innovation theories of harm on digital mergers have raised the question of whether they are capable of fully grasping the extent of competitive harm in digital markets, especially when ecosystems are involved. Thus, even if these theories of harm have already been adapted to some degree to account for the specificities of digital markets, there is the need to understand whether it is possible to adjust them to fully reflect the potential sources of competitive harm, or if there are any new theories that need to be developed[455].

[450] European Commission (2017), Case M.7932 – Dow/DuPont, *supra* note 447, para. 8.9
[451] *Id*., para. 8.10
[452] Argentesi E., *et al.*, *supra* note 413, at 10
[453] For further insights on the *Dow/Dupont* decision see, Petit N., "Innovation Competition, Unilateral Effects and Merger Policy", 82 Antitrust Law Journal No. 3, pp. 873-919, 2019.
[454] Todino M., Van de Walle G., Stoican L., *supra* note 442, at 22-23
[455] OECD (2023), *supra* note 444, at 25-26. According to the OECD, traditional theories of harm "*do not always adequately reflect the interrelation between different sides of a multi-sided market, or the potential impact of a merger on the ecosystem more broadly […] In particular, the effects of a merger may be felt more acutely in the non-consumer facing side of a multi-sided market, or markets other than the ones focus of the merger. Further, the competitive harm might be fully understood only when looking at the combined effect of the*

3.1 **Alternative theories of harm for properly reviewing acquisitions in digital markets**

As already said, in recent years competent Authorities, as well as experts and scholars, have started considering possible new theories of harm, which take into the due account typical features of digital markets, such as the impact of ecosystem and innovation, to tackle the perceived gaps in the traditional ones, when the latter are used to review digital mergers. There is, however, a debate on to which extent these proposed theories actually represent wholly new theories rather than simple adjustments to the extant ones[456], with some authors that have simply recommended some modifications to already existing theories. The mentioned debate notwithstanding, in this section we will provide an examination of some recent formulated theories, also in an attempt to understand whether they would be suitable to face killer acquisitions in the digital world.

The first category of alternative theories that have been recently proposed to assess digital mergers can be labeled as "Ecosystem-based theories"[457]. According to these theories, acquisitions encompassing ecosystems (like those realized by gatekeepers) may have a vast impact on the involved market by consolidating the position and relevance of the ecosystem as a whole. This could lead to barriers to entry the market for newcomers, as well as direct harm to competition by gatekeepers that leverage their ecosystems. Thus, ecosystem-based theories of harm could be more appropriate to assess digital mergers than traditional foreclosure theories because, while the latter, looking at the effects of the assessed merger in isolation, might lead to the conclusion that the operation will not have a direct impact on competition, the former, taking into consideration a broader view of the digital ecosystem in its entirety, may result in a different conclusion[458].

---

transaction on several related markets. When this is the case, or when multiple theories are relevant for the same case and strongly interrelated, a segmentation of theories of harm according to the traditional classification of horizontal/vertical/conglomerate effects might not tell the full story."

[456] *Id*., at 27

[457] *Id*.

[458] Robertson V., "*Merger review in digital and technology markets: Insights from national case law*", final report, 2022, paras. 232-233

Furthermore, ecosystem-based theories of harm could be a better fit in reviewing conglomerate mergers, particularly when they involve the acquisition of start-ups, as these kind of operations may strengthen ecosystems' power and, consequently, there would be the necessity to "*understand systems competition, rather than to focus on narrowly defined relevant market* […] *having in mind that the focus should be not only on consumers of specific products but also those of relevant ecosystems as a whole*[459]". Since there would be a gap in the assessment of conglomerate mergers involving ecosystems, Crémer *et al*. have proposed a model for the implementation in practice of such theories of harm in reviewing digital mergers where the owner of a digital ecosystem intend to acquire an undertaking that is active in a different but related market and that may potentially become a competitor beyond the market in which it operates at the time of the operation. Particularly, according to their report, competition Authorities should firstly determine whether parties of the merger are active in the same "technological space" or "user space" and, if so, review the operation by injecting "*some "horizontal" elements into the "conglomerate" theories of harm*[460]", *i.e.*, evaluating the merger applying horizontal theories of harm, even if both the acquirer and the target do not have overlapping products in the traditional way. Furthermore, this kind of analysis would need an intensified degree of control over acquisitions of start-ups by gatekeepers, given the possible harm to competition caused by the strengthening of the ecosystems of the latter. Additionally, gatekeepers should bear the burden of proving that the merger-specific efficiency compensates for the negative effects on competition[461].

Finally, ecosystem-based theories of harm might result helpful in assessing mergers involving a platform's enveloping strategy. In greater detail, such a strategy refers to "*to the ability of a platform with dominance in one market to enter another platform market (whether the platforms are complements, substitutes, or unrelated) by bundling or tying the two platform products. As a result of network effects (from the dominant platform's existing user base) and economies of scope (due to shared technology and data), the competing platforms in the second market would be unable to compete*[462]" with the merged entity. It must be said, moreover, that this kind of strategy could be fostered by realizing conglomerate

---

[459] Zingales N., Renzetti B., "*Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience*", World Competition, Vol. 45(4), at 3

[460] Crémer J. *Et al.*, *supra* note 26, at 11

[461] *Id*.

[462] OECD (2020), Roundtable on Conglomerate Effects of Mergers - Background Note, at 26-27, available at the following link: https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf

mergers, as it would constitute a way in which a platform can further widen its ecosystem without having to offer revolutionary product to increase its market share[463].

Another category of new theories of harm for reviewing M&A in digital markets are theories incorporating longer-run effects[464] of such operations. Indeed, the timeframe of two or three years usually applied to estimate the impact of mergers may be too short for digital M&A and could be extended[465].

As an example, there has been a proposal for a theory of harm that specifically tries to encompass longer-term effects of digital mergers, which is based on the assumption that the acquisition of a new product and/or service by a platform can produce efficiencies in the short run but can also result in harm to competition in long-term by rising barriers to entry for newcomers[466]. More in depth, this idea considers that due to complementarity and economies of scope, acquisitions put in place by an ecosystem may be fostered by different incentives than traditional conglomerate merger, because the two characteristics of digital markets mentioned before would provide a synergy that favors the creation of a bigger ecosystem. This implies that the merged entity would be able to generate higher values from its products and services at a lower cost, making the ecosystem more efficient when it acquires additional products or services. Even if this can be perceived as beneficial, it could be problematic in the long-run, because a potential entrant may find it harder to compete with an expansive incumbent's ecosystem. Put in other terms, greater efficiency in the short-run eliminates competition in the long-run[467].

Moreover, according to the theory at stake, in assessing M&A operations it should be taken into the due account also that conglomerate mergers might have negative effects on competition even in the short-run, when "*the mergers are considered killer acquisitions, if the tying of products post-merger allows the leveraging of market power or if it allows for other exclusionary behaviour*[468]". Thus, this theory could be helpful for tackling potential killer acquisitions.

---

463 Robertson V., *Supra* note 458, para. 34
464 OECD (2023), *supra* note 444, at 30
465Lear (2019), *supra* note 446, at 46
466 Van den Boom J., Samranchit P., "*Assessing the long run competitive effects of digital ecosystem mergers*", Social Science Research Network (SSRN), 29 January 2021, at 2
467 *Id*.
468 *Id*., at 3

Nevertheless, in order to incorporate this theory in their tests to capture the long-term effects stemming from mergers, competition Authorities should: (i) assess more in depth he efficiency gains of economies of scope and complementarity between the merging parties; (ii) perform an assessment which covers a longer time span than the usual one; (iii) base the assessment on a reverse burden of proof, *i.e.*, the merging parties should be able to prove (even through commitments) that long-run anti-competitive effects will not materialize in the future or, however, that the latter will be outweighed by benefits to consumers[469].

It must be stressed out, though, that the introduction of long-run effects into digital mergers reviewing is not considered a solution by all scholars, by reason of the fact that "*in digital industries the pace of innovation is too fast for any serious long-run forecast to be possible*[470]".

As said at the very beginning of this paragraph, some authors have focused their attention on adjusting existing theories of harm rather than on formulating potential alternatives. Bourreau and de Streel, as an example, propose an adapted innovation-focused theory of harm according to which competition Authorities should directly assess the effects of a concentration on innovation in order to deal potential killer acquisitions[471]. Accordingly, to incorporate this revised theory into digital mergers assessment, competition Authorities should follow these steps: (i) first, they should focus on possible "cannibalisation effects", evaluating whether the acquired undertaking, by leveraging its innovation, could disrupt the acquirer's market (if no, there would be no need to further proceed); (ii) then, they should assess how such cannibalisation effects influence, after the merger is completed, the incentives of the acquirer (put in other words, Authorities should assess whether introducing innovation into the market would result in greater gains than losses); (iii) finally, once established that the incumbent would have a stimulus to delay or cancel potential innovation, they should directly investigate the business plans of the incumbent, which should be able to show that it would not hinder the acquired undertaking's potentially disruptive innovation, hopefully by offering commitments along these lines. The operation should not, otherwise, be cleared[472].

---

[469] *Id.*, at 34
[470] Cabral L., "*Merger policy in digital industries*", Information Economics and Policy, vol. 54, 2021, at 2
[471] Bourreau M., de Streel A., "*Digital Conglomerates and EU Competition Policy*", in Social Science Research Network (SSRN), 2019, at 30
[472] *Id.*

Other authors suggest that, when dealing with acquisitions of innovative start-ups that could dampen competition and innovation, it should be necessary to look at a broader category of competitive relationships which could be able to appropriately catch the reality of fast-evolving markets where disruptive activities are performed. This means that, considering that at the time of acquisition there may not necessarily be a clear horizontal overlap between the merging parties, competition Authorities should also assess the existence of an overall strategy of a dominant undertaking to systematically acquire fast-growing digital firms with a certain and considerable potential to become competitors in the dominated market in the future. Indeed, such a strategy could jeopardize competition on a long-lasting base, particularly in highly concentrated markets[473].

While the theories mentioned above are surely worthy of scrutiny and could play a role in successfully addressing killer acquisitions-related challenges in the near future, the lack of data makes it hard to confidently determine the best theory of harm to apply to the phenomenon being considered. In my belief, given the fact that gatekeepers, which usually are the main characters of merging operations involving innovative digital start-ups, run businesses that are essentially based on ecosystems, the ecosystem-based theory of harm might potentially be the most suitable to address antitrust threats posed by killer acquisitions in the digital environment.

Nevertheless, given the unprecedented challenges posed by digital mergers, competition Authorities will probably face several issues when reviewing such mergers, regardless of the theory that will be applied[474]. Still, the development of the theory of harm at the roots of a merger's review is just one step, even if of utmost importance, in the competitive assessment of mergers. Indeed, for competition Authorities to apply any theory of harm there is the need to ensure that effective merger review actually can occur, factor that has ignited the debate over notification thresholds' inadequacy and the need of their update and/or possible alternatives. Furthermore, the suitability of a theory of harm and its success are usually determined by its ability to meet the substantive existing legal standards of review, the debate on whose effectiveness is still open.

---

[473] Schweitzer H. *et al.*, "*Modernising the law on abuse of market power*", Report for the Federal Ministry for Economic Affairs and Energy, 2018, at 4-5

[474] As highlighted by the OECD, in the next future both the EU Commission and NCAs could face criticism that they are not providing sufficient certainty to business when they apply speculative theories or, however, incorporate additional elements of uncertainty into existing theories (such as non-price parameters of competition like innovation) in assessing digital mergers. For further information, see: OECD (2023), *supra* note 444, at 34

However, going beyond the discussion on the most suitable theories of harm for addressing issues coming from digital acquisitions, the literature has made significant efforts to propose several possible solutions to fill the gap in assessing and reviewing potential killer acquisitions, that would be the result of the perceived inefficiency of the extant legal tools. The following paragraphs will be essentially focused on this topic.

4. Alternative approaches to the assessment of digital mergers: A reconsideration of notification thresholds

Since the idea that current revenue-based notification thresholds might lead to an underenforcement in the control of M&A of innovative start-ups has spread in recent years (this is because the assumption according to which a merger is likely to have a negative effect on competition only when the target undertaking has a large turnover has proved flawed in the case of killer acquisitions, given that the target has usually a very low turnover), the literature has tried to suggest some alternative approaches related to non-revenue methods to trigger competition authorities' intervention. As an example, among the alternatives proposed it is possible to include:

- Notification thresholds based on transaction values rather than on the traditional revenue test;
- The existence of residual powers of review that would allow competition Authorities to assess the outcome of a merger following its conclusion, especially for those merging operations having significant potential implications on competition that could justify an *ex-post* assessment[475];
- The proposal for a mandatory notification system;
- With a special reference to the EU, an adjustment of the criteria used for applying the referral system established by the EUMR;

As regard to alternative thresholds to the extant ones, at the very beginning of this Chapter we said that the scope of the EUMR is essentially based on turnover thresholds of

[475] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 72

merging parties. This has been perceived as a gap in merger review for acquisitions of start-ups with significant competitive potential at high purchase prices by gatekeepers or very large digital undertakings that, though, were neither caught by the EUMR nor by the majority of EU NCAs. That is the reason why the literature has proposed new thresholds that relate to the value of the relevant transaction (*i.e.*, transaction-value based thresholds) and that are based on the premise that a transaction's competitive relevance can be determined by its high purchase price and low sales[476]. The rationale under these new proposed thresholds is that, while "*in the digital economy, the absence of sales, or a low level of sales, for a start-up that is still relatively young does not necessarily reflect its competitive potential*[477]", the target's attractiveness and potential competitiveness can be gauged by the price willingly paid by the buyer to acquire it.

Austria and Germany are two recent examples of introduction of such type of thresholds in merger control legal framework. Indeed, both Germany[478] and Austria[479] in 2017 introduced complementary transaction-value based tests aiming at bringing the phenomenon of killer acquisitions in digital markets within the scope of their respective jurisdictions[480].

---

[476] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 63

[477] *Id*. The report highlights, moreover, that this assumption is "*particularly true if a start-up initially heavily aims for growth in size or user growth and postpones the development of a sustainable business model to a later point in time*".

