Journal of Law, Market & Innovation

ISSUE 2/2022

Journal of Law, Market & Innovation

2/2022

Editors: Riccardo de Caria, Cristina Poncibò,
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Journal of Law, Market & Innovation
Vol. 1 - Issue 2 - 2022
ISSN 2785-7867
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FOREWORD TO ISSUE 2/2022

The digital economy has profoundly transformed in the last decades. One of the most conspicuous and influential driving forces of such a transformative process is the rise of digital platforms. The extraordinary expansion of the platform economy has reshaped business models in a variety of sectors, the market structure, and the interplay between incumbents and new entrants, between platform models and non-platform models. In such a context, the growing power of big platforms is attracting the attention of legislators, regulators and supervisors.

This issue (2/2022), *The growing power of big platforms: rethinking regulatory strategies (beyond competition law),* is devoted to understanding, appraising, and decoding the power of big platforms and to reflecting on how to devise effective policy responses. To that end, the issue gathers contributions that address the role of big platforms in the global economy and discuss regulatory strategies aimed to counter their growing power and its implications for the digital society. Beyond the market power from a competition-law perspective, big platforms are proving to act as gatekeepers in the access to services, markets, resources, and infrastructures. The influence of large platforms goes beyond the concept of market power and, consequently, the traditional antitrust mechanisms are arguably insufficient, slow, or even inefficient. The DMA (Digital Markets Act) represents a shift of the EU regulatory strategy towards an ex-ante, preventive approach to ensure fair and contestable digital markets. It pivots on the designation of gatekeepers on the basis of a combination of quantitative and qualitative criteria and the compliance of a set of obligations aimed to rebalance the market.

Contributions to this issue aimed to address various questions raised by the platform power. How should the interplay between market power and gatekeeping potential work? Does the concept of market power need to be reconsidered in the platform economy? Should large platforms be deemed as critical infrastructures or essential facilities? How does the ex-ante regulatory approach work in a global digital economy? Will the DMA approach foster the emergence of new platforms in the European Union? Are competition and innovation effectively promoted under a preventive approach? Should very large platforms be forced to break up to reduce their power?

The issue collects studies from different perspectives that compare the competition-law approach and the ex-ante regulatory strategy, analyse the DMA's rules and concepts, study specific cases of platform power, and dive into the interplay of the DMA

with other key legal and regulatory components of the digital economy – the DSA (Digital Services Act, big data and data governance, privacy).

The editors of the issue are University of Turin's dr Cristina Poncibò, Professor of Comparative Private Law and dr Riccardo de Caria, Professor of Comparative Public Law, jointly with dr Teresa Rodríguez de las Heras Ballell, Professor of Commercial Law at the Universidad Carlos III de Madrid.

T.R.H.B., C.P. and R.d.C.

Marco Giraudo[*] *and Massimiliano Vatiero*[**]

INTRODUCTION TO "INNOVATION LETTERS": "ANOMALIES" IN THE LEGAL-TECHNOLOGICAL DOMAIN. A SECTION OF THE JOURNAL OF LAW, MARKET & INNOVATION

Reality is much less deferential to disciplinary boundaries than academic departments. Out there, conflicting agents interact in contexts marked by uncertainty, economic competition, as well as political clashes. Legal innovation, technology and economic investments become contested spaces in such rapidly evolving scenarios of competition and conflict over new (scarce) resources.

Especially, law and technology play a substantial role in creatively destroying the order of actions within the economic and political domains. These co-evolutionary dynamics between technology, legal rules and economic plans require novel, creative, audacious approaches and frameworks in order to accommodate the new reality into a robust and adjourned order of ideas. Awareness of these interdependent dynamics is of foundational importance for researchers, policy makers, and industrial leaderships as neither of them can do without the others. Yet, scientific journals wherein publish frontier research or thoughts are often in short supply.

This journal provides for a specific and dedicated interdisciplinary forum for these reflections and research agendas. The "Innovation letters" is the section of JLMI featuring the "anomalies" in emerging activities, technological dynamics or budding theoretical insights that challenge the prevailing order of ideas in law and bordering disciplines. The section is named after successful examples in economics having become prestigious venues for economists (i.e., Economic Letters, Elsevier) to share short – yet rigorous – accounts of theoretical ideas as well as empirical research.

The aim is that of providing legal scholars, social scientists, rule makers, and practitioners with an interdisciplinary forum to quickly signal "anomalous" phenomena, make available innovative theories, or share relevant case law. The focus on anomalies aims at making the section "Innovation Letters" the gateway for interdisciplinary exchange and cross fertilization. Perspectives coming from all the

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spectrum of social sciences are welcome to enrich the scientific conversation with further elements of evolution, continuity and disruption that are present in the contemporary multi-faceted reality.

Scientific contributions for this section are concise (around 2,500 words) and present facts or ideas which do not entirely square with the dominant theoretical frames in use in law and social sciences in general. They can include:

preliminary theoretical understandings of emerging technological dynamics;

thought provoking case reports from relevant jurisdictions, or;

cutting-edge insights from bordering disciplines.

The section "Innovation letters" aims at supplying researchers with an additional tool to know about new technological dilemmas and innovative theoretical insights, to push forward the frontier of their scientific understanding of the legal implications of the technological innovation.

*Thomas Hoppner**

INNOVATION LETTER

FROM CREATIVE DESTRUCTION TO DESTRUCTION OF THE CREATIVES: INNOVATION IN WALLED-OFF ECOSYSTEMS

Abstract

For a long time, a prevailing view was that due to the dynamic nature of competition in digital markets intervention by antitrust authorities may do more harm than good. It was assumed that Joseph Schumpeter's "perennial gales of creative destruction" would sufficiently discipline any incumbent digital firm as rivals were only 'one click away', switching costs low and network effects reversable. Based upon the economics of innovation, the article first examines the market conditions under which significant product improvement and/or disruptions from outside may develop and unfold. It then examines why such conditions are lacking where a single undertaking largely controls a digital ecosystem. The article concludes that the protective moats and walls that digital gatekeepers have built around their "cash cow" services significantly reduce the incentives and abilities to innovate for any participant within such ecosystem and to disrupt the incumbent's service. Due to common interests and mutual interdependencies of the operators of the largest digital ecosystems, it also cannot be presumed that the lack of innovation within ecosystems (intra-ecosystem competition) is sufficiently outbalanced by innovation across ecosystems (inter-ecosystem competition). In such a setting, competition policy may no longer assume that dynamic competition sufficiently disciplines even dominant companies and that there is a higher risk from over-enforcement than from underenforcement. Accordingly, the measures proposed, for instance, in the European Digital Markets Act and the American Choice and Innovation Online Act to open up markets for innovation go into the right direction

JEL CLASSIFICATION: D42, K21, L12, L43, P12

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1 Introduction

For a long time, a prevailing view amongst economists and antitrust lawyers was that due to the dynamic nature of competition in digital markets intervention by antitrust authorities would do more harm than good.[1] Based upon some early toppling of market leaders, it was assumed that the permanent risk of disruptive innovations, the Joseph Schumpeter's "perennial gale of creative destruction"[2], would sufficiently discipline any incumbent digital firm. Even any position of dominance was assumed to be inherently temporary as rivals were only "one click away", switching costs low and network effects reversable. In any case, the persistent strong potential competition from disruptive innovations would render antitrust enforcement unnecessary.

This "innovation letter" outlines why such assumptions are no longer sustainable and, on the contrary, state intervention is indispensable to keep dominated digital platform markets contestable through dynamic competition.

2 Creative destruction in digital ecosystems

2.1 Schumpeter's innovation theory

Proponents of a *laissez-faire* approach in digital markets have frequently turned to the theories of Joseph Schumpeter on "creative destruction". Schumpeter believed that

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[1] See, for instance, D Daniel Sokol and Roisin E Comerford, 'Does Antitrust Have a Role to Play in Regulating Big Data?' in Roger D Blair and Daniel Sokol (eds), *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech* (Cambridge University Press 2017) 19; Geoffrey A Manne and Joshua D Wright, 'Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google' (2011) 34 Harv. J.L. & Pub. Pol'y 171; Michael A Salinger and Robert J Levinson, 'Economics and the FTC's Google Investigation' (2015) 46 Rev Ind Organ 25, 55; David S Evans, 'Why the Dynamics for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies' (2017) <https://bit.ly/3QABnZg> accessed 22 June 2022; Ryan Bourne, 'Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism' (Cato institute, Policy Analysis Nr. 872, 2019); Aurelien Portuese, 'Biden Antitrust: The Paradox of the New Antitrust Populism' (2022, forthcoming) Geo. Mason L. Rev.; Marixenia Davilla, 'Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules' (2017) 8 J. of EU Comp. Law & Practice 370; Maren Tamke, 'Big Data and Competition Law' (2017) 1 Journal of Competition Law (ZWeR) 358, 384 ff.

[2] Joseph Schumpeter, *Capitalism Socialism & Democracy* (first published 1943, Taylor & Francis e-Library 2003) 84, 87.

2 Creative destruction in digital ecosystems

2.1 Schumpeter's innovation theory

Proponents of a *laissez-faire* approach in digital markets have frequently turned to the theories of Joseph Schumpeter on "creative destruction". Schumpeter believed that competition is driven less by the number of buyers and sellers or elements such as the price or output of a product but rather by innovation. What really matters would be "competition from the new commodity, the new technology, the new source of supply, the new type of organisation – competition [...] which strikes not at the margins of the profits and the output of the existing firms but at their foundations and their very lives".[3] He argued that such innovation – perennial gales of "creative destruction" – is the centre of economic change, driving both economic development and business cycles. A company, even a successful one, would consistently feel such threat. This in turn could discipline its behaviour in a similar manner as a perfectly competitive market would.[4]

2.2 Role of innovation for platform competition

Schumpeter's rationale worked well for digital (platform) markets as it coincides with some economic particularities of such markets.

The economics of multi-sided markets has taught us that competition for such platforms is driven by network effects[5] that make the strong become stronger and the weak become weaker. Where a platform has accumulated so many users and therefore generates such strong positive network effects that, from a user's perspective, any other platform appears inferior, a market may "tip" towards such platform. Once a market has tipped, newcomers offering the identical product are unlikely to attract a critical mass of users to generate sufficient network effects to trigger any growth. Therefore, where products and services are not interoperable (thereby "sharing" and neutralising the network effects created by the joint user bases), such tipping of a market towards one platform may be irreversible. The competition "for the market" has been decided.[6]

[3] ibid 84.
[4] ibid 85.
[5] Network effects exist where an increased number of users improve the value of a good or service.
[6] See generally Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era, Final report' (European Commission 2019); Jason Furman, 'Unlocking digital competition. Report of the Digital Competition Expert Panel' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 25 July 2022.