[478] Section 35, subsection 1a of the German Act Against Restraints of Competition, introduced in 2013 and then amended several times (including 2017), has established a threshold of EUR 400 million for a merger to be notified to the German competition Authority by the involved parties. The most recent version of the document is the following: Competition Act in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the Act of 25 October 2023 (Federal Law Gazette I, p. 294), available at: https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html

[479] The Austrian Federal Cartel Act of 2005, section 9, subsection 4, paras. 3-4-, as amended in 2017, set out that, for those mergers to which turnover-based thresholds do not apply, there is however a mandatory notification requirement when "*the value of the transaction in greater than EUR 200 million, and the undertaking to be acquired is active to a significant extent on the domestic market*". The document under scrutiny is available in English at the following link: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf

[480] A similar path has been followed by other countries. In the UK, for instance, the CMA (UK antitrust Authority) is entitled to review acquisitions that do not meet the established turnover thresholds but that results in the supply or purchase of at least 25% of any good or service in the UK. To this respect, see Digital Competition expert panel (2019), *supra* note 9, at 120. As regards to Spain, Article 8, paragraph 1(a) of the Spanish Law on Defence of Competition establishes a system of compulsory advance monitoring by the Spanish NCA for any concentrations that represent a certain market share (*i.e.*, equal or higher than 30 percent of the relevant product or service market at a national level or in a geographical market defined within the same). For further information, visit the webpage of the Comisión Nacional de los Mercados y la Competencia (Spanish competition Authority) at the following link: https://www.cnmc.es/en/ambitos-de-actuacion/competencia/concentraciones

It must be stressed out, however, that such introduction of complementary thresholds has been sharply criticized for several reasons. First of all, determining what constitutes a significantly large transaction value may considerably vary from one jurisdiction to another, even within the EU, considering the different sizes of the economies of the 27 EU Member States. Furthermore, identifying an appropriate value threshold could be quite impossible, given that what constitutes a significantly large transaction value might greatly differ from one industrial sector to another[481]. Thus, it would appear that "*the greatest drawback of adopting a transaction value test lies in the fact that the perceived 'value' of a transaction is spread unevenly around the world, depending inter alia on the origins of the merging parties, their catchment areas in terms of existing sales, the range of their IP protection, and brand awareness in particular cultures and demographics*[482]."

Nevertheless, aiming at shedding some light on the matter, the EU Commission published a staff working document (following a public consultation started in 2016), where it stated that most respondents considered that the absence of complementary jurisdictional thresholds (such as the value-based ones) did not harm the achievement of the goals of EU merger control[483]. Additionally, the EU Commission highlighted that "*the majority of respondents (public and private-sector stakeholders alike) stressed the difficulties in determining the value of the transaction in practice, entailing risks for effective self-assessment. It was also argued that purchase price is a subjective matter agreed upon between the parties and does not give any indication of a transaction's possible competitive significance*[484]." Other identified issues related to the introduction of transaction value thresholds were: (i) the risk of catching large numbers of 'false positive[485]' cases; the risk of taking away important resources, usually spent by the EU Commission to investigate competitively significant cases, in order to spend time on consultations to clarify jurisdictional questions[486].

Furthermore, the EU Commission has closely monitored the application of additional jurisdictional thresholds based on the value of the transaction introduced in Germany and

[481] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 75-76

[482] *Id*.

[483] European Commission (2021), Commission Staff Working Document "Evaluation of procedural and jurisdictional aspects of EU merger control", SWD (2021) 66 final, at 29, para. 92, available at the following link: https://competition-policy.ec.europa.eu/system/files/2021-04/SWD_findings_of_evaluation.pdf

[484] *Id*., para. 93

[485] False positive cases refer to mergers or acquisitions that are incorrectly deemed anticompetitive and blocked or cleared conditionally (with remedies) when they should have been allowed unconditionally because they did not pose any real threat to competition.

[486] European Commission (2021), *supra* note 483, at 29

Austria, as discussed before. According to its findings, in Germany, from June 2017 to June 2020, only 28 notifications were made on these premises. Of these, 19 cases were simply cleared at the first stage of the assessment, while the remaining ones were withdrawn after the German NCA's confirmation that there was no notification obligation. It is also noteworthy that only 4 notifications were filed by digital companies, while the remaining 24 notifications related to the pharmaceutical and other sectors. As regards to Austria, from November 2017 to the end of 2020, 53 notifications were made on the basis of the new complementary thresholds, 5 of which concerned the digital sector, while the other 48 related to the pharmaceutical and other sectors. What is more, none of the cases led to an in-depth investigation before the Cartel Court[487].

In accordance with these observations, the EU Commission concluded that "*it seems that the new thresholds in Germany and Austria have not resulted as yet in capturing additional anticompetitive transactions, as all transactions notified on the basis of the new thresholds have been cleared unconditionally. As to the digital sector in particular, these thresholds do not appear so far to have brought many additional relevant cases under review*[488]."

Also, even other categories of jurisdictional thresholds, such as those introduced by Spain and the UK[489] and related to the combined market share of the merging undertakings or to their share of sales of goods or services in a given market, were not considered as appropriate to face killer acquisitions in digital markets, since they could have resulted in in capturing "a lot of transactions" (*i.e.*, over-enforcement) or failing to correctly catch situations where "*a large foreign-based company firstly enters the EU market through the acquisition of a local start-up*[490]".

Thus, taking into consideration all the observations discussed above, Crémer *et al.* concluded that there would be no need to change the EUMR jurisdictional thresholds at this stage. Indeed, adding new complementary thresholds to the extant ones would entail several difficulties, in particular given that new, non-turnover-based jurisdictional thresholds: (i) would necessitate clarity as to whether a given transaction must be notified; (ii) should be able to reduce the extra administrative burden and transaction costs that would be triggered;

[487] *Id.*, at 40-41
[488] *Id.*, at 41, para. 125
[489] See *supra*, note 480
[490] Václav Š., "*Concentrations in digital sector - a new EU antitrust standard for "killer acquisitions" needed?*", Intereulaweast, Vol. VII (2) 2020, at 7

(iii) should point out the existence of a local connection with the EEA; (iv) should be able to guarantee a balanced coexistence with national merger control systems; (v) should be designed in in such a way as to avoid the risk of over-enforcement[491].

4.1 *Ex post* powers of review for addressing challenges in digital mergers

An alternative proposal to the introduction of transaction value-based thresholds is related to the establishment of *ex post* powers of review to be granted to competition Authorities to address the anticompetitive outcomes arising from digital mergers[492].

The introduction of such an *ex post* system of merger review has been put forward by the French Antitrust Authority[493], which has proposed an *ex post* assessment that should be initiated only when severe competition concerns were to show within a reasonable time span following the merger (that is from six months to two years[494]). The advantage of such proposed solution would be that of allowing "*the Autorité to control, at its own initiative, a very limited number of transactions that may raise competition issues, especially in that they give rise to dominant or monopolistic positions on specific markets or can lead to significantly reducing competition*[495]". According to the French NCA, such a proposal would be, moreover, supported by the fact that this system already exists in several European countries (Estonia, Hungary, Ireland, Lithuania, Norway and Sweden) as well as in the United States and Japan[496].

The literature has, nevertheless, shown conflicting opinions on the matter. Indeed, according to some authors, one of the most important benefits related to the *ex post* assessment of killer acquisitions would be the decrease of heuristic issues for competition Authorities that, instead of trying to estimate future impacts, could monitor for a certain

[491] Crémer J. *Et al.*, *supra* note 26, at 114
[492] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 65
[493] On this topic, see: Autorité de la Concurrence, press release "*Modernisation and simplification of merger control*", 07 June 2018, available at the following link: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/07-june-2018-modernization-and-simplification-merger-control
[494] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 65
[495] Autorité de la Concurrence, *supra* note 493
[496] OECD (2020), Start-ups, killer acquisitions and merger control – Note by France, at 7, available at the following link: https://one.oecd.org/document/DAF/COMP/WD(2020)16/en/pdf

timeframe the behavior of the merged entity and the market reaction to it[497]. This is because, finding *ex ante* evidence on killer acquisitions is particularly tough, since making an accurate prediction as to the future of a nascent, fast-growing undertaking in a dynamic market is definitely challenging[498]. Therefore, it would be appreciably easier to assess the possible effects stemming from killer acquisitions in an *ex post* scenario[499].

On the other hand, such a proposal has not been looked at favorably by other authors, as it would imply the application of Article 102 TFEU to intervene *ex post* on the merger operation. The use of such an Article as a tool to address digital killer acquisitions has been opposed by the mentioned authors on the grounds that it would "*create a category of ex post intervention which is radically different from the legal basis and philosophy underpinning Articles 101 and 102 of the Treaty on the Functioning of the European Union*[500]", that is because Article 102 enforcement is strictly linked to specific abusive practices and not to the mere existence of a dominant position that might lead to abusive behaviour. Therefore, this proposal could not be accepted by simply trying to justify it by claiming that Article 102 has already been applied by the EU Commission to fill the enforcement gap in the EU merger control practices[501].

To make matters worse, the introduction of such an *ex post* assessment of digital mergers would not be a good idea to recommend because it could result in legal uncertainty that could, at first, discourage the merging parties to exploit all the appropriate measures to integrate the undertakings while the *ex post* assessment of the operation is still possible. This means that such measures would be taken only when the time for the *ex post* review is expired, a strategy that would pose a challenging question about which competitive effects can be strictly attributed to the merger and which can be explained by other factors[502].

[497] Václav Š., *supra* note 490, at 8
[498] OECD (2020), Start-ups, killer acquisitions and merger control – Note by the European Union, para. 28, available at the following link: https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf
[499] Jafarguliyev, A., "*Capturing Killer Acquisitions in Digital Markets under the European Union Merger Control Rules*", Trento Student Law Review, vol. 5, No. 2, 2023, pp. 47-70, at 58
[500] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 84
[501] Jafarguliyev, A., supra note 499, at 58. The reference in this case it to the well-known *Tetra Pak* case, in which Article 102 has been applied because the theory of harm related to the merger review proceedings was not considered as appropriate. It must be said, nevertheless, that this case represents an extraordinary situation involving a monopoly arising from unique technological characteristics and, thus, there is a small chance of coming across this situation again. For further insights on this case, see European Court of Justice (1990), Case T-51/89 "*Tetra Pak Rausing SA v Commission of the European Communities*", available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61989TJ0051
[502] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 65

However, even if it is theoretically viable to catch killer acquisitions through an *ex post* assessment under Article 102 TFEU, this option has not been favoured by the EU Commission, as we will see later in this Chapter, probably because applying the mentioned Article would not be easy as it would require competition Authorities to define the relevant market and to establish dominance and market power of the incumbent undertaking, a task that is not easy to realize in digital markets, given all their peculiar features already discussed in the present dissertation.

4.2 **Proposal for a mandatory notification system: the solution of the DMA**

An alternative reform proposal to tackle competition concerns stemming from digital platforms M&A is related to a so-called mandatory notification requirement when they hold a relevant position within the market in which they act[503]. As an example, even if the notification of mergers and acquisitions to the Australian Competition and Consumer Commission (hereinafter "ACCC") is voluntary in Australia, the ACCC has recommended that pre-designated very large digital platforms should provide in advance a notification of all their intended acquisitions. Accordingly, "*the ACCC considers it appropriate that the large digital platforms should each agree to a protocol to notify the ACCC of proposed acquisitions that may impact competition in Australia*[504]".

A similar proposal in the US can be found in the Stigler report, according to which it would be desirable to create a new "Digital Authority" which should be entrusted with all the necessary power to review mergers of digital platforms holding "bottleneck power", a situation where "*consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly*[505]". This Authority would be, consequently, able to review "*even the smallest transactions involving digital businesses with bottleneck power because*

[503] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 77
[504] Australian Competition and Consumer Commission (2019), *supra* note 11, at 10. It must be highlighted however, that according to some part of the literature, this invitation by the ACCC to formulate a "consensual" notification protocol might provide a simple forum for a debate which could result in an unworkable notification obligation in practice. See, on this respect, Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 78
[505] Stigler Committee on digital platforms final report, *supra* note 29, at 32

nascent competition against these entities is very valuable for consumers[506]". The report concluded that this would be a better solution than trying to adjust national antitrust law to accommodate one difficult and fast-changing sector (that is the digital one) where false negatives could be particularly costly[507]. However, this solution seems difficult to apply in a jurisdiction such the US one, where there exists a dual merger review system that is implemented by both the Department of Justice (known as "DoJ") and the Federal Trade Commission ("FTC") and that already has its own issues related to inconsistencies and cost duplication[508].

Looking at the European continent, in the UK another version of such mandatory notification obligation has been advised, according to which digital companies that have been designated as having a "strategic market status" should be required to make the Competition Market Authority (hereinafter "CMA") aware of all intended acquisitions[509], the fact that the UK merger regime would remain voluntary for the other sectors notwithstanding. However, just this last fact would make this proposal disproportionate and would, moreover, result in a higher degree of legal uncertainty[510].

As briefly mentioned in the second Chapter, this mandatory notification approach has been endorsed in the EU by the Commission that has decided to adopt it within the DMA. In greater detail, Article 14, paragraph 1 DMA establishes an obligation for gatekeepers to notify any concentration "*where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules*[511]". This clearly serves to catch killer acquisitions as well. Furthermore, among the information gatekeepers are required to provide to the Commission we can list: (i) the undertakings involved in the mergers, together with their Union and worldwide annual turnovers and their fields of activity, including activities directly related to the concentration; (ii) the transaction value of

[506] *Id.*, at 33
[507] *Id.*, at 111
[508] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 79
[509] Digital Competition expert panel (2019), *supra* note 9, at 12
[510] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 79
[511] European Commission (2022), *supra* note 217, Article 14, paragraph 1

the agreement or an estimation thereof; (iii) a summary of the concentration, including its nature and rationale and a list of the Member States concerned by the concentration[512].

Additionally, once the information has been received, "*the Commission shall inform the competent authorities of the Member States of any information received pursuant to paragraph 1 and publish annually the list of acquisitions of which it has been informed by gatekeepers pursuant to that paragraph*[513]". NCAs can, consequently, refer the merger at stake to the EU Commission pursuant to Article 22 EUMR, enabling in this way the Commission to establish its jurisdiction over the merger for those countries that referred it[514]. We can say, in practical terms, that thanks to this strategy the EU Commission will be able to capture all digital mergers intended by gatekeepers and, potentially, to assess killer acquisitions in an *ex-ante* way[515].

However, as we will analyse later in this Chapter, to better understand the functioning of such a notification system, it is necessary to see it *in tandem* with the Guidance on the application of the referral mechanism[516] mentioned before that has been published by the EU Commission in 2021.

Another provision related to M&A activities by gatekeepers contained in the DMA is provided by Article 18, paragraph 2, according to which, in case of systematic non-compliance with the DMA, the EU Commission can adopt a decision that prevents, during a limited period, the concerned gatekeeper from entering into a concentration regarding the core platform services or the other services provided in the digital sector or enabling the collection of data that are affected by the systematic non-compliance. Nevertheless, before implementing such remedies, the gatekeeper must have been subject to three previous non-compliance decisions over the preceding 8 years[517]. This would imply that such a remedy will not be perceived by gatekeepers as an immediate deterrent[518].