As a consequence, new competition may arise only from products and services that are so different to the "winner" that the user groups generating the strongest network effects, typically consumers, do not directly compare the benefits of such platforms but consider the new offering as complementary and therefore start using both, i.e., multi-home. Where, as in most cases, the digital service is offered to consumers at zero-price, such differentiation may not follow from any lower prices, but from a significantly different quality or product design. Thus, for incumbent platforms, the most serious threat does not come from incremental improvements of equivalent platforms, even if they are offered at a lower price. Instead, the biggest threat comes from drastic product differentiations, that is from a platform that – while offering (at least the low-end) functionalities of the incumbent – gains separate attention through different and new features that the incumbent does not provide but add value. If such significant product differentiation originates from a neighbouring market rather than from within the incumbent's market and therefore catch the latter off-guard, economists refer to them as "disruptive innovations".[7] However, the boundaries between significant product differentiations *within* an existing market and disruptive innovations from *outside* are fluent.[8] The difference is not so much that incumbents are blind to disruptions from outside but that they can do less to prevent them (as compared to innovations within their markets) as they escape their web of influence. This article will therefore refer to both (i) drastic product differentiations from within and (ii) disruptive innovations from outside as "significant innovations".

Since digital markets that have tipped may only be contested by means of significant innovations that overcome the incumbent's network effects, such innovations are tantamount to Schumpeter's "creative destructions" that even dominant firms need to fear and which may discipline them most.

2.3 Laissez-faire approach

The conceptual overlap between Schumpeter's innovation theory and the functioning of multi-sided digital markets is striking. However, courts and economists drew different conclusions from such overlap. Often, the dynamic arguments were used to dismiss antitrust interventions.[9] Because innovation-driven digital markets are

[7] Alexandre de Streel and Pierre Larouche, 'Disruptive Innovation and Competition Policy Enforcement' (OECD Background Note, DAF/COMP/GF(2015)7, 2015) para 4.

[8] At least from a legal perspective, for instance, it should make no difference whether a niche general search engine seeks to supplant the incumbent by adding social media features (frontal competition) or whether, conversely, a large social media platform includes general search functionalities to challenge the incumbent (disruption).

[9] See references in (n 1); Michael L. Katz and Howard A Shelanski, '"Schumpeterian" Competition and Antitrust Policy in High-Tech Markets' (2005) 14 Competition 47.

highly dynamic, it was argued that even high market shares did not imply dominance[10] and that, in any case, due to short innovation cycles any dominance was either ephemeral or permanently subject to threats by disruptive forces. Since this would sufficiently discipline the incumbent firm, antitrust intervention was deemed unnecessary.[11] Accordingly, for two decades, authorities argued against interventions in digital markets on the grounds that "Type 1 errors" (the risk of any over-enforcement) could reduce the crucial incentive to innovate and invest in the dynamic digital markets, while "Type 2 errors" (the risk of under-enforcement) would matter far less as such errors would quickly be corrected by new market entries.[12]

3 Destruction of the creatives in digital ecosystems

Twenty years ago, such reasoning bore some empirical backing. In the early days of the internet, we did indeed witness an open and dynamic economy, in which new firms sprung up frequently, no internet company appeared to enjoy dominance for long, and fluctuation among them was high. Amongst others, we witnessed AltaVista/Yahoo! being pushed aside by Google as the dominant general search engine and Meta's Facebook toppling over the once strong social media platforms Friendster, Orkut and MySpace.[13]

However, twenty years later, the internet world looks different.

There are still vast areas of the digital economy that witness a high level of significant innovation. Yet, at least in the vicinity of some of the commercially most relevant online platform services, vigorous competition appears to have significantly cooled down and market concentration has risen to new highs. This includes services which were previously marked by significant shifts in the market such as for general search services, web browsers or marketplaces. For some monopolised services, such as the provision of app stores, there has never been any genuine competition. The rising

[10] *United States v. Microsoft Corp.* [2001] 253 F.3d 34, 49 (D.C. Cir. 2001); Case T-79/12 *Cisco Systems and Messagenet v Commission* [2013] para 69 confirming *Microsoft/Skype* (Case No COMP/M.6281) Commission Decision [2011] para 78.

[11] See Case T-79/12 *Cisco Systems and Messagenet v Commission* [2013] para. 69; *Facebook/WhatsApp* (Case No COMP/M.7217) Commission Decision [2014] paras 132, 135; David S. Evans, '*Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*' (2016) Coase-Sandor Working Paper Series in Law and Economics Research Paper No 753.

[12] See Cristina Caffarra, Gregory Crawford and Tommaso Valletti, ''How tech rolls': Potential competition and 'reverse' killer acquisitions' (*VoxEU.org*, 11 May 2020) <https://bit.ly/3QGsH3o> accessed 13 June 2022.

[13] Some also refer to the Microsoft's Internet Explorer being overtaken by Google's Chrome as leading web browser as example of dynamic competition. However, this toppling was only enabled by antitrust intervention in the US and Europe and hence provides more arguments for rather than against regulatory intervention.

number of antitrust complaints and investigations into abuses of dominance[14] do not suggest that the small number of digital gatekeepers is sufficiently disciplined by any genuine risk of "creative destruction". On the contrary, today, some incumbent firms appear to focus more on innovative means to reduce competition and suppress significant innovation rather than on improving their own services. So where did reliance on Schumpeter's innovation theory run short?

The main reason is that, contrary to the assumptions of some laissez-faire proponents, significant innovations do not just emerge out of nowhere and then magically topple over any incumbent firm if they are just good enough. For significant innovations, two requirements must be fulfilled. First, companies need to have an incentive to innovate (see below at 3.1) and, second, they must have the ability to effectively develop and, more importantly, bring any innovation to market (see below at 3.2). Both requirements are closely interlinked. Where it is unlikely that an undertaking would be able to diffuse and monetise an innovation, there is no incentive to innovate in the first place. And where there is no incentive, even the best abilities do not suffice.

This is where Big Tech comes into play. As has been mentioned in the European Digital Markets Act[15], "[s]ome of those gatekeepers 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 those market operators may be."[16] Gatekeepers that control the operation of entire ecosystems around their core "cash cow" platform services lack the incentive to innovate against their own technology themselves. And they have an incentive and the ability to suppress any significant innovation from third parties within their ecosystems which could, potentially, weaken their core platform business (see below at 4). Where, due to the very presence of a digital gatekeeper, no significant innovation is likely to succeed, it is no longer justified to rely on dynamic competition. On the contrary, in such a structural setting, state intervention needs to pro-actively render markets contestable again by removing any barriers that gatekeepers have set up to prevent significant innovations that could challenge their business (see below at 6).

[14] For an overview of pending investigations see the case "tracker" at https://www.digital-competition.com/tracker.
[15] Regulation (EU) 2022 of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).
[16] Recital (3) Digital Markets Act (n 15).

3.1 Incentives to innovate

Experience from intellectual property law has proven that to a large extent incentives to innovate rest upon the innovator's prospect of a financial reward.[17] Such reward can follow from selling own products that implement the innovation or from selling or licensing the innovation to third parties that are in a better position to monetise an innovation. There is also broad consensus that, all factors equal, fierce competition creates stronger incentives to innovate than highly concentrated markets.[18]

Innovation incentives of dominant incumbents

Larger firms may have more resources to finance major research and development (R&D) initiatives. They may also be better positioned to subsequently diffuse any resulting innovations and appropriate its value. "But monopolies, if protected from competition, are unlikely to be vigorous innovators."[19] To be sure, digital incumbents are aware of the constant threat from significant innovations disrupting their business. They cannot afford a "quiet life"[20]. However, a dominant firm with sunk investments in its technology has no incentive to invest in innovation that could not gain any additional business but may only cannibalise its existing business by replacing revenues it already secured[21] or even opening the door for third parties to displace such business in the long run. A monopolist on market A may still have an incentive to innovate for a market B that it does not yet dominate. But due to the mentioned "replacement effect"[22] a dominant firm is unlikely to bite the hand that feeds it – to disrupt the technology on which its revenues rest.

The more entrenched and profitable a company's service, the higher its incentive to shift all its creative efforts from innovating own products to suppressing third-party innovation that could challenge the service.[23] This incentive goes beyond preventing

[17] See David Abrams, 'Did TRIPS Spur Innovation? An Empirical Analysis of Patent Duration and Incentives to Innovate' (2009) 157 University of Law Review 1613; Herbert Hovenkamp, 'Antitrust and Innovation: Where We Are and Where We Should Be Going' (2011) 77 Antitrust Law Journal accessed 22 June 2022.
[18] Richard Gilbert and A Douglas Melamed, 'Innovation Under Section 2 of the Sherman Act' (2021) 84 Antitrust Law Journal 602, 606 ff.
[19] Gilbert and Melamed (n 18) 607.
[20] Which according to Sir John Hicks famously is the "best of all monopoly profits", J.R. Hicks, 'Annual Survey of Economic Theory: The Theory of Monopoly' (1935) 3 Econometrica 1, 8.
[21] See Steve Jobs, '[W]hat's the point of focusing on making the product even better when the only company you can take business from is yourself?', 'Voices Innovation: Steve Jobs' (*Bloomberg Businessweek*, 11 October 2004) <https://bloom.bg/3HLjy5y> accessed 22 June 2022.
[22] See Kenneth J Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Richard R Nelson (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962) 609; Gilbert and Melamed (n 18) 620.
[23] Gilbert and Melamed (n 18) 620; Herbert J. Hovenkamp, 'Schumpeterian Competition and Antitrust' (2008) 4 Competition Pol'y Int'l 273, 277: '[T]here are good reasons for believing that market-dominating

innovation relating to the incumbent's core platform service. It extends to the incumbent's entire business model. A dominant provider of search-based advertising[24], for instance, does not just have an incentive to stifle innovation challenging its search service. It will also seek to prevent innovation that could make the use of search engines unnecessary or render alternative forms of offline or online advertising more attractive to advertisers (e.g., by increasing its targeting capabilities).[25] Where such alternative advertising format already exists (e.g., programmatic display advertising), the search advertising incumbent will seek to prevent any innovation that would facilitate or increase the deployment of such alternatives in order to prevent that demand and prices for its search-based advertising business drop.[26]