---

[512] *Id.*, Article 14, paragraph 2. In addition to the mentioned information, for any relevant core platform services gatekeepers should provide information on their Union annual turnovers, their numbers of yearly active business users and their numbers of monthly active end users, respectively.
[513] *Id.*, Article 14, paragraph 4
[514] *Id.*, Article 14, paragraph 5
[515] Jafarguliyev, A., supra note 499, at 68
[516] European Commission (2021), Communication from the Commission "*Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*", 2021/C113/01, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0331(01)
[517] European Commission (2022), *supra* note 217, Article 18, paragraph 3
[518] Robertson V., "*The Future of Digital Mergers in a Post-DMA World*", European Competition Law Review, 44(10), pp. 447-450, 2023, at 450

Mandatory notification requirement and penalty for systematic non-compliance notwithstanding, the lack of any substantive merger rules for digital gatekeepers in the DMA has been criticized by part of the literature[519]. This is because, the mandatory notification system would not quell the risk of approving mergers that could result in killer acquisitions, nor it would be an appropriate tool for a more adequate assessment of whether a merger is pro-competitive or not.

In addition, since the DMA aims at governing the online behaviour of gatekeepers, it does not take into the due account the case when a gatekeeper merges with an undertaking acting outside of the digital environment. Accordingly, this circumstance, even if not frequent, "*should not be neglected, because a gatekeeper can benefit from digital markets' characteristics (particularly from the use of gathered users' data) to expand its services to "traditional" markets as well*[520]".

However, despite the fact that merger control for gatekeepers' acquisitions is not covered in the DMA substantive principles, its conduct rules might, nonetheless, somehow decrease the likelihood of these kind of mergers resulting in a harm for competition, because "*the DMA's conduct rules outright prohibit a broad array of exclusionary leveraging strategies that, if properly enforced, the gatekeeper should no longer be able to use to extend its gatekeeper position to new markets following the acquisition of a company operating in a neighbouring market*[521]".

Therefore, in light of the various viewpoints presented in the literature on this topic, the debate on whether the DMA will be able to achieve its objectives of ensuring platform contestability effectively without special rules on merger control for gatekeeper platforms is still open.

---

[519] On this topic, the EU Parliament's plenary rejected an amendment by its Committee on Economic and Monetary Affairs that would have restrained gatekeepers from entering into mergers unless they could prove that the takeover would not harm competition. The rationale under this rejection would be the fact that reversing the burden of the proof would have been deemed disproportionate by centre-right lawmakers. For further information, see: Bertuzzi L., "*EU parliament adopts regulation targeting internet giants*", Euractive, January 2022, available at the following link:
https://www.euractiv.com/section/digital-single-market/news/eu-parliament-adopts-regulation-targeting-internet-giants/

[520] Puric S., *supra* note 3, at 307. According to the author, the represented category of merger should be reviewed as they might have an impact on the strengthening of gatekeeper's position both in the digital and traditional markets.

[521] Witt A.C., *supra* note 268, at 31-32

4.3 The solution of the EU Commission for capturing killer acquisitions: a new approach to the EUMR referral mechanism

A very peculiar trait of the EU legal framework established for the assessment of mergers is the so-called "one-stop-shop" rule, which grants the EU Commission with the exclusive jurisdiction[522] over the review of merger operations that are considered as having a Community dimension due to the high turnover generated by the merging parties[523].

One exception to the exclusive jurisdiction of the EU Commission on mergers having such a dimension is provided by Article 4, paragraph 4 EUMR, that allows the Commission to refer the operation to one or more Member States[524], on request of parties to the transaction, when two conditions are met[525]: (i) there must be indications that the concentration may significantly affect competition in a market or markets (*i.e.*, the requesting parties are required to demonstrate that the transaction is liable to have a potential impact on competition on a distinct market in a Member State); and (ii) the market(s) in question must be within a Member State and present all the characteristics of a distinct market, which means that the requesting parties must show that a geographic market in which competition is affected by the transaction is national, or narrower than national in scope[526].

Another exception to the one-stop-shop rule is established by Article 9 EUMR, which provides for the possibility for a referral of mergers having a Community dimension to the

---

[522] This is clearly stated by Article 21, para. 3 EUMR, according to which "*no Member State shall apply its national legislation on competition to any concentration that has a Community dimension*". It must be highlighted, however, that according to Article 4, para. 4 EUMR, the notifying parties my inform the Commission via a reasoned submission that the operation at stake could affect competition in a market within a Member State and, thus, should be examined, in whole or in part, by that Member State. The Commission then transmits the submission to the involved Member State that has 15 working days to express its opinion on the matter. Finally, when the Commission considers that the submission has a solid foundation, it refers the case (even partially) to the NCA of the Member State with a view to the application of that State's national competition law.

[523] As discussed in the preamble to this Chapter, Article 1, paras. 2-3 EUMR establishes the turnover test for identifying mergers having such a dimension.

[524] The peculiarity of this system of referral is that it is triggered through a reasoned submission lodged by the parties to the concentration.

[525] European Commission (2005), Commission Notice on Case Referral in respect of concentrations, 2005/C 56/02, paragraph 16, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=PL

[526] *Id*., paras. 17-18

competent NCA. More in detail, under this article there are two options for a Member State wishing to request referral of a case following its notification to the Commission:

- The first one is represented by Article 9, paragraph 2(a) EUMR, according to which such a referral can be made only if a concentration (i) threatens to affect significantly competition in a market; and (ii) the market in question must be within the requesting Member State and present all the characteristics of a distinct market. With reference to the first requirement, the Member State must demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and, thus, that it deserves close scrutiny[527]. As regards to the second criterion, the Member State is required to prove that a geographic market in which competition is affected by the transaction is national, or narrower than national in scope[528];
- The second option is offered by Article 9, paragraph 2(b) EUMR, which allows Member States to request the referral of the operation to their NCA when: (i) the concentration affects competition in a market; and (ii) the market in question must be within the requesting Member State, present all the characteristics of a distinct market, and must not constitute a substantial part of the common market. With reference to first condition, a requesting Member State is required to show, based on a preliminary analysis, that the concentration is liable to have an impact on competition in a market[529]. As regards to the second requirement, a requesting Member State must demonstrate that not only that the market in which competition is affected by the operation constitutes a distinct market within a Member State, but also that the market in question does not constitute a substantial part of the common market[530]. It is noteworthy that, when such criteria are met, the Commission has an obligation to refer the case[531].

[527] *Id*., paragraph 35
[528] *Id*., paragraph 36. According to the Notice, in addition to the two discussed legal requirements, in assessing whether the referral of a case is likely to be considered appropriate, other factors, such as an assessment on whether the competition Authority or Authorities requesting the referral of the case is/are in the best position to deal with the case, should be considered.
[529] *Id*., paragraph 39
[530] *Id*. paragraph 40. According to the same paragraph, usually a market presents such characteristics when it has a narrow geographic scope, within a Member State
[531] *Id*., paragraph 41

As regard to mergers that have not a Community dimension, the EUMR provides for two distinct mechanisms thanks to which the Commission is still allowed to exercise its powers onto them. The first one is provided by Article 4, paragraph 5 EURM, according to which, when a concentration has not a community dimension and is, however, capable of being reviewed under the national competition laws of at least three Member States, the notifying parties of a merger may inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission. If the involved Member States do not express their disagreement, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission[532]. The Member States, consequently, are forbidden from applying their national competition law to the concentration[533].

The second of these mechanisms is the referall system provided by Article 22, paragraph 1 EUMR, which is historically known as the "Dutch Clause". Indeed, in the final version of Regulation 4064/89[534] (*i.e.*, EU first merger regulation that entered into force in 1989), the EU Commission decided to introduce Article 22 that allowed Member States, such as Italy, Luxembourg and the Netherlands, that did not have national merger control rules when the Regulation was firstly adopted, to ask to the Commission to review mergers affecting competition within those Member States and that did not meet the turnover thresholds laid down in the Regulation[535]. Such a provision was called "Dutch Clause" as its

---

[532] There could be, nevertheless, additional elements for the requesting parties to take into consideration other than the two mentioned legal requirements (namely that the operation under scrutiny is actually a concentration according to the definition of Article 3 EUMR and that it must be capable of being reviewed under the national competition laws for the control of mergers of at least three Member States), such as: (i) the actual cross-border nature of the concentration; (ii) its potential effects on competition in one or more markets affected by the concentration; (iii) the investigative and enforcement powers likely to be required to address any such effects; (iv) the existence of a specific expertise within the EU Commission that could be better positioned to review the case; (v) finally, the cost and time delay involved in submitting multiple Member State filings (which means that, depending on the case, notifying the operation directly to the Commission could be the most efficient decision). For further insights on this matter, see European Commission (2005), *supra* note 525, paras. 25-32

[533] It is noteworthy that the examined referral mechanism is triggered, even in this case, by the notifying parties rather than by the EU Commission or the NCAs.

[534] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ No L 395/1, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989R4064

[535] Cseres J.K., "*Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities*", Journal of European Competition Law & Practice, Volume 14, Issue 7, October 2023, pp. 410–422, at 414. It is noteworthy, as stated by the Author, that the Dutch Clause was born out of a compromise as it was introduced in exchange for the insertion, in the Merger Regulation, of a provision allowing Member States to conduct their own investigation where a prospective merger had substantial effects on a market within a Member State. Such a provision is known as the "German Clause", because it was introduced as a compensation for Germany that accepted turnover thresholds lower than it desired.

introduction was requested by the Netherlands and it was, in essence, created as an extraordinary legal tool allowing EU Members States that lacked a merger review regime to rely on the assistance of the Commission for examining presumably local transactions[536].

The original Article 22 was, then, updated[537] and transposed in the EUMR of 2004. As per the wording of the current version of Article 22 EUMR, one or more Member States may request the Commission to examine any concentration, as defined by Article 3 EUMR[538], that does not have a Community dimension, when two legal requirements are met:

- The concentration must affect trade between Member States, meaning that it is liable to have some discernible influence on the pattern of trade between Member States[539]. It is important to stress that the concept of trade mentioned before encompasses all cross-border economic activities and cases where the transaction affects the competitive structure of the market. For this reason, in assessing whether the transaction may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, the EU Commission shall take into the due account other factors that could prove relevant, such as the location of (potential) customers, the availability and offering of the products or services at stake, the collection of data in several Member States, or the development and implementation of R&D projects that may be commercialised in more than one Member State[540].

---

[536] Modrall J., "*Illumina/Grail Prohibition: The End of the Beginning for EU Review of "Killer Acquisitions"?*" Kluwer Competition Law Blog, September 8, 22, available at the following link: https://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/

[537] Particularly, the present EUMR has made some modifications to the previous text of Article 22. One of the most important changes deals with the introduction of two legal requirements, as discussed later in this paragraph, that should be met for a Member State to refer the case to the Commission. A further modification deals with Article 22, para. 5 that, in contrast with the original text, grants the Commission with the power to inform one or several Member States that a concentration meets the legal requirements set out in Article 22(1) and, as a consequence, it may invite that/those Member State(s) to make a referral request. For further insights on this matter, see Looijestijn C. A. *et al.*, "*In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation*", Maastricht Journal of European and Comparative Law, vol. 29, issue 5, 2022, pp. 550-571, at 552-553

[538] Accordingly, a concentration arises where a change of control on a lasting basis results from: (i) the merger of two or more previously independent undertakings or parts of undertakings; or (ii) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. Furthermore, according to the same Article, the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration.

[539] European Commission (2005), *supra* note 525, para. 43

[540] European Commission (2021), *supra* note 516, para. 14

- The concentration threatens to significantly affect competition within the territory of the Member State or States making the request. This implies that, as established by Article 9, paragraph 2 (a), we already discussed this condition above, a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny[541]. According to the Guidance on the application of the referral mechanism set out in Article 22, in assessing whether the transaction threatens to significantly affect competition the competent authorities should take into considerations elements such as " *the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices*[542]".

However, as indicated in the Notice on Case Referral, since referring a case to the EU Commission may entail additional cost and time delay for the merging parties, Member States should exercise this kind of discretion only for a limited number of cases which seem to present a real risk of negative effects on competition and trade between Member States, and where it appears that these would be best addressed at the Community level[543]. Furthermore, the same Notice lists cases normally most appropriate for referral to the Commission pursuant to Article 22 EUMR, among which it is possible to include: (i) cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets; and (ii) cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially

[541] European Commission (2005), *supra* note 525, para. 44
[542] European Commission (2021), *supra* note 516, para. 15
[543] Commission (2005), *supra* note 525, para. 45

affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets[544].

It must be highlighted, nevertheless, that since the adoption of the Merger Regulation of 1989 most Member States have adopted a national merger control regime, factor that would have made the original need for Article 22 EUMR less relevant[545]. Furthermore, the considerations above of the EU Commission on when it would be appropriate for a Member State to refer a case to the Commission seems to aim at discouraging such kinds of referral. Indeed, as of the end of 2023, referrals pursuant Article 22 have not been frequent, just 48 cases since such a mechanism was introduced[546].

This last tendency of the EU Commission related to the application of the referral mechanism described above started changing in the mid-2010s when the phenomenon of killer acquisition in both the pharmaceutical and digital sectors began to be perceived as an actual threat to competition. Indeed, in 2021, the Commission abandoned its restrictive approach towards the application of Article 22 EUMR by considering that "*the Commission's current approach of discouraging referrals under Article 22 of the EU Merger Regulation where the concentration falls outside the national merger control thresholds of the referring Member State limits the effectiveness of these referrals as a corrective mechanism to the turnover-based thresholds. In practice, under this approach, only transactions that are notifiable in at least one Member State can be potentially referred under Article 22*[547]", and that "*the current practice has resulted in the potential of the corrective mechanism under Article 22 not being fully realised, reducing its effectiveness. Accepting and encouraging a referral of relevant transactions would give flexibility to the Member States and the Commission to target concentrations that merit review at EU level, without imposing the notification of transactions that do not*[548]".

This shift finally resulted in the publication of the already mentioned Guidance on Article 22 referrals (hereinafter "the Guidance"), for the introduction of which the EU Commission bypassed any formal legislative procedure, public consultation or

[544] *Id*.
[545] European Commission (2001), Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745 final, para. 85, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0745
[546] For further information on this topic, see the EU Commission Statistics on Merger Cases, available at the following link: https://competition-policy.ec.europa.eu/system/files/2023-12/Merger_cases_statistics.pdf
[547] European Commission (2021), *supra* note 483, para.268
[548] *Id*.

implementation period[549]. According to the Commission, the main goal of such a document is to provide practical guidance with reference to its approach to the use of the referral mechanism set out in Article 22 EUMR, in order to facilitate and clarify its application in certain categories of appropriate cases[550]. Furthermore, the Commission illustrates that, in recent years, there have been several transactions involving innovative companies conducting research & development projects and with strong competitive potential, even if they generated little or no turnover at the time of the concentration. As a consequence, although turnover-based thresholds in the EUMR, complemented by the referral mechanisms set out in the Merger Regulation, have generally been effective in capturing transactions with a significant impact on competition in the EU internal market, a number of cross-border operations, particularly in the digital and pharmaceutical sectors, which could potentially also have such an impact, have escaped review by both the Commission and NCAs. Therefore, according to the Commission, a reappraisal of the application of Article 22 EUMR would be necessary to address such an issue. Thus, in the light of the above considerations, the Commission establishes that it intends to encourage and accept referrals even in cases where the referring Member State does not have initial jurisdiction over the case (*i.e.*, even when national thresholds are not triggered), ensuring in this way that transactions that merit review under the Merger Regulation are examined by the Commission. Accordingly, this change in the Commission's practice would not require a modification of the relevant provisions of the EUMR[551]. We can essentially conclude that, through this update to Article 22 EUMR the Commission is aiming at directly reviewing killer acquisitions.