Innovation incentives of third parties

Where the incumbent cannot be expected to innovate in relation to its business model, any dynamic competition depends on the incentives of third parties to invest in innovations that could overcome the incumbent's existing technology. The most likely candidates would be remaining (niche) rivals within the relevant market or firms operating on neighbouring but related markets from which an attack could be launched. The prospect of getting a share of the incumbent's monopoly revenues will likely create a sufficient financial incentive for such attack. However, any third party's innovation incentive will also depend on the party's likely ability to appropriate any value from a significant innovation, in particular by opening the door to the incumbent's revenues. And here again, Big Tech has a word to say.

exclusionary practices to restrain the innovations of rivals or potential rivals than to develop or promote their own innovations.'

[24] Search-based advertising is considered to form a distinct online advertising market (separate from display advertising) due to the particular abilities it provides for advertisers to target consumers at the time of their highest intent to purchase as expressed by their query. See *Google Search (AdSense)* (Case AT.40411) Commission Decision C/2019/2173 [2019] at section 6.2.

[25] This is at the heart of the pending investigations in Google's Privacy Sandbox/Topics (*Google Ad Tech* (Case AT.40670) Formal antitrust proceedings initiated on 22 June 2021) and Apple's App Tracking Transparency (ATT) framework (German Federal Cartel Office, 'Bundeskartellamt reviews Apple's tracking rules for third-party apps' (Press Release of 14 June 2022) <https://bit.ly/3zTrr7e> accessed 22 June 2022). Both investigations concern a joint effort by Google and Apple to deprive programmatic display advertising of the data it requires to match the targeting capabilities of search-based advertising. Google's bulk of revenues comes from Google Ads in Search. Via a (monopoly) Revenue-Sharing-Agreement for searches on Safari and Siri, Apple directly benefits from Google's search ads. In addition, Apple benefits from selling more Apple Search Apps for searches in the Apple app store.

[26] This is at the heart of the competition cases relating to Google's measures to prevent 'Header-Bidding', a mechanism developed by publishers to facilitate multi-homing between ad intermediaries that enable programmatic advertising, which would enhance its efficiency. See Autorité de la Concurrence, Decision 21-D-11 of 7 June 2021 (<https://bit.ly/3HK726z> accessed 22 June 2022) regarding practices implemented in the online advertising sector.

3.2 Abilities to innovate

To appropriate value from any innovation, an entrepreneur needs to master several phases. First, he or she needs to actually invent something new. Then he or she has to diffuse this invention so that consumers adopt it broadly. Already Schumpeter highlighted that for an innovation to lead to a "creative destruction" the initial phase of the invention is far less relevant than the subsequent diffusion, which is the period when the profitable potential of a new product or service is realised and it is widely rolled out.[27] This also applies to digital services.

Where strong network effects are at play, for any significant innovation (irrespective of product differentiation or disruption[28]) to displace an incumbent, it first needs to gain a critical mass of users to generate any positive network effects. The common strategy to gain such foothold on the market is to aim for customers at the "low-end" of the market. As first described by Christensen[29], incumbent firms tend to focus on constantly improving their products to pull the market to the (more lucrative) "high-end". This creates opportunities for other firms to attract users through low-end products that meet the basic requirements of users (the "value network"[30]) while offering added value through their respective innovation. If this initial phase of gaining a foothold is successful, the innovator can successively redefine the factors that matter to users (i.e., the value network) and progress to also cater to the interests of mainstream users of the incumbent, thereby ultimately replacing it.[31]

The problem we are facing today, however, is that with a view to effectively prevent innovation that could challenge their business, some incumbents can and actively do interfere in all stages of the innovation process within an ecosystem, from the invention to the diffusion. This can be observed, in particular, in digital ecosystems that are largely walled-off from other industries.

4 Gatekeepers' suppression of innovation in walled-off ecosystems

Based upon the principles outlined above, the more entrenched an incumbent's market position for its core "cash cow" service and the higher the threat that an innovation could displace such service, the lower the incumbent's incentive to itself

[27] Joseph Schumpeter, *Konjunkturzyklen. Eine theoretische, historische und statistische Analyse des kapitalistischen Prozesses* (first published 1939, Vandenhoeck 1961).
[28] See above Section 2.2 on the differences.
[29] Clayten M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Harvard Business Review Press 1997).
[30] Christensen (n 29) defines a value network as a 'collection of upstream suppliers, downstream channels to market, and ancillary providers that support a common business model within an industry'.
[31] de Streel and Larouche (n 7) para 4.

invest in such innovation but the stronger its incentive and ability to also prevent any third party from doing so.[32]

Applying this to digital markets, twenty years of under-enforcement of antitrust law leaves us with a very dim prospect for innovation. Over these years, a small group of companies has built up and connected a web of products and services around their core "cash cow" businesses that effectively shields off such business from competitive threats, in particular from disruptive innovation or disintermediation.[33] At a global level, this is most striking for

- Alphabet/Google[34],
- Apple[35],

[32] Compare Gilbert and Melamed (n 18) 620: 'All other things equal, for products sold at positive prices, this replacement effect is likely to be greatest for firms with the largest market shares, and thus the most profits to lose'.