As regards to the novelties introduced by the Guidance, thanks to the new approach of the EU Commission, the referral mechanism laid down in Article 22 EUMR can be applied even where the merger is not notifiable in the referring Member State(s) but where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. Moreover, the Guidance includes a non-exhaustive list (which is not limited to any specific economic sector) of categories of cases that will normally be well-

[549] Faria T.L. *et al*., "*New trends in merger control: capturing the so-called killer acquisitions... And everything else*", Actualidad Jurídica Uría Menéndez 57, 2021, pp. 33-53, at 40

[550] European Commission (2021), *supra* note 516, para. 1. In the Commission's opinion, such a document is necessary as it provides practical guidelines to the EU Commission itself and to NCAs on the application of such a referral mechanism, since competition Authorities retain a considerable margin of discretion in deciding whether to refer cases or accept referrals, respectively (see the 2nd paragraph of the Guidance).

[551] *Id*., paras. 9-11. It also noteworthy that, as stated by paragraph 12 of the Guidance, the aim of the document is also to increase transparency, predictability and legal certainty as regards a wider application of Article 22 of the Merger Regulation.

suited for referral, such as: (i) cases where the target is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (ii) cases where the involved undertaking is an important innovator or is conducting potentially important research; (iii) concentrations where the target is an actual or potential important competitive force; (iv) acquisitions in which the target has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (v) it provides products or services that are key inputs/components for other industries[552].

A second important update delivered by the Guidance deals with the fact that, even if the referral is to subject the deadlines set out in Article 22 (*i.e.*, 15 working days of the date on which the concentration was notified or, if no notification is required, otherwise made known to the Member State concerned), Member States are allowed to refer cases even when the related transactions have already been closed. The Commission states, however, that it would generally not consider a referral appropriate where more than six months have passed after the implementation of the concentration, although in exceptional circumstances a later referral may also be appropriate, based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers[553]. It is self-evident that, with this provision, the EU Commission has granted itself the powers to *ex post* review closed transactions avoiding, once again, any legislative procedure[554].

As for procedural aspects, in the Guidance the Commission has provided also the various steps that will be followed for the practical implementation of Article 22 referrals. First of all, the Commission makes it clear that it will closely cooperate with NCAs to identify concentrations that may constitute potential candidates for a referral under Article 22. Also, merging parties can voluntarily provide information about their intended transactions, while third parties are allowed to contact the Commission or the competent NCA of the Member States and inform them of a concentration that, in their opinion, could be a candidate for a referral under Article 22 EUMR. Thus, when the Commission becomes aware of a transaction that it considers as meeting the relevant criteria for a referral, it may inform the Member State(s) potentially concerned and invite it/them to make a referral request. When a referral request in being evaluated, the Commission will inform the parties

[552] *Id.*, paras. 19-20
[553] *Id.*, para. 21
[554] Jafarguliyev, A., supra note 499, at 62

to the transaction as soon as possible. The merging parties are, however, still free to implement their transaction or, conversely, to delay it until it has been decided whether a referral request will be made[555].

With regards to the deadline for notification under Article 22 EUMR, the Guidance upholds the timeframe of the Regulation, stating however that the notion of "*made known to the Member State concerned*" related to concentrations for which notification is not required should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral. Furthermore, at the latest 10 working days after the expiry of the deadline for Member States to join the referral request (*i.e.*, 15 working days of being informed by the Commission of the initial request), the Commission must take a decision on whether to examine the referred concentration provided that, if a decision is not been taken within this period, it will be deemed to have adopted a decision to examine the concentration in accordance with the request[556].

Finally, it must be highlighted that when the Commission informs the undertakings concerned that a referral request has been made, if a concentration has not already been implemented the merging parties are obliged to suspend the transaction until it has been declared compatible with the common market, as provided by Article 7 EUMR. Nevertheless, the suspension obligation ceases if the Commission subsequently decides not to examine the concentration[557].

As we are going to discuss in the following paragraph, this new approach of the EU Commission to Article 22 referral mechanism has been criticized by the literature for several reasons. However, before examining such concerns, it is important to analyse the *Illumina/Grail* case[558], which represents the first instance in which the mentioned new approach has been practically applied.

[555] European Commission (2021), *supra* note 516, paras. 23-27
[556] *Id.*, paras. 28-30
[557] *Id.*, para. 31
[558] European Court of Justice (2022), General Court Case T-227/21, "*Illumina v. Commission*", available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=773F77FD605FC65FDA566BB806B515D5?text=&docid=262846&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=11983472

4.4 **The *Illumina/Grail case***

The *Illumina/Grail* case deals with a concentration that involved two US-based undertakings active in the manufacture of basic pharmaceutical products and preparations sector, as well as in the sector of manufacture of other electrical equipment. In greater detail, Illumina (the acquirer) is a global health technologies company, and leading supplier of next generation sequencing ("NGS") systems for genetic and genomic analysis, while Grail (the target) is s a customer of Illumina that develops cancer detection tests relying on NGS systems.

Even if the transaction was not notifiable to the EU Commission or to the Member States because the turnover of the undertakings concerned did not exceed the relevant thresholds, following a complaint received by the EU Commission on 7 December 2020, the Commission reached the preliminary conclusion that the concentration at issue could be the subject of a referral under Article 22(1) EUMR, particularly in view of the fact that Grail's importance for competition was not reflected in its turnover. On these grounds, on 10 February 2021 the Commission informed the Member States of the concentration at issue and invited them to submit a referral request. Following such a request, on 9 March 2021 the French NCA asked the Commission to examine the concentration at issue, even if it had not triggered its national merger control rules. Furthermore, Belgium, Greece, Iceland, the Netherlands and Norway asked to join the referral request[559].

According to the Commission, the referral request under Article 22 EUMR was appropriate because "*GRAIL's competitive significance is not reflected in its turnover, as notably evidenced by the USD 7.1 billion-dollar deal value*[560]". Thus, the acceptance of the referral set in motion the standstill provision contained in Article 7 EUMR, meaning that Illumina was prohibited from implementing the acquisition before the eventual clearance of the Commission. Nevertheless, while on 22 July 2021 the Commission decided to open an in-depth investigation on the case in order to establish whether the proposed acquisition of GRAIL by Illumina was compatible with the EUMR[561], Illumina still implemented the

---

[559] *Id.*, paras. 9-19

[560] European Commission, Press Release of 20 April 2021, "*Mergers: Commission to assess proposed acquisition of GRAIL by Illumina*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_1846

[561] European Commission, Press Release of 22 July 2021 "*Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844. In its preliminary investigation the Commission considered that, following the acquisition, Illumina could have engaged in vertical input foreclosure strategies given its leading position in the NGS systems, having an adverse impact on GRAIL's

acquisition without waiting for the Commission's decision. Consequently, the Commission opened an investigation to assess whether such a conduct constituted a breach of the standstill obligation under Article 7 of the Merger Regulation[562]. Finally, on 12 July 2023, the EU Commission closed the investigation and fined Illumina and GRAIL approximately €432 million and €1,000 respectively, for implementing their proposed merger before its approval[563].

In the meantime, Illumina appealed the Commission's decision accepting the referral before the ECJ and put forward, *inter alia*, three different pleas:

- First of all, according to Illumina, the Commission lacked competence to initiate, under Article 22 EUMR, an investigation into a concentration which does not meet national thresholds for notification. Accordingly, the Commission's position would have been incompatible with the 'one-stop shop' objective, as well as with the principles of legal certainty, subsidiarity and proportionality;
- Secondly, Illumina submitted that the referral of the concentration at issue was requested tardily and, in the alternative, that the Commission's delay in sending the invitation letter undermined the principle of legal certainty and the right to good administration;
- Finally, the applicant alleged that the Commission, according to its policy, at the time when the undertakings concerned had agreed on the concentration at issue, did not accept referral requests for concentrations that did not fall within the scope of national merger control rules, infringing in this way the principles of legal certainty and the protection of legitimate expectations[564].

rivals and European patients, in particular by hampering innovation, reducing the choice, innovative features and performance of products available to patients, doctors and health systems, and increasing barriers to enter the NGS-based cancer detection tests space.

[562] European Commission, Press Release of 20 August 2021 "*Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina/GRAIL transaction*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322

[563] European Commission, Press Release of 12 July 2023 "*Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773 . In the view of the Commission "*Illumina and GRAIL knowingly and intentionally breached the standstill obligation during the Commission's in-depth investigation. This is an unprecedented and very serious infringement undermining the effective functioning of the EU merger control system*".

[564] European Court of Justice (2022), *supra* note 558, paras. 83-85. Illumina sustained this on the grounds that, while the agreement with Grail was concluded on 20 September 2020, the Guidance on Article 22 was published later in 2021

The ECJ, on 13 July 2022, rejected the appeal by Illumina on several grounds, upholding in this way the new approach of the EU Commission to Article 22 referral mechanism. As regards to the first plea, the Court turned down the considerations of the applicant on the grounds of its analysis of the literal, contextual, historical and teleological interpretations of Article 22 EUMR. Indeed, according to the ECJ, Article 22 paragraph 1 EUMR allows Member States to refer to the Commission any concentration that does not have a Community dimension but that, nonetheless, affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States. Thus, according to the Court the literal interpretation of the expression "any concentration" contained in the examined Article would suggest that a concentration may be the subject of a referral regardless of the existence or scope of national merger control rules, provided that the cumulative conditions already discussed above (§ Chapter 3, paragraph 4.3) are met[565]. Additionally, the ECJ noted that the Guidance on Article 22 EUMR was adopted after the introduction of the EUMR and hence, was not relevant to the historical interpretation of the Regulation and, consequently, to the outcome of the dispute[566]. Furthermore, the Court acknowledged that the referral mechanism laid down in the EUMR is an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid nature, is not capable of covering all concentrations which merit examination at European level. Accordingly, Article 22 EUMR, as interpreted by the EU Commission in its Guidance, simply provides the necessary flexibility for the examination, at European level, of transactions that are likely to significantly impede effective competition within the EU market which, since the turnover thresholds have not been met, would otherwise escape control under the merger control system of both the EU and the Member States[567]. On those grounds, the ECJ concluded that a referral request under Article 22 EUMR may be submitted irrespective of the scope of national merger control rules.

With reference to Illumina's second plea, the applicants stated that "*the Commission erred in law in finding that, in order to find that the concentration had been made known to the Member State within the meaning of that provision, that Member State should be informed not only of the existence of the concentration but also of the information enabling a preliminary competitive analysis of the transaction to be carried out*[568]", as this

[565] *Id.*, paras. 89-94
[566] *Id.*, para. 115
[567] *Id.*, paras. 142-143
[568] *Id.*, para. 186

interpretation would have implied that a concentration should be notified *de facto* in all the Member States even if it is not subject to an obligation to notify (undermining in this way the principle of legal certainty). Against this claim, the ECJ ruled that, having regard to the purpose of the EUMR and to the principle of legal certainty, "*the concept of 'made known to the Member State concerned', as set out in the second subparagraph of Article 22(1) of that regulation, must be interpreted as meaning that it requires the relevant information to be actively transmitted to that Member State, enabling it to assess, in a preliminary manner, whether the conditions for a referral request under that article have been satisfied. Consequently, according to that interpretation, the period of 15 working days laid down in that provision starts to run, where notification of the concentration is not required, from the time when that information was transmitted*[569]". Consequently, since the invitation letter which enabled those authorities to carry out a preliminary assessment of the conditions for the application (*i.e.*, the document that made the concentration known to the Member States), was dated 19 February 2021 and the referral request was submitted on 9 March 2021, the period of 15 working days laid down in that provision was complied with and that letter cannot be regarded as out of time[570].

Furthermore, even the second part of such plea, according to which the Commission's delay in sending that letter was contrary to the fundamental principle of legal certainty and to the obligation to act within a reasonable time under the principle of good administration, was rejected. Indeed, even if the Court acknowledged that the letter was actually sent within an unreasonable period of time[571], this factor did not infringe the applicant's right of defence[572] (that would be the only case in which the annulment of a decision taken at the end of an administrative procedure concerning competition could be justified by the infringement of the reasonable time principle[573]).

Finally, as for the third plea alleging breach of the principles of the protection of legitimate expectations and of legal certainty, the ECJ pointed out that, in order to rely on the principle of legitimate expectation, the party concerned should establish that it has received precise, unconditional and consistent assurances originating from authorised, reliable sources (the EU Commission in this case). Since Illumina failed to prove this, even

[569] *Id.*, para. 211
[570] *Id.* para. 214
[571] *Id.*, para. 239
[572] *Id.*, para. 246
[573] *Id.*, para. 240

the third plea was considered as unfounded, and the appeal dismissed in its entirety[574]. Illumina decided to appeal against this judgment, seeking for its annulment[575]. The case is still pending before the ECJ.

Therefore, from the above, it seems uncontestable that, in its judgment, the ECJ clearly upheld the broadening of the interpretation of Article 22 EUMR established by the Guidance published by the EU Commission in 2021. As we are going to discuss in the next paragraph, the new policy of the Commission on referral pursuant Article 22 EUMR as an instrument to tackle potential killer acquisitions, particularly in the digital environment, has been, nonetheless, criticised by the literature on several grounds.

4.5 **Potential unintended consequences of the Guidance on Article 22 EUMR**

One of the most relevant concerns of the literature related to the new policy of the EU Commission as regards to the application of Article 22 EUMR deals essentially with the degree of legal uncertainty that would have risen following the introduction of the discussed Guidance. Indeed, according to some scholars, while previously merger control was based on objective criteria, such as the revenue-based thresholds laid down in the EUMR (even if they were not flawless), after the implementation of the Guidance merger control rules would be based also on unpredictable criteria. This would lead to legal uncertainty because, while in the past undertakings could be sure that their transaction would have not been subject to merger review, because it did not meet the relevant thresholds, now basically any concentration could be subject to the merger control system, meaning that parties to a transaction would have to try to anticipate a potential interest to review their operation in any EU Member States. This would lessen the legitimate expectations of undertakings, as

[574] *Id.*, paras. 251-267

[575] European Court of Justice (2022), Case Case C-611/22 P "*Ilumina v. Commission*". The text of the appeal is available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=267964&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=142070

well as the legal certainty of the EU merger control system would be undermined by such a new approach grounded on a subjective assessment of the substance of the transaction[576].

It seems, however, that the Commission has tried to mitigate such a risk by encouraging undertakings to provide sufficient information on their intended transactions, so that the Commission might give them an early indication that it does not consider that their concentration would constitute a good candidate for a referral under Article 22 EUMR[577]. Yet, the introduction of such a system of voluntary information would not solve the issue related to legal uncertainty, as parties to a merger could not be sure what is "sufficient information" to provide, how much time it will take them to get the EC's opinion and so many others. As a consequence, such voluntary information provision could even create more uncertainty and bureaucracy for undertakings rather than a useful tool to seal their transactions[578]. This could be particularly true for digital acquisitions, where such a system could imply a thorough and complex analysis of the digital undertakings involved. Thus, "*ultimately, the mechanism could be side tracked: the pressure would be greater on transactions that do not reach the thresholds than on those that do*[579]".

Furthermore, another concern related to the heightened degree of legal uncertainty deals with the timeline for an NCA to refer the transaction pursuant Article 22 to the EU Commission, as the deadline in case of absence of a mandatory notification would be unpredictable. Indeed, in such a case the referral should be made within 15 working days starting from the moment in which the concentration is made known to the Member State concerned. Even if the ECJ has tried to shed some light on this matter in the *Illumina/Grail* case, according to some part of the literature the fact that a concentration will be considered as "made known" when the Member State has received sufficient information to make a preliminary assessment of the operation would leave excessive discretion for the relative NCA to determine when it became actually aware of the transaction[580]. This last argument would be precisely supported by the same *Illumina/Grail* case, where the transaction was publicly announced in September 2020, while the French NCA made the referral request in March 2021, after six months of the public announcement.

---

[576] Faria T.L. *et al.*, *supra* note 549, at 42
[577] European Commission (2021), *supra* note 516, para. 24
[578] Jafarguliyev, A., supra note 499, at 66
[579] Turgot, C., *supra* note 438, at 120
[580] Faria T.L. *et al.*, *supra* note 549, at 42

Additionally, legal uncertainty would be a risk stemming from the fact that Member States can refer to the Commission even transactions that have already been closed, specifically within six months from their closing. This deadline is however subject to exceptions: first of all when the implementation of the concentration was not in the public domain, this period of six months would run from the moment when material facts about the concentration have been made public in the EU; secondly, later referral (i.*e.*, referral going beyond the six months deadline) could be accepted if the EU Commission considers there is a potentially detrimental effect on consumers or the magnitude of the potential competition is threatened[581]. Accordingly, such a provision would have, indeed, granted the Commission the power to review closed transactions, but would have also increased the degree of legal uncertainty since merging parties will always be at risk of being reviewed by the Commission about their completed transactions and, thus, they could never be assured to complete their transaction with the confidence of not being subject to merger review[582]. To make matters worse, the EU Commission, in case it finds any relevant competitive hinders, could even order to revert the transaction by imposing a re-establishment of the situation prior to the transaction[583].

Another concern expressed by scholars deals with the likelihood of an overuse of the referral system under Article 22 EUMR by both the NCAs and the Commission, factor that could lead to inefficiencies. Indeed, considering particularly the high number of acquisitions realized by gatekeepers that escaped scrutiny of antitrust Authorities (as previously discussed), EU Member States could be especially fostered to refer to the Commission a significant number of mergers involving gatekeepers, in order to avoid underenforcement in the digital sector and to face challenges posed by killer acquisitions. Based on this thought stream, this could lead to inefficiencies related to high enforcements costs as competition Authorities would have to dedicate significant time and resources to assess mergers that could eventually prove as unproblematic.

Inefficiencies could, moreover, rise also on the gatekeepers' side, because when theCommission informs merging parties that a Member State has made a referral, they must suspend the transaction in accordance with the stand-still provision laid down in the EUMR, circumstance that might lead to substantial costs due to the fact that any review could result

[581] European Commission (2021), *supra* note 516, para. 21
[582] Jafarguliyev, A., supra note 499, at 67
[583] Faria T.L. *et al*., *supra* note 549, at 42

in delays and create a risk that the Commission will block the deal. To sum up, scholars fear that the costs might outweigh the benefits of the new interpretation of Article 22 EUMR[584].

From the above, it appears clear that the intervention of the Commission on the debate on how to tackle digital mergers, especially killer acquisitions, has not been percieved as decisive from part of the literature and has left some questions open. This is the reason why the literature has continued to debate on such a topic, starting questioning also the appropriateness of the existing legal standards of review usually applied in digital mergers' assessment. The following paragraph will be devoted to this last matter.

4.6 Substantive legal standards of review: is there any need to depart from the so-called SIEC test?

The current legal standard of review applied in several jurisdictions for assessing whether a transaction would be capable of effectively hindering competition is the "Substantial Impediment of Effective Competition" test (hereinafter "the SIEC test"). This kind of test was adopted within the EU in 2004, following the introduction of the present text of the EUMR, according to which "*a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*[585]". Accordingly, in order to assess whether a concentration would significantly impede competition, through the SIEC test competition Authorities take into consideration several elements, such as *inter alia*: (i) the structure of the markets at stake; (ii) the presence of actual or potential competitors; (iii) market shares of undertakings parties to the concentration; (iv) legal and/or other barriers to entrance to the market; (v) contribution to economic and technical development. Thus, the eventual strengthening of a dominant position of the acquirer, in the extant version of the test, is no longer a prerequisite for prohibiting the transactions as long as a healthy post-merger competitive environment exists[586]. In sum, the SIEC test enables the EU Commission to focus more on market

584 Carugati C., *supra* note 425, at 6
585 EUMR, *supra* note 103, Article 2, paragraph 3.
586 Stakheyeva H., "*Test SIEC*", Global Dictionary of Competition Law, Concurrences, Art. N° 89155, available at the following link: https://www.concurrences.com/en/dictionary/siec-test-mergers

equilibrium effects of the proposed transaction than on the eventual strengthening of a dominant position, ensuring at the same time that non-coordinated effects of mergers arising in oligopolies can be reviewed[587].

However, as mentioned before, in recently scholars have started questioning whether the SIEC standard of review would constitute an efficient cornerstone onto which both the EU Commission and NCAs can base their merger assessment in digital markets. More in detail, the principal concerns have converged on two main questions: (i) first of all, whether the implementation of the SIEC test to digital mergers (especially to potential killer acquisitions) would be capable of facing the issues stemming from the digital environment or whether there would be the need to shift towards a test based on a "balance of harm"; (ii) whether some aspects of the "burden of proof" should be modified and certain rebuttable presumptions of harm introduced to ease competition Authorities' decision-making process[588].

As to the first concern, part of the literature suggests that the SIEC test is no longer adequate to catch issues arising from digital mergers as it only considers how likely a merger is to reduce competition and then, only if a substantial lessening of competition is more likely than not to result, a merger may be blocked. In the case of killer acquisitions this kind of analysis could constitute a crucial gap because, as an example, if a gatekeeper intends to acquire a smaller innovative undertaking, competition Authorities would be able to block the merger just if they consider the smaller undertakings more likely than not to be able to succeed as a competitor. Therefore, the SIEC test should be replaced by a "balance of harm" test that would take "*into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation*[589]".

Even the OECD has endorsed such a shift towards a balance of harm test, stating that it would be "*preferable to an alternative in which agencies maintain a balance of*

---

[587] Before 2004, the EU Commission applied a standard of review test that was essentially focused on the strengthening of dominant position following the transaction. Indeed, according to Article 2, paragraph 3 of the Merger Regulation of 1989 "*a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market*". There were several reasons for shifting from a test focused on dominance to the SIEC test. For further info on this topic see: Röller L.H., De La Mano M., "*The Impact of the New Substantive Test in European Merger Control*", European Competition Journal, volume 2, issue 1, 2006, pp. 9-28, available at the following link: https://ec.europa.eu/dgs/competition/economist/merger_control_test.pdf

[588] Alexiadis, P., & Bobowiec, Z., supra note 420, at 88

[589] Digital Competition expert panel (2019), *supra* note 9, at 13

probabilities test, but inflate the likelihood that is ascribed to the emergence of the constraint from potential competition[590]". Accordingly, while the SIEC test (defined by the OECD as "balance of probabilities test") requires agencies to hold an expectation that the start-up that is part of a merger is likely to succeed as a business (otherwise, no constraint can be considered to be lost), "*a more economic approach such as an expected harm test, would look not only at the likelihood of harm occurring, but also the likely scale of the anticompetitive effects if harm did occur. This approach would therefore differ in that it would lead to intervention in circumstances where the risk of harm is lower, but the scale of harm is high, and hence the expected value of the harm is high (probability of harm multiplied by magnitude of harm)*[591]".

It must be highlighted, nevertheless, that the potential introduction of a balance of harm test, in place of the SIEC one, has not been welcomed by all scholars, as some part of the literature sustains that its implementation would necessarily face practical difficulties, such as that of quantifying costs and benefits of the merger for competition and the probabilities of their realisation with the necessary precision. Furthermore, if such a test based on a general cost/benefit analysis would be adopted, it would provide the European Commission with a margin of discretion that would be very difficult for the EU Courts to control[592]. Thus, the introduction of a balance of harm test would not be fully appropriate to tackle challenges from acquisitions of start-ups.

Given the considerations above and the fact that there is inevitably a degree of uncertainty in predicting the potential outcome of a merger on the market, especially in digital ones, other scholars suggest that it would be wiser to rely on an approach that is based on relatively simple and clear, economically based criteria and principles[593], rather than on the elements discussed before. Accordingly, in assessing a transaction where the acquirer intends to merge with an undertaking that has a much smaller market presence but possesses the capability to innovate in a manner that could lead it to "steal" significant, profitable business from the incumbent in the future, the element to be taken into account in such

[590] OECD (2020), *supra* note 393, at 38

[591] *Id*., at 37. It is noteworthy however, that the same OECD stated admittedly that whichever legal standards apply to digital mergers, the uncertainty in enforcing the law in killer acquisition cases makes merger control difficult to predict, and this phenomenon would be unfortunately kind of unavoidable.

[592] Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 67

[593] Federico G., Scott Morton F., Shapiro C., "*Antitrust and Innovation: Welcoming and Protecting Disruption*", 2019, at 12

assessment should be the level of market power of the acquiring company[594]. Indeed, "*If there are existing competitors to the incumbent, or potential competitors better placed than the target, then the loss of that source of potential competition may be limited. However, if there is limited "competition in the market," and the main or only locus of competition is to be found in "competition for the market," then the loss of a potential challenger can cause substantial consumer harm*[595]" and, in such a case, there would be grounds to justify a prohibition of the transaction at stake.

Thus, whenever innovative start-ups are acquired by digital platforms, it would be useful not only to examine the potential harm on the consumer side, but also a possible increase in market power on the other side of the platform, assessing even whether the acquisition will lead, directly or indirectly, to a strengthening or expansion of the market position of a digital ecosystem[596]. As a consequence, according to part of the literature, market power of the acquiring undertaking would be a key factor to account for when reviewing potential killer acquisitions.

Not all scholars are, nevertheless, convinced that abandoning the SIEC test for adopting a new legal standard of review would be the appropriate option. Accordingly, the SIEC test would remain a sound basis for assessing digital mergers, even if a certaing gap in reviewing such mergers would actually exist[597]. Such scholars acknowledge, however, that "*a new theory of harm may be needed to capture the potential adverse effects on competition of the mergers"*, especially digital ones, and that "*in the future, the analysis must include an analysis of the strategic relevance of such mergers in shielding broader ecosystems from competitive threats from the fringe*[598]".

With regard to the second question, namely whether a shift in the burden of proof, coupled with the introduction of a rebuttable presumption of inadmissibility of transactions involving potential killer acquisitions, would be useful to assess problematic digital mergers, some scholars have suggested that the burden of proof should be reversed. This would imply that, instead of imposing on competition Authorities an obligation to show that the transaction under assessment will have a negative impact on competition as a requisite to block the operation, the best solution would be that to impose an obligation on the acquirer

---

594 *Id.*, at 22
595 *Id.*
596 Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 67
597 Crémer J. *Et al.*, *supra* note 26, at 116-117
598 *Id.*, at 124

to prove that the acquisition will have pro-competitive effects or, however, that it will not negatively affect competition within the market[599]. In this respect, Crémer *et al.*, have sustained that such a reform would not result in a presumption against the inherent legality of nascent mergers but, conversely, it would take due account of new business strategies developing in digital markets and the competitive issues they might raise and, additionally, such a shift towards a reversed burden of proof might prove useful to minimize false negative in the digital environment where these categories of costs are particularly high[600].

Even the OECD has expressed its support to such a reform by stating that there would be "*considerable merit in legislating to reverse the burden of proof in some circumstances, for example by creating a rebuttable presumption of anticompetitive effects for nascent acquisitions by dominant incumbents, either in general, or where the acquisition increases the risk of competitive harm, for example that there were a reasonable (25-30%) prospect of harm*[601]". Accordingly, within the EU, such a proposal was concretely endorsed by the French Parliament in a draft law according to which acquiring undertakings need to prove that their operations investigated by the French competition Authority is not likely to harm competition[602].

It must be stressed out, nevertheless, that such a reform has been considered by other part of the literature as disproportionate to the challenges posed by the digital economy, and should therefore been ruled out in favour of other potential solutions[603], such as the development of guidelines specifying new legal considerations, for instance new theories of harm, which should take in high consideration elements such as data, innovation and possible outcomes of digital mergers[604]. In sum, the discussed proposal of reversing the burden of proof has, so far, received mixed response, leaving the debate, another time, open.

[599] Alexiadis, P., & Bobowiec, Z., *supra* note 420, at 94
[600] Crémer J. *Et al.*, *supra* note 26, at 11
[601] OECD (2020), *supra* note 393, at 2
[602] French Parliament (2020), Proposition de loi n° 302 du Sènat visant à garantir le libre choix du consommateur dans le cyberespace, 5 février 2020, available at the following link: https://www.senat.fr/leg/ppl19-302.html
[603] Digital Competition expert panel (2019), *supra* note 9, at 101. See also, in this respect, Federal Ministry for Economic Affairs and Energy (2019), *supra* note 113, at 66
[604] *Id.*, at 68

5. **Closing address**

Since its introduction in 1989, the Merger Regulation aimed at filling the gaps in the system of protection against distortions of competition in relation to concentrations[605]. Yet, it is undeniable that, with the rising of the Internet and the digitalisation of our economy, "*a gap in protection has emerged in recent years in the coverage and control, under competition law, of acquisitions of innovative start-ups, for example in the fields of internet services, pharmaceuticals or medical technology ('killer acquisitions')*[606]". Accordingly, the impact of the phenomenon of killer acquisition on the EU internal market has risen several concerns on how to effectively tackle such a phenomenon.

In the view of the author of this final dissertation, all the opinions discussed in the present Chapter can be summarised in one single question: should we need to change the EUMR to address the phenomenon of killer acquisitions? The literature on the matter clearly shows that answering such a question is not a simple task.