[33] Disintermediation means the process of reducing the use of intermediaries between producers and consumers, in particular by cutting out one or more middlemen from a transaction. See Thomas Hoppner, Felicitas Schaper and Philipp Westerhoff, 'Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs' (2018) 9 J. of Euro. Comp. Law & Practice 626 ff.

[34] Google dominates multiple central touchpoints to access end users and business users alike. Its core business is general internet search and search advertising (Google Search). To shield this core business from indirect competition by aggregators, Google developed and integrated multiple specialised search services (for example, Google Shopping, Google Travel, Google Local Search) and content services (for example Google Streetview) into the search results pages of Google Search. Google also own YouTube, a video-ad funded social media platform. To shield Google Search from direct competition (that is, other general search services) and in anticipation of the shift towards mobile internet usage, Google acquired the mobile operating system developer Android. Besides Android, Google also developed its own web browser (Google Chrome) as an additional distribution channel for its general search service. To wall this mobile ecosystem further off and to ensure that the purportedly open-source Android platform was not used by others to compete against Google, the search giant developed and distributed the Google Play app store. Google Play is a must-have software product for all Android users, as it is the only credible way of installing apps on Android devices and comes pre-installed on nearly all Android smart mobile devices globally. Hundreds of ancillary services tie the Google ecosystem further together, for example its 'super app' Google Maps along with productivity and communication software such as Gmail, Google Docs and Drive, Photos and Google Meet and its own voice assistant. Taken together, Google has at least eight properties with more than one billion users each (Search, YouTube, Maps, Assistant, Gmail, Chrome, Android, and Play). All products and services collect valuable user data and information, thus reinforcing each other. Google even made specific acquisitions to get access to additional user data, for example Fitbit. In addition, Google not only dominates search advertising (Google Ads, formerly known as AdWords) and owns highly valuable advertising real estate such as YouTube. Since acquiring DoubleClick in 2007, Google also dominates every single level of the digital value chain for display advertising, the lifeblood of the digital economy (Google Marketing Platform, Google Ad Manager, AdSense, AdMob, to name a few). Lastly, Google also owns and operates the tools to monitor and control marketing performance (e.g., Google Analytics, Search Console) as well as a cloud service (Google Cloud Platform).

[35] Originally being a hardware manufacturer, today, Apple controls a complex walled-off ecosystem. Unlike Google, Apple always pursued the strategy of operating tightly closed-off, vertically-integrated platforms, combining its own hardware with proprietary software solutions. Its core product is the iPhone, which nowadays is not only a hardware product but includes the entire iOS platform together with the App Store – the only way users can download and install apps on iOS – and multiple additional software

- Amazon[36] and (to a lesser extent),
- Meta/Facebook[37] and

software solutions (for example, the Safari browser, which is also available for Apple's other product lines, e.g., Macs). To complement its hardware-software-ecosystem, Apple pushed its Wearables, Home, and Accessories business (Apple Watch, AirPods, HomePod, Beats headphones etc.). Given the saturation of the market for smart mobile devices and the corresponding decline in iPhone sales, in recent years Apple shifted more and more towards its highly-lucrative services segment, integrating more and more subscription services, such as Apple Pay (the only payment service who used to have access to the iPhone's NFC chipset) along with content services such as Apple TV+, Music and Arcade (among others). With Search Ads in the App Store, in 2020 Apple also entered the advertising business, with expected revenues of more than USD 5 bn. in 2022.

[36] Amazon started as an online bookstore. However, Amazon rapidly grew into a giant, vertically-integrated but at the same time conglomerate corporation. Today, the company is best-known as an "Everything Store", a place where consumers can buy nearly anything online. Combining its own sales operations (including many own brands) with that of a merchant platform, the Amazon Marketplace has become the global e-commerce site. For its own use but also thousands of merchants globally, Amazon offers all kind of warehousing and fulfilment solutions, and even its own logistics services, including its own airline. Such logistics infrastructure can, in turn, be used for additional services such as Amazon Fresh (food deliveries). Amazon even went so far as to acquire brick-and-mortar businesses like Whole Foods, which operates more than 500 retail locations in the US, Canada and UK. While Amazon pursued a strategy purely focused on growth for many years regarding this core business (meaning that it operated with very low margins), its most profitable, cross-subsidising services are offered under the brand Amazon Web Services (AWS) and operate the by far leading on-demand cloud computing platform along with server farms located throughout the world as well as various software tools. Not only by rival content platforms such as Netflix rely upon these cloud solutions, but also its own content platforms like Amazon Music, Prime Video or the audiobook platform Audible. For such content platforms, Amazon heavily invested into high-quality content (licenses and own productions). With its recent acquisition of the film and television studio MGM (for nearly USD 8.5 billion), Amazon added thousands of premium titles to its streaming business. Its Prime membership ties its ecosystem together – premium fulfilment and logistics for online orders on Amazon.com and content services come as a bundle for many consumers globally. With its own voice assistant Alexa and other smart home devices, Amazon has also conquered their homes – and allows them to shop on Amazon.com even more easily. Around 2014, Amazon also entered the market for advertising. At its heart are search based ads by merchants active on the Amazon Marketplace. But Amazon also offers display advertising and operates a growing ad tech (intermediation) stack. Net sales increased from USD 12.6 in 2019 to USD 31.2 billion in 2022 – making Amazon the third largest advertising business (after Google and Meta) in the world – after just a few years in business.

[37] Starting out as a social network, Facebook became the by far most used personal social network globally. The company is well known for what is referred to as "killer acquisitions", i.e., the acquisitions of nascent, potential future competitors (such as Instagram). The company, recently renamed to "Meta", however, diversified its business significantly – with WhatsApp, it operates one of the leading global communication services, complementing its communication tool Messenger. With Facebook and Instagram, Meta offers some of the largest online advertising real estate globally. A must-have for many advertisers. In addition, Meta provides one of the largest advertising networks for app monetisation (Meta Audience Network). The company's future lies in augmented and virtual reality products such as Oculus – which are closely linked to the social network operation.

- Microsoft[38] (the "gatekeepers").[39]

One motivation for setting up such ecosystems is to be included in all the most profitable value chains built on or around their platform (advertising, subscriptions/payments, data). Another reason is to gain influence on the innovation process to protect the core platform monopoly from entry and disruption. The ancillary services serve as a protective "moat"[40] or "wall" around the incumbent's "castle", i.e. its core revenue-generating services to identify any potential disruptive innovation and prevent that it may gain a foothold.

Such moat-building permeates the strategies of all gatekeepers and is a core business principle in digital markets. In their combination, such protective web of services may develop into full-scale ecosystems which are, in varying degrees, closed to third parties ("walled off ecosystems").[41]

The control over such walled-off ecosystems allows digital gatekeepers to suppress innovation. In particular, it enables them to effectively

1. deprive third parties of the assets required to innovate;
2. set the conditions for any innovation to reach end users;
3. monitor any innovation on related markets for pre-emptive defensive measures;
4. prevent disruptive market entry by acquiring and "killing" innovations;
5. hamper the diffusion of any innovation within their ecosystem;

[38] Microsoft built its ecosystem around its professional and home software products, such as the operating system Windows (which is still by far the leading desktop operating system worldwide), server software, and the productivity software suite Microsoft Office (Word, PowerPoint, Excel etc.). With the Internet Explorer, it used to operate the leading Internet browser, and with its current Edge browser, it is starting to challenge the current market leader Google Chrome again. It also operates the general search engine Bing. In addition, Microsoft is the second largest cloud computing provider (Microsoft Azure) and over time bought many companies to diversify its ecosystem (e.g., the communication software Skype, which is complemented with its business communication tool Microsoft Teams) and the professional social network LinkedIn. With the planned acquisition of Activision Blizzard, Microsoft will again become one of the largest computer games developers globally.

[39] Note that in some countries, in particular China, other companies (such as Alibaba and Tencent) have created ecosystems that are no less walled off.

[40] The moat analogy, famously used by Warren Buffet for investment decisions, was first considered in an antitrust context in the European *Google Android* investigation (see *Google Android* (Case AT.40099) Commission Decision [2018] para. 116). It was subsequently adopted by Assistant Attorney General J. Kanter of the DoJ, 'Keynote' (Speech at CRA Conference, Brussels, 31 March 2022) <https://bit.ly/3tSFsyk> accessed 13 June 2022.

[41] Generally, see Daniel Crane, 'Ecosystem Competition and Antitrust Laws' (2019) 98 Nebraska Law Review 412.

6. quickly imitate, integrate and thereby outcompete any innovation within the ecosystem.

4.1 Depriving rivals of innovation assets

"A firm that controls the inputs required to innovate has the ability to suppress innovation and can be said for that reason to have market power over innovation."[42]

Digital gatekeepers (as defined above) typically control several inputs that may be crucial for participants of their ecosystem (hereafter "business users") to innovate.

Data & Usage Rights

The central asset is data. Another asset is the (data protection/privacy) right to combine, share or otherwise use personal data. Gatekeepers can typically control both assets. Gatekeepers operate central digital gateways for business users to reach end users. The control over such gateways allows a gatekeeper to unilaterally determine how business users may engage with end users and what kind of data they may access and collect in this process. They may also introduce, design and present interfaces and choice screens to effectively influence whether and under which conditions end users grant consent for any business user to use their personal data. This allows a gatekeeper to effectively reduce the business users' ability to access data and to obtain usage rights for such data.

By technically withholding any relevant data or preventing business users from receiving permission to use it, gatekeepers can render it more difficult for business users to identify their users' interests and/or to measure the success of any new features they introduce. With Apple's so-called App Tracking Transparency (ATT) framework, introduced in 2021, and Google's Privacy Sandbox/Topics solution, announced around the same time, we have already witnessed two gatekeepers taking advantage of such control over data flows.[43] Under the disguise of enhancing privacy, both campaigns aim at increasing the data gap between themselves as operators of their ecosystem and any business active within.[44] The less data actual or potential rivals obtain within an ecosystem, the smaller their potential to innovate.

Infrastructure

Similarly, by controlling an ecosystem, gatekeepers may also be able to deprive rivals of crucial storage capacities (cloud services), premium content and corresponding

[42] Gilbert and Melamed (n 18) 611.