First of all, we discussed the appropriateness of the extant theories of harm (namely harm to potential competition and harm to innovation) to face the outcomes of acquisitions of innovative start-ups and the eventual need to formulate new theories that would be better placed to tackle such phenomenon. Even if, currently, there is no tangible sufficient data that could show that the proposed new theories of harm would be actually able to deal with killer acquisitions, in the opinion of the author of the present contribution, given the fact that such a kind of transactions are usually realized by gatekeepers in digital markets that act as an ecosystem, the ecosystem-based theory of harm would probably be well positioned to confront with the mentioned transactions. Still, the effectiveness of the application of this theory in addressing the challenges posed by digital mergers would need to be evaluated in actual cases.

---

[605] Recitals five and six of the precedent version of the EUMR clearly state this, since the rules that were in force at that time were not considered as "*sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty*" and, therefore, the introduction of *ad hoc* Regulation was perceived as necessary "*to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community*".

[606] European Court of Justice (2022), Case C-449/21 Towercast v Autorité de la concurrence *et al.*, Opinion of Advocate General Kokott delivered on 13 October 2022, para. 48, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CC0449

In second instance, we analysed the proposal related to the introduction of transaction-value-based thresholds, in the place of the turnover-based ones, within the EUMR as an alternative legal tool to catch problematic digital acquisitions. Nevertheless, although such new thresholds could be perceived, *prima facie*, as the solution for reviewing mergers with little or no turnover, data appear to suggest quite the contrary. Indeed, as considered by the EU Commission in its staff-working document[607], the introduction of such thresholds in place of the extant ones would have not been a decisive instrument because, even if both Austria and Germany have introduced it in 2017, they do not seem so far to have brought many additional relevant cases under review (see paragraph 4 above).

Then, we examined, *inter alia*, whether the application of new legal standards, as an alternative to the SIEC test, could contribute to mitigate the phenomenon of killer acquisitions. In my personal opinion, however, the proposal of a reversed burden of proof imposed on undertakings wishing to acquire innovative start-ups could prove disproportionate, as pointed out by part of the literature, because it could even put a stop to mergers that would not have a negative impact on the market[608].

That being said, the new approach of the EU Commission on Article 22 EUMR referral system, as endorsed by the ECJ in the *Illumina/Grail* case seems, in my personal opinion, the only legal instrument currently applicable to contain in some way the phenomenon of killer acquisitions, at least for now. As a matter of fact, despite its discussed flaws, which appear to be mainly related to some degree of legal uncertainty (and the Commission should definitely work on it[609]), such a mechanism should be seen as part of a puzzle to which Article 14 DMA also belongs. Indeed, thanks to their functioning *in tandem*, in the next future gatekeepers will be obliged to inform the Commission of any intended merger, allowing, in turn, the Commission to inform NCAs and to invite them to make a referral, as foreseen in Article 22, paragraph 5 EUMR. As a consequence, gatekeepers will have to re-examine their strategy devoted to the acquisition of digital innovative start-ups, if

[607] European Commission (2021), *supra* note 483

[608] It is noteworthy to recall that not all digital mergers result in killer acquisitions, because some of these transactions can be defined as conglomerate mergers through which the acquirer aims at expanding its ecosystem by integrating the target's product or service in its platform, operation that usually is not perceived as problematic by competition Authorities.

[609] It seems that the Commission was lacking accuracy in its Guidelines on Article 22 EUMR. The suggestion would be, in such a case, to provide a new document with more precise guidelines where the Commission should provide clearer deadlines and accurately determine the transactions concerned as to avoid that the referral mechanism will turn the EU merger control system into a system that has no bottom.

their intended objective is simply to shut down them in order to eliminate potential competitors from the market.

Therefore, provided that the contributions of the scholars taken into consideration in this third Chapter are certainly valuable and could prove to be fundamental in the near future, it seems too early to conclude, at present, that we must change the EUMR. The best strategy seems, in the look of the author of this thesis, to wait for the system of mandatory notification pursuant Article 14 DMA, coupled with that of referral pursuant Article 22 EUMR, to jointly deploy their effects on EU digital markets before deciding whether and how to update the EUMR. Indeed, even if it may seem premature to be confident that the solution provided by the EU Commission will prove successful (it is noteworthy to bear in mind that the obligations laid down in the DMA will start to apply in March 2024), the hope is, however, that this kind of mechanism will be somehow able to lessen the issue related to killer acquisitions, reinforcing at the same time the objective of the DMA that is to make and maintain digital markets contestable.

CONCLUDING REMARKS

The revolution produced by the Internet and the emergence of digital platforms has had an incredible impact on the world economy and has changed the way in which undertakings compete to gain or maintain market shares. As a matter of fact, several, if not all, markets have been penetrated by online platforms, that "*have changed the way in which goods are sold and purchased, and in which information is exchanged and obtained, allowing a shift from the offline world to the online environment, where they provide a myriad of digital services*[610]".

Because of the emergence of such a multifaceted and impetuous economic phenomenon, multiple unprecedented concerns on competition have been risen, inflaming the debate of scholars and Authorities both at EU and national level. Therefore, as declared

[610] Bertolini A., Episcopo F., Cherciu N.A., *supra* note 81, executive summary

in the introduction to this contribution, the very objective of this final dissertation has been essentially to participate in such debate, offering fresh ideas and considerations.

At the very beginning of this work, I discussed about the dispute around the definition of online platform, which is a topic of utmost importance for correctly governing digital markets in order to avoid important distortions to competition within the EU market. Firstly, I provided an *excursus* of the most important efforts of defining such a phenomenon made by eminent scholars, analysing their proposed taxonomies and categorisations, as well as the main features of digital platforms.

Then, considering that, until now, there has been no one-size-fits-all definition of such a phenomenon and that this definitional *vulnus*, coupled with the risks associated to the widespread confusion on what an online platform is, could lead to relevant harms to competition, due to some degree of underenforcement as a consequence of such interpretative issues, I concluded that finding a minimum notion of platform applicable to any legislative framework (at least within the EU) would be desirable as to clarify the normative landscape related to digital markets, that has been frequently perceived as unclear, and to make sure that rules are applied consistently on digital platforms. Accordingly, the definition of platform offered by a study of the EU Parliament, according to which digital platforms essentially are entities offering OTT digital services or infrastructures to users (with the exclusion of ISPs) seems, in the view of the Author of this contribution, the best way for correctly addressing challenges posed by digital markets.

However, with the aim to make such a definition more efficient and capable of allowing EU Institutions to regulate specific digital businesses or services offered in the market, I concluded that it should be interpreted not only with a functional approach but with a service-based approach which would be able to take into the due account the specific category of OTT service(s) offered by platforms in a market, narrowing down in this way the scope of application of sector-based rules applying to specific digital platforms or services.

The second Chapter has been devoted to an analysis of the legislative tools applicable for regulating digital platforms behaviour. After having examined benefits and drawbacks of both *ex post* and *ex ante* regulation, my consideration was that the debate over such a topic has lost its original spark, given the entry into force of the Digital Markets Act proposed by the EU Commission, and that the focus of the discussion should be henceforth shifted on the actual efficiency of the DMA in dealing with the issues related to online platforms and on how, if appropriate, amend and improve it.

To this end, I firstly provided an analysis of the structure and key provisions of the mentioned Regulation, examining thereafter its most debated issues. In light of all of this, even if its impact on digital markets cannot be properly assessed at this early stage, I am of the opinion that the DMA has a good chance to reach its goal, which is to make sure that markets stay contestable. However, far from being spotless, I believe that its success will essentially depend on the efficient cooperation among the EU Commission and other national Institutions as well as on the appropriate number of resources (*i.e.*, enough personnel and tools) spent to correctly enforce the Regulation.

Finally, in the third Chapter the emphasis has been put on a compelling topic, namely killer acquisitions, a phenomenon by which very large online platforms (usually gatekeepers) acquire innovative start-ups whit the sole aim to shut down them, eliminating potential rivals from the market. By virtue of this kind of strategy, incumbent digital undertakings are able to pursue their abusive behaviour escaping competition Authorities control, because of the fact that such transactions do not reach the revenue-based thresholds laid down in the EUMR or in the national legislation of the EU Member States, which would allow the Commission or NCAs to properly review the operation. This is the reason why the mentioned thresholds started to be questioned and several alternative approaches have been proposed to amend the EUMR. The goal of the last Chapter has been, accordingly, to shed light on a phenomenon that is still unclear.

Thus, after having reviewed proposals from several scholars and reports on how to tackle such a phenomenon, starting from alternative theories of harms, moving on to the discussion on transaction value thresholds as a preferable replacement to the extant ones, culminating in the assessment of the more appropriate legal standard of review for correctly assessing digital mergers, it seems too early to confidently state that the EUMR must be changed, since we do not have enough data to assess whether these proposal will be successful and resolve the issue.

This is the reason why, in my personal opinion, the approach of the EU Commission towards a refreshed application of the referral mechanism pursuant Article 22 EUMR, coupled with the system of mandatory notification set out by Article 14 DMA, could be, *prima facie*, the most suitable legal instrument to put a stop to the rampant issue of killer acquisitions, at least until we have new estimates and data that can point us in the right direction for alternative and better-placed solutions.

BIBLIOGRAPHY

Abba P. Lerner, "*The Concept of Monopoly and the Measurement of Monopoly Power*", 27 J. Reprints Antitrust L. & Econ. 471 (1997)

AGCM (2021), Press Release of 9 December 2021 "*Amazon fined over € 1,128 billion for abusing its dominant position*", available at the following link: https://en.agcm.it/en/media/press-releases/2021/12/A528

Akman P., "*Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act*", European Law review 85, 2022

Alexiadis P., & Bobowiec Z., "*Eu merger review of "killer acquisitions" in digital markets - threshold issues governing jurisdictional and substantive standards of review*", Indian Journal of Law and Technology, 16(2), 64-102, 2020

Argentesi E., *et al.*, "*Merger Policy in Digital Markets: An Ex-Post Assessment*", CESifo Working Paper No. 7985, 2019

Australian Competition and Consumer Commission, Digital Platforms Inquiry-Final Report (2019), available at: https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf

Autorité de la Concurrence & Bundeskartellamt, competition law and data (2016), available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2

Autorité de la Concurrence, press release "*Modernisation and simplification of merger control*", 07 June 2018, available at the following link: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/07-june-2018-modernization-and-simplification-merger-control

Autorité de la Concurrence & Bundeskartellamt, Algorithms and Competition (2019)

Bania K., "*Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause*", European Competition Journal, 19:1, pp. 116-149, 2023

Barbano M., “*Verso un antitrust italiano 4.0? I GAFAM e i big data all'esame dell'AGCM*”, in Diritto del Commercio Internazionale, fasc.4, 2021

Basedow J., “*Das Rad neu erfunden: Zum Vorschlag für einen Digital Markets Act (Reinventing the Wheel: The Proposal for a Digital Markets Act)*” Zeitschrift für Europäisches Privatrecht (ZEuP), Vol. 29, 2021

Batura O., van Gorp N., Larouche P., “*Online Platforms and the EU Digital Single Market. A response to the call for evidence by the House of Lord's internal market sub-committee*”, e-Conomics, Rotterdam, 2015

BEREC (2016), “*Report on OTT services*”, BoR (16) 35

Bertolini A., Episcopo F., Cherciu N.A., “Liability of online platforms”, Study, Panel for the Future of Science and Technology, 2021

Bertuzzi L., “*EU parliament adopts regulation targeting internet giants*”, Euractive, January 2022, available at the following link: https://www.euractiv.com/section/digital-single-market/news/eu-parliament-adopts-regulation-targeting-internet-giants/

Blockx J., “*The Digital Markets Act: fostering innovation ‘made in Europe’?*”, 31 March 2023

Body of European Regulators for Electronic Communication (BEREC-2021), “*For a swift, effective and future-proof regulatory intervention: BEREC Opinion on the European Commission's proposal for a Digital Markets Act*”, BoR 21(35)

Bourreau M., de Streel A., “*Digital Conglomerates and EU Competition Policy*”, in Social Science Research Network (SSRN), 2019

Bower J.L. and Christensen C.M., “*Disruptive Technologies: Catching the Wave*”, in Harvard Business Review 73, no. 1 (January–February 1995): 43–53.

Bradford A., “*The Brussels effect*”, Northwestern University Law Review, Vol. 107, No. 1, 2012

Brynjolfsson E. *et al.*, “*Scale Without Mass: Business Process Replication and Industry Dynamics*”, Harvard Business School Technology & Operations Mgt. Unit Research Paper No. 07-016, 2008, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=980568

Bundeskartellamt (2016) working paper – "*the market power of platforms and networks*" (executive summary)

Bundeskartellamt (2016), Working Paper No. B6 113/15, "*Market Power of Platforms and Networks*", available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=2

Cabral L., "*Merger policy in digital industries*", Information Economics and Policy, vol. 54, 2021

Caffarra C., Crawford G., Valletti T., "*How Tech Rolls: Potential competition and 'reverse' killer acquisitions*", VoxEU, 11 May 2020, available at the following link: https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions

Caffarra C., Scott Morton F., "*The European Commission Digital Markets Act: A translation*", VoxEU, 5 January 2021, available at the following link: https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation

Camera dei Deputati (Italian Parliament), Legge sui mercati digitali (Digital markets act), in Dossier No. 52 del 18 maggio 2021, available at the following link: https://documenti.camera.it/Leg18/Dossier/Pdf/ES052.Pdf

Cappai M., Colangelo G., "*Applying ne bis in idem in the aftermath of bpost and Nordzucker: the case of EU competition policy in digital markets"*, Common Market Law Review, vol. 60, issue 2, 2023, pp. 431-456

Carlton D.W., Winter R.A., "*Vertical MFN's and the Credit Card No-surcharge Rule*", 2018

Carugati C., "*Which mergers should the European Commission review under the Digital Markets Act?*", in Policy Contribution 24/2022, Bruegel

Chiarella M.L., "*Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment*", Athens Journal of Law 2022, 9: 1-25

Chisholm A., Jung N., "*Platform regulation — ex-ante versus ex-post intervention: evolving our antitrust tools and practices to meet the challenges*", in Competition Policy International, Volume 11, No.1, 2015

CMA, Report on the CMA's call for information, "*The commercial use of consumer data*", June 2015

CMA., Online Platforms and Digital Advertising Market: Final Report (2020), available at: https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

Colangelo G., "*The Digital Markets Act and EU Antitrust Enforcement: Double & Triple Jeopardy*", International Center for Law and Economics (ICLE) white paper 2022-03-23

Colangelo G., "*The European Digital Markets Act and antitrust enforcement: a liaison dangereuse*", in European Law Review, vol. 47 (2022), p. 597

Colangelo G., "*DMA begins*", Journal of Antitrust Enforcement, Volume 11, Issue 1, March 2023, pp. 116–122

Colangelo M., Zeno-Zencovich V., "*La intermediazione on-line e la disciplina della concorrenza: i servizi di viaggio, soggiorno e svago*", in Diritto dell'Informazione e dell'Informatica (Il), vol.1, 2015

Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, available at: https://www.epo.org/en/legal/epc/2020/convention.html

Crémer J. *Et al*., Report for the European Commission "*Competition policy for the digital era*", 2019

Cseres J.K., "*Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities*", Journal of European Competition Law & Practice, Volume 14, Issue 7, October 2023, pp. 410–422

Cunningham C., Ederer F., and Ma S., "*Killer Acquisitions*", Journal of Political Economy, Vol. 129, No. 3, pp. 649–702

Deutsch J., "*Big Tech Shadow Lobbying Campaigns Under Fire in EU Parliament*", Bloomberg, 5 July 2022

Díez Estella F., "*The DMA: a new Regulation for -or against- Digital Markets in the EU*?", January 2023

Digital Competition Expert Panel, "*Unlocking Digital Competition: Report of the Digital Competition Expert Panel*" (2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

Digital Freedom Fund (2020), "*Theories of harm in competition law cases*", available at the following link: https://digitalfreedomfund.org/wp-content/uploads/2020/05/4_-DFF-Factsheet-Theories-of-harm-in-competition-law-cases.pdf

Dobosz K., "*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*", Yearbook of Antitrust and Regulatory Studies 26 (2022): 157-174

Dubé J.P., Dube, Hitsch J.G., Chintagunta P. K., "*Tipping and Concentration in Markets with Indirect Network Effects*", Chicago GSB Research Paper No. 08-08, 2008

EDiMA and Copenhagen institute (2015), Online intermediaries – Impact on the EU economy, available at: https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/2/342/1454501505/edima-online-intermediaries-eu-growth-engines.pdf

EU Commission Statistics on Merger Cases (2023), available at the following link: https://competition-policy.ec.europa.eu/system/files/2023-12/Merger_cases_statistics.pdf

European Commission (2001), Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745 final, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0745

European Commission (2005), "*DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*", available at: https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf

European Commission (2014), White paper "*Towards more effective EU merger control*", Brussels, 9.7.2014 COM(2014) 449 final, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449

European Commission (2015), Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

European Commission (2016), Commission Staff Working Document on Online Platforms, Accompanying the document "Communication on Online Platforms and the Digital Single Market", available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0172&from=DA

European Commission (2016), Consultation on "*Evaluation of procedural and jurisdictional aspects of EU Merger Control*"

European Commission (2018), Press Release of 18 July 2018 "*Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581

European Commission (2019), Press Release of 20 March 2019 "*Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770

European Commission (2020), "*Digital Markets Act Impact Assessment Support Study*", available at the following link:
https://op.europa.eu/en/publication-detail/-/publication/0a9a636a-3e83-11eb-b27b-01aa75ed71a1/language-en

European Commission (2020), Commission Staff Working Document "Evaluation of the Vertical Block Exemption Regulation" available at:
https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-EU-competition-rules-on-vertical-agreements-evaluation_en

European Commission (2020), Commission Staff Working Document "Executive Summary Of The Evaluation of the Vertical Block Exemption Regulation", available at:

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-EU-competition-rules-on-vertical-agreements-evaluation_en

European Commission (2020), Commission staff working document "*Impact assessment report accompanying the document proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in digital sector (Digital Markets Act)*", Part 2/2, pp. 109-117, available at the following link: https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act

European Commission (2020), Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the document Proposal For A Regulation of the European Parliament and of the Council, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0349&from=IT

European Commission (2020), Commission Staff Working Document Executive Summary of the Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0364&from=IT

European Commission (2020), Explanatory Memorandum accompanying the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en

European Commission (2020), Inception Impact Assessment, Ares(2020)2877634, available at the following link: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en

European Commission (2020), Press Release of 16 June 2020 "*Antitrust: Commission opens investigations into Apple's App Store rules*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073;

European Commission (2021), Commission Staff Working Document "Evaluation of procedural and jurisdictional aspects of EU merger control", SWD (2021) 66 final, available at the following link:
https://competition-policy.ec.europa.eu/system/files/2021-04/SWD_findings_of_evaluation.pdf

European Commission (2021), Press Release of 20 April 2021, "*Mergers: Commission to assess proposed acquisition of GRAIL by Illumina*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_1846

European Commission (2021), Press Release of 30 April 2021 "*Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061

European Commission (2021), Press Release of 22 June 2021 "*Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143

European Commission (2021), Press Release of 22 July 2021 "*Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844

European Commission (2021), Press Release of 20 August 2021 "*Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina/GRAIL transaction*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322

European Commission (2022), Press Corner, "*Sneak peek: how the Commission will enforce the DSA & DMA*", blog of Commissioner Thierry Breton, 5 July 2022, available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_4327

European Commission (2022), Press Release of 13 October 2022, "*Competition: Second EU-US Joint Technology Competition Policy Dialogue consolidates international cooperation on competition policy and enforcement in technology sector*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6167

European Commission (2023), Press Release of 14 June 2023 "*Antitrust: Commission sends Statement of Objections to Google over abusive practices in online advertising technology*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207#:~:text=Antitrust:%20Commission%20sends%20Statement%20of,practices%20in%20online%20advertising%20technology&text=The%20European%20Commission%20has%20informed,industry%20('adtech')

European Commission (2023), Press Release of 12 July 2023 "*Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval*", available at the following link:
https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773

European Competition Network (ECN-2021), Joint paper of the heads of the national competition authorities of the European Union, "*How national competition agencies can strenghten the DMA*", ECN Directors General's meeting of 22 June 2021

European e-commerce report (2021), available at: https://ecommerce-europe.eu/wp-content/uploads/2021/09/2021-European-E-commerce-Report-LIGHT-VERSION.pdf

Evans D.S., Schmalensee R., "*Matchmakers: The New Economics of Multiseded Platforms*", Harvard Business review press, 2016.

Fabbio P., "*Competition law in germany: some observations and evaluations from european perspective*", Orizzonti del Diritto Commerciale, Vol. 3, 2019, pp. 549-588

Faria T.L. *et al.*, "*New trends in merger control: capturing the so-called killer acquisitions... And everything else*", Actualidad Jurídica Uría Menéndez 57, 2021, pp. 33-53

Farrell J., Klemperer P., "*Coordination and Lock-In: Competition with Switching Costs and Network Effects*", Handbook of Industrial Organization, Vol.3, 2007

Federal Ministry for Economic Affairs and Energy (2019), "*A New Competition Framework for the Digital Economy: Report by the Commission 'Competition Law 4.0*", available at: https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3

Federal Trade Commission, press-release of the 20th December 2007, available at: https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation

Federico G., Scott Morton F., Shapiro C., "*Antitrust and Innovation: Welcoming and Protecting Disruption*", 2019

Filistrucchi L. *et al.*, "*mergers in two-sided markets - a report to the Netherlands competition authority*" (2010)

Filistrucchi L., Geradin D., Van Damme E., Affeldt P., "*Market definition in two-sided markets: Theory and practice*" (2014) 10:2 Journal of Competition Law and Economics 293-339

Gebicka A., Heinemann A., "*Social Media & Competition Law*", world Competition 37, no. 2 (2014), pp. 149–172

General Court of the European Union (2021), Press Release No 197/21, Luxembourg, 10 November 2021, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf

Geradin D., "*DMA proposal: Should there be a greater role for the Member States?*", The Platform Law Blog, 2021

Geradin D., "*What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?*", 2021

Giordano G., "*Il Digital Markets Act e la centralizzazione dei poteri in capo alla Commissione europea: quale ruolo per le Autorità antitrust nazionali?*", in Comparazione e Diritto Civile, Vol. 3, 2022, pp. 979-1000

Giordano G., "*La responsabilità degli intermediari digitali nell'architettura del Digital Services Act: è necessario che tutto cambi affinché tutto rimanga com'è*?", in Comparazione e Diritto Civile, vol.1, 2023, pp. 193-222

Godlovitch I. *et al.*, "*Over-the-Top (OTTs) Players: Market Dynamics and Policy Challenges*", European Parliament, Directorate for Economic and Scientific Policies, 2015

Graef I., "*Data as Essential Facility, Competition and Innovation on Online Platforms*" Kluwer Law International BV, 2016

GSMA (2016), "*Resetting competition policy frameworks for the digital ecosystem*"

Hagiu A., "*Merchant or Two-Sided Platforms?*" (2007), Review of Network Economics Vol.6, Issue 2

Hagiu A., Wright J., "*Multi-Sided Platforms, a Working Paper*", Harvard Business School Working Paper, No. 12-024, October 2011.

Hagiu, A., Wright, J., "*Multi-sided platforms*", International Journal of Industrial Organization, Vol. 43, 2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2794582

Hagiu A., Wright J., "*Marketplace or Reseller?*" Management Science, Vol. 61, No. 1, pp. 184–203, 2015

Hermalin B.E., Katz M.L., "*What's So Special About Two-Sided Markets*?" (2018), in Towards A Just Society: Joseph Stiglitz and 21st Century Economics

Hermalin B.E., Katz M.L., "*What's So Special About Two-Sided Markets*?", in Toward a just society: Joseph Stiglitz and twenty-first century economics. - New York: Columbia University Press, 2018, pp. 111-130

House of Lords, "*Online Platforms and the Digital Single Market*" (10th Report of Session 2015–16), 20 April 2016, available at: https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf

Ibáñez Colomo P., "*Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*", Chillin'Competition Blog, 2019

Ibáñez Colomo P., "*The Draft Digital Markets Act: A Legal and Institutional Analysis*", in Journal of European Competition Law & Practice, Vol. 12, No. 7, pp. 561-575, 2021

Jafarguliyev, A., "*Capturing Killer Acquisitions in Digital Markets under the European Union Merger Control Rules*", Trento Student Law Review, vol. 5, No. 2, 2023, pp. 47-70

Jens-Uwe F., Peitz M., "*Taming Big Tech: What Can We Expect From Germany's New Antitrust Tool?*!, Oxford Business Law Blog, 2021, available at the following link: https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/02/taming-big-tech-what-can-we-expect-germanys-new-antitrust-tool

Katz. M.L and Shapiro C., "*Network Externalities, Competition, and Compatibility*", The American Economic Review, Vol. 75, No. 3, 1985, pp. 424-440

Katz M.L., Sallet J., "*Multisided Platforms and Antitrust Enforcement*" (2018), 127 Yale L. J. 2142

Kobayashi B.H., Wright J.D., "*Antitrust and Ex-Ante Sector Regulation"* The Global Antitrust Institute Report on the Digital Economy 25, 2020

Krattenmaker G., Lande R.H., Salop S.C., "*Monopoly Power and Market Power in Antitrust Law*", 27 J. Reprints Antitrust L. & Econ. 585 (1997)

Lamadrid de Pablo A., Bayón Fernández N., "*Why The Proposed DMA Might be Illegal Under Article 114 TFEU, And How To Fix It*", Journal of European Competition Law & Practice, Volume 12, Issue 7, 2021, pp. 576–589

Lancieri F., Sakowski P.M., "*Competition in Digital Markets: A Review of Expert Reports*", 26 Stan. J.L. Bus. & FIN. 65 (2021), at 92

Larouche P., de Streel A., "*The European Digital Markets Act: A Revolution Grounded on Traditions*", Journal of European Competition Law & Practice, vol. 12, issue 7, 2021, pp. 542-560

Lear (2019), "*Ex-post assessment of merger control decisions in digital markets*", paras. 138-142, available at the following link:

https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf

Libertini M., "*Digital markets and competition policy. some remarks on the suitability of the antitrust toolkit*", Orizzonti del Diritto Commerciale, Special Issue, 2021, pp. 337-358

Looijestijn C. A. *et al.*, "*In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation*", Maastricht Journal of European and Comparative Law, vol. 29, issue 5, 2022, pp. 550-571

Lorenz M., An Introduction to EU Competition Law, Cambridge University Press, 2013

Luchetta G., "*Is the Google platform a two-sided market?*", 23rd European Regional Conference of the International Telecommunication Society, Vienna, Austria, 1-4 July 2012, ITS, Wien

Luchetta G., "*Is the Google platform a two-sided market*" (2014) 10:1 Journal of Competition Law and Economics 192

Meli V., "*Concentrazioni [dir. comm.]*", Enciclopedia Giuridica Treccani online, Istituto della Enciclopedia Giuridica Italiana, Roma, 2015

Meyring B., "*Germany's gatekeeper rules: the start of divergence for gatekeepers*?", Linklaters, 2021, available at the following link: https://techinsights.linklaters.com/post/102gox7/germanys-gatekeeper-rules-the-start-of-divergence-for-gatekeepers

Modrall J., "*Illumina/Grail Prohibition: The End of the Beginning for EU Review of "Killer Acquisitions"?*" Kluwer Competition Law Blog, September 8, 22, available at the following link:
https://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/

Monti G., "*The Concept of Dominance in Article 82*", in European Competition Journal 2(1), pp. 31-52, 2006

Monti G., "*The Digital Markets Act Improving Its Institutional Design*", European Competition and Regulatory Law Review, vol. 5, issue 2, 2021, pp. 90-101

Moreno Belloso N., Petit N., "T*he EU Digital Markets Act (DMA) A Competition Hand in a Regulatory Glove*", in European Law Review, 2023, issue 4

Motta M., Peitz M., "*Intervention triggers and underlying theories of harm*", Expert advice for the Impact Assessment of a New Competition Tool, 2020

Muscolo G., Minuto R. A., "*sharing economy: a multifaceted phenomenon*", in The new frontiers of innovation and competition vol. II, n.1 (2018), at 99

Nazzini R.," Online Platforms and Antitrust: Where Do We Go from Here?", in Italian Antitrust Review, Vol. II, N. 1 (2018)

OECD (1993) "*Glossary of Industrial Organisation Economics and Competition Law*", compiled by Khemani R.S. and Shapiro D.M., commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, available at: https://www.oecd.org/regreform/sectors/2376087.pdf

OECD (2004), "*Access Pricing in Telecommunications*", OECD, Paris, Glossary of Terms

OECD (2012), "*Market Definition*", Best Practice Roundtables on Competition Policy

OECD (2012), "*The Digital Economy*", OECD publishing, Paris, available at: https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf

OECD (2017), "*Market definition in multi-sided markets*", Note by Sebastian Wismer and Arno Rasek

OECD (2018), Background Note by the Secretariat, "*Personalized pricing in the digital era*"

OECD (2019), "*An Introduction to Online Platforms and their Role in the Digital Transformation*", OECD Publishing, Paris, pp. 23-25, available at: https://read.oecd-ilibrary.org/science-and-technology/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation_53e5f593-en#page27

OECD (2019), "*Vectors of digital transformation*", OECD Digital Economy Papers No. 273, OECD publishing, Paris, available at:
https://www.oecd-ilibrary.org/docserver/5ade2bba-en.pdf?expires=1664264447&id=id&accname=guest&checksum=787A7F86A22AF6271864D4A168F348E5

OECD (2020), "*Merger Control in Dynamic Markets*", available at the following link: https://web-archive.oecd.org/2020-03-10/546724-merger-control-in-dynamic-markets-2020.pdf

OECD (2020), Roundtable on Conglomerate Effects of Mergers - Background Note, at 26-27, available at the following link:
https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf

OECD (2020), "*Start-ups, Killer Acquisitions and Merger Control – Background Note*", available at the following link:
https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf

OECD (2020), Start-ups, killer acquisitions and merger control – Note by France, available at the following link:
https://one.oecd.org/document/DAF/COMP/WD(2020)16/en/pdf

OECD (2020), Start-ups, killer acquisitions and merger control – Note by the European Union, available at the following link:
https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf

OECD (2021), "*Ex ante regulation in digital markets – Background Note by the Secretariat*", DAF/COMP(2021)15

OECD (2023), "*Theories of Harm for Digital Mergers*", OECD Competition Policy Roundtable Background Note, available at the following link:
https://www.oecd.org/daf/competition/theories-of-harm-for-digital-mergers-2023.pdf

Office of Fair Trading (2004), "*Assessment of Market Power*"

Oxera (2014), "*Most-favoured-nation clauses: falling out of favour?*", in Agenda Advancing economics in business, available at: https://www.oxera.com/insights/agenda/articles/most-favoured-nation-clauses-falling-out-of-favour/

Parker G., Petropoulos G., Van Alstyne M.W., "*Digital Platforms and Antitrust*", Working Paper 06/2020, Bruegel, available at: https://www.bruegel.org/sites/default/files/wp_attachments/WP-2020-06-1.pdf

Parker G., Petropoulos G. and M. Van Alstyne, "*Platform mergers and antitrust*", Working Paper 01/2021, Bruegel

Perset K., "*The Economic and Social Role of Internet Intermediaries*", OECD, Paris, 2010

Petit N., "Innovation Competition, Unilateral Effects and Merger Policy", 82 Antitrust Law Journal No. 3, pp. 873-919, 2019

Petit N., "*The Proposed Digital Markets Act (DMA): A Legal and Policy Review*", Journal of European Competition Law & Practice, Volume 12, Issue 7, 2021, pp. 529-541

Portuguese Autoridade da Concorrência (2019), Digital ecosystems, Big Data and Algorithms, issues paper, available at: https://www.concorrencia.pt/sites/default/files/processos/epr/Digital%20Ecosystems%2C%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf

Proposal by French, German and Dutch Ministers of Economic Affairs (2021), "*Letter and proposal: Strengthening the Digital Markets Act and its Enforcement*"

Puric S., "*New european solutions for strengthening competitiveness in digital markets*", EU and Comparative Law Issues and Challenges Series, 5(Special Issue), 295-314

PwC, 2018 Global Innovation 1000 study, "*what the top innovators get right*" (2018), available at: https://www.strategy-business.com/feature/What-the-Top-Innovators-Get-Right

Rizzuto F., "*Bpost and Nordzucker AG: The End of Competition Law Enforcement Exceptionalism Concerning the Principle of Ne bis In Idem*", European Competition and Regulatory Law Review (CoRe) 6, No. 2 (2022): 154-166

Robertson V., "*Merger review in digital and technology markets: Insights from national case law*", final report, 2022,

Robertson V., "*Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy*", The Routledge Handbook of Smart Technologies: An Economic and Social Perspective, 2022, Chapter 21

Robertson V., "*The Future of Digital Mergers in a Post-DMA World*", European Competition Law Review, 44(10), 2023, pp. 447-450

Rochet J.C. and Tirole J., "*Platform Competition in Two-Sided Markets*", Journal of the European Economic Association, Volume 1, Issue 4, 2003, Pages 990–1029, available at: https://academic.oup.com/jeea/article/1/4/990/2280902

Rochet J.C. and Tirole J., "*Two-Sided Markets: A Progress Report*" (2006), 37, The RAND Journal of Economics, 645,646.

Röller L.H., De La Mano M., "*The Impact of the New Substantive Test in European Merger Control*", European Competition Journal, volume 2, issue 1, 2006, pp. 9-28, available at the following link: https://ec.europa.eu/dgs/competition/economist/merger_control_test.pdf

Rysman M., "*The Economics of Two-Sided Markets*" (2009), Journal of Economic Perspectives, Volume 23, Number 3, pp. 125–143

Schweitzer H. *et al.*, "*Modernising the law on abuse of market power*", Report for the Federal Ministry for Economic Affairs and Energy, 2018

Schweitzer H., "*The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair: A Discussion of the Digital Markets Act Proposal*", in ZEuP issue 3, pp. 503-544, 2021

Silva L.R., Garrido, M.P., Bueno C.D., Souza M., Chakmati, S., "*Killer acquisitions: startups, disruptive innovation and antitrust intervention – Where are we and where are we heading to?*", 2019

Stakheyeva H., "*Test SIEC*", Global Dictionary of Competition Law, Concurrences, Art. N° 89155, available at the following link:
https://www.concurrences.com/en/dictionary/siec-test-mergers

Stigler Committee on digital platforms, sub-committee on market structure and antitrust report, in Stigler Committee on digital platforms final report, 2019, available at: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf

Todino M., Van de Walle G., Stoican L., "*EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation)*", The Antitrust Bulletin 2019, Vol. 64(1) 11-30, 2018

Turgot, C., "*Killer acquisitions in digital markets: evaluating the effectiveness of the eu merger control regime*", European Competition and Regulatory Law Review (CoRe), 5(2), 112-121

Turner V., "*The EU Digital Markets Act–A New Dawn for Digital Markets?*", Antitrust Magazine, Vol. 37, No. 1, 2022, pp. 42-50

Václav Š., "*Concentrations in digital sector - a new EU antitrust standard for "killer acquisitions" needed?*", Intereulaweast, Vol. VII (2) 2020

Van den Boom J., Samranchit P., "*Assessing the long run competitive effects of digital ecosystem mergers*", Social Science Research Network (SSRN), 29 January 2021

van Eijk N. *et al.*, "*Digital platforms: an analytical framework for identifying and evaluating policy options*", TNO report, Dan Haag, 2015

Vessia F., "*Big data: dai vantaggi competitive alle pratiche abusive*", in Giurisprudenza Commerciale, issue 6, 2018, p. 1064

Vesterdorf B., "*Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin*", Competition Law & Policy Debate, Volume 1, Issue 1, February 2015

Witt A.C., "*The Digital Markets Act – Regulating the Wild West*" Common Market Law Review, vol. 60, issue 3, 2023, pp. 625-666

Zingales N., Renzetti B., "*Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience*", World Competition, Vol. 45(4)

TABLE OF CASES

AGCM (2014), Decision I779, "*Mercato dei servizi turistici-prenotazioni alberghiere on line*", available at: https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/660EE2E99780F7B5C1257E350039D1CD/$File/p25422.pdf

AGCM (2021), Decision A528-FBA Amazon, in bulletin n. 49 of 13th December 2021

Autorité de la concurrence (2021), Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector

Bundeskartellamt (2016), Decision B 9-121/13

European Commission (2008), Case COMP/M.4731, "*Google/DoubleClick*"

European Commission (2011), Case M. 6281, "*Microsoft/Skype*"

European Commission (2014), Case M. 7217, "*Facebook/ WhatsApp*"

European Commission (2017), Case AT.39740 "*Google Search (Shopping)*", Commission Decision of 27 June 2017, C (2017) 4444 final, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

European Commission (2017), Commission Decision of 27.3.2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7932 – Dow/DuPont), available at the following link: https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf

European Commission (2018), Case AT.40099 "*Google Android*", Commission Decision of 18 July 2018, C(2018) 4761 final, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf

European Commission (2018), Case M. 8788, "*Apple/Shazam*"

European Commission (2019), Case AT.40411, "*Google Search (AdSense)*", Commission Decision of 20 March 2019, C(2019) 2173 final, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf

European Commission (2020), Case AT.40437, "*Apple – App Store Practices (music streaming)*"

European Commission (2021), Case AT.40670, "*Google – Adtech and Data related practices*"

European Court of Justice (1990), Case T-51/89 "*Tetra Pak Rausing SA v Commission of the European Communities*", available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61989TJ0051

European Court of Justice (1991), case C-41/90, "*Höfner and Elser v Macroton GmbH*"

European Court of Justice (1993), joined Cases C-159/91 and C-160/91, "*Poucet v Assurances Générales de France*"

European Court of Justice (1994), Case C-364/92, "*SAT Fluggesellschaft mbH v Eurocontrol*"

European Court of Justice (1996), Case C-73/95P, "*Viho Europe BV v Commission of the European Communities*"

European Court of Justice (1997), Case C-343/95, "*Calì and Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG)*"

European Court of Justice (2002), case C-309/99 "*Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*"

European Court of Justice (2003), General Court Case T-319/99, "*Fenin v Commission of the European Communities*"

European Court of Justice (2009), Case C-97/08P, "*Akzo Nobel NV and Others v Commission of the European Communities*"

European Court of Justice (2010), Case C-58/08, "*Vodafone, O2 et al. v Secretary of State for Business, Enterprise and Regulatory Reform*"

European Court of Justice (2011), Case C-439/09 "*Pierre Fabre Dermo-Cosmétique*"

European Court of Justice (2018), Case C-524/15, "*Tribunale di Bergamo* v *Luca Menci*", available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0524

European Court of Justice (2019), Case T-334/19, "*Google and Alphabet v Commission*", available at the following link:

https://curia.europa.eu/juris/document/document.jsf?text=&docid=216769&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=4510448

European Court of Justice (2021), Case T-612/17 "*Google and Alphabet v Commission (Google Shopping)*".

European Court of Justice (2022), Case C-117/20, "*bpost SA v Autorité belge de la concurrence"*, EU:C:2022:202, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020CJ0117

European Court of Justice (2022), Case C-151/20, "*Bundeswettbewerbsbehörde v. Nordzucker AG and Others*", EU:C:2022:203, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020CJ0151

European Court of Justice (2022), Case T-604/18, "*Google LLC v European Commission*", available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=81202

European Court of Justice (2022), General Court Case T-227/21, "*Illumina v. Commission*", available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=773F77FD605FC65FDA566BB806B515D5?text=&docid=262846&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=11983472

European Court of Justice (2022), Case Case C-611/22 P "*llumina v. Commission*". The text of the appeal is available at the following link: https://curia.europa.eu/juris/document/document.jsf?text=&docid=267964&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=142070

European Court of Justice (2022), Case C-449/21 Towercast v Autorité de la concurrence *et al.*, Opinion of Advocate General Kokott delivered on 13 October 2022, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CC0449

Higher Court of Düsseldorf (2015), Decision of 9 January 2015, Ref. VI Kart 1/14 (V)

Office of Fair Trading (2010) Case CE/9320-10, available at: https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation

Office of Fair Trading (2013), Decision ME/6167/13 "*Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited*", available at the following link: https://assets.publishing.service.gov.uk/media/555de2cfed915d7ae2000027/motorola.pdf

TABLE OF STATUTES

Charter of Fundamental Rights of The European Union, 2012/C 326/02, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT

Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition, available at the following link (pg. 309): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2008:115:FULL

Council of the European Union (2021), "*Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) - General approach*", 2020/0374(COD), Article 32a, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13801_2021_INIT

Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ No L 395/1, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989R4064

Council Regulation (EC) No 1/2003 of 16 December 2002
on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Chapter IV, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, "*on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*" (Directive on electronic commerce), available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN

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), available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104

Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018, "*amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities*", available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=it

Directive (EU) 2019/1 of The European Parliament and of The Council of 11 December 2018, "*to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market", L 11/3, available at the following link:*
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001

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*", available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=IT

European Commission (1997), "*Commission notice on the definition of relevant market for the purposes of Community competition law*", (97/C 372 /03) of 9 December 1997, available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN

European Commission (2004), "*Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*", (2004/C 101/04), available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(03)

European Commission (2004), Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, (2004/C 31/03), available at the following link:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:en:PDF

European Commission (2004), Communication from the Commission Notice "*Guidelines on the application of Article 81(3) of the Treaty*", O.J. 2004, C101/97, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(07)

European Commission (2005), Commission Notice on Case Referral in respect of concentrations, 2005/C 56/02, paragraph 16, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=PL

European Commission (2008), "*Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*", 2008/C 95/01, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)

European Commission (2008), *"Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*", 2008/C 265/07, available at the following link:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF

European Commission (2010), Commission Regulation No 330/2010 on the 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, available at:
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF

European Commission (2011), Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers OJ L55/13, art. 4, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0182

European Commission (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and he Committee of the Regions "*A Digital Single Market Strategy for Europe*", COM(2015) 192 final, available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN

European Commission (2016), Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, "*A European agenda for the collaborative economy*", available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0356&from=EN

European Commission (2018), Communication from the Commission - Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507(01)&from=EN

European Commission (2020), 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, available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=IT

European Commission (2020), Communication from The Commission to the European Parliament, the Council, the European Economic And Social Committee And the Committee of the Regions "*Shaping Europe's digital future*", COM(2020) 67 final, available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0067&from=IT

European Commission (2020), Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en

European Commission (2021), Communication from the Commission "*Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*", 2021/C113/01, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0331(01)

European Commission (2022), Commission Regulation (EU) 2022/720 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, available at:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN

European Commission (2022), Communication from the Commission "*Commission Notice Guidelines on vertical restraints*", 2022/C 248/01, p. 78, available at the following link:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01)

European Commission (2022), Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065&from=EN

European Commission (2022), Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925&from=EN

European Parliament (2017), resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI)), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0272&from=EN

European Parliament (2022), Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 — C9-0419/2020 — 2020/0374(COD)), (2022/C 251/33), amendment 85. Document available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021AP0499

European Union (2004), Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24 29.01.2004) available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF

European Union (2010), Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union – Charter of Fundamental Rights of the European Union, Publications Office, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN

French Parliament (2020), Proposition de loi n° 302 du Sènat visant à garantir le libre choix du consommateur dans le cyberespace, 5 février 2020, available at the following link: https://www.senat.fr/leg/ppl19-302.html

Italian Parliament (2022), Law 5 August 2022, No. 118, "*Legge annuale per il mercato e la concorrenza 2021*", in Gazzetta Ufficiale n.188, 12 August 2022, Article 33, available at the following link: https://www.gazzettaufficiale.it/eli/id/2022/08/12/22G00126/sg

Treaty on European Union (TEU) consolidated version, available at the following link: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

Treaty on the Functioning of the European Union (TFEU) consolidated version, Article 114(1), available at the following link: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

WEBSITES

https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package

https://www.europarl.europa.eu/olp/en/interinstitutional-negotiations

https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en#:~:text=Content%20and%20Technology-,Potential%20gatekeepers%20notified%20the%20Commission%20and%20provided%20relevant%20information,Article%203%20of%20the%20DMA

https://ec.europa.eu/commission/presscorner/detail/%20de/ip_23_4328