[43] See German Federal Cartel Office (n 25); Feng Zhu and Daniel Sokol, 'Harming Competition and Consumers Under the Guise of Protecting Privacy: An Analysis of Apple's iOS 14 Policy Updates' (2021) Competition Policy International <https://bit.ly/3n7iXBY> accessed 22 June 2022; Thomas Hoppner and Philipp Westerhoff, '*Privacy by Default, Abuse by Design: EU Competition Concerns About Apple's New App Tracking Policy*' (2021) Hausfeld Competition Bulletin Spring 2021.

[44] German Federal Cartel Office (n 25); Zhu and Sokol (n 43) Hoppner and Westerhoff (n 43).

usage (IP-)rights (through exclusivity) or crucial know-how (by artificial non-transparency). They may also preclude or restrict third-party access to key standards or technology features that is necessary to develop innovative products within the respective ecosystem.[45] Conversely, this means that gatekeepers holding a monopoly over crucial research and development (R&D) assets will be the only potential innovators within their walled-off ecosystem.[46]

Funding

Gatekeepers may not preclude innovative ideas from being funded. Yet, they can significantly reduce any incentive to do so. Having watched Big Tech squash competition time and again, venture capitalists are well aware of the endless options (further outlined below) that unregulated gatekeepers enjoy to use the monopoly profits from their core services to detect, pre-emptively clone, suppress and/or anti-competitively outperform any innovation within the ecosystem they control to deprive newcomers of any profit margin in the crucial phases of their business development. Today, the reality is that "[w]hen entrepreneurs and investors consider companies to start and fund, they shy away from sectors where tech monopolies might abuse their mighty power and destroy them."[47] There is simply no incentive to invest in challengers that are at the mercy of the incumbents they seek to challenge.

4.2 Limiting rivals' scope for innovations through technical settings

In addition to withholding crucial inputs, gatekeepers may also limit third-party innovation by setting the rules for business within their ecosystem in a way that no innovation may arise that seriously threatens their core "cash cow" service.

All core platform services such as operating systems, web browsers, search engines, app stores or online marketplaces that directly intermediate between end users and business users unilaterally set the rules and commercial conditions by which businesses on downstream (intermediated) markets may access end users through the respective (upstream) platform.[48] Gatekeepers that exercise control over entire ecosystems typically even set general terms and conditions for business within the system. They define the characteristics a business user and its offerings need to fulfil to

[45] An example is the Apple NFC-Case (European Commission, '*Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay*' (IP/22/2764, Press release of 2 May 2022) <https://bit.ly/3Oc2E2D> accessed 22 June 2022) in which the Commission takes issue with Apple preventing innovative mobile wallets apps by limiting third-party access to necessary hardware and software for Near-Field Communication (NFC).

[46] Gilbert and Melamed (n 18) 624.

[47] Rand Fishkin, 'Google, Apple, and Amazon Stifle Innovation When They Favor Their Own Products' (*SparkToro*, 14 June 2022) <https://bit.ly/3QEJcwV> accessed 22 June 2022.

[48] See Recital (13) Digital Markets Act (n 15).

be accepted to and to reach end users through a core platform service. This allows a gatekeeper to unilaterally determine what kind of technology and business will be the "winners" or the "losers" when competing via its core platform service – and hence within its entire ecosystem.

Digital services can only succeed if they reach end users. To achieve that, they need to be present on the main platforms used by end users to access services. This renders businesses dependent on intermediation services. Where success on a downstream market depends on the outcome of any upstream intermediation service, the rules set by the upstream intermediary determine the success and hence the competitive structure of the downstream market more than any other factor.[49] This allows an upstream intermediary to set conditions disfavouring any downstream innovation that could threaten its upstream or any other of its core businesses.

For instance, to enter the market, apps need to be available on app stores. By defining the conditions an app needs to fulfil to be admitted to an app store, the dominant app store may effectively determine what kind of app, with what kind of offerings and ancillary features (payment, advertising etc.), may enter the market.[50] Equally, by defining which websites and which advertisers may appear on Google's general search results pages, which have "characteristics akin to those of an essential facilities"[51] for most B2C services, the gatekeeper unilaterally defines what kind of innovations on any website are admissible and will actually be found by end users and which are not. [52] Similarly, a dominant online marketplace may unilaterally determine what kind of sellers get access to its marketplace and what kind of products or services they may sell

[49] See Case T-612/17 *Google Shopping* [2021].

[50] As seen in cases relating to Apple and Google, the operator of a monopoly app store may simply ban any innovative apps from the store that would compete with the gatekeeper or could disrupt their business. The case of the exclusion of *Epic Games* (Fortnight) from both app stores after it implemented its own purchasing functionalities demonstrates this. See also the CMA's current investigation into Apple's restrictions on cloud gaming where the CMA is concerned that "Apple has also blocked the emergence of cloud gaming services on its App Store. Like web apps, cloud gaming services are a developing innovation, providing mobile access to high-quality games that can be streamed rather than individually downloaded. Gaming apps are a key source of revenue for Apple and cloud gaming could pose a real threat to Apple's strong position in app distribution. By preventing this sector from growing, Apple risks causing mobile users to miss out on the full benefits of cloud gaming." (CMA, 'CMA plans market investigation into mobile browsers and cloud gaming' (Press Release of 10 June 2022) <https://bit.ly/3ybbcRA> accessed 22 June 2022).

[51] Case T-612/17 *Google Shopping* [2021] EU:T:2021:763, para 224.

[52] As outlined in Case T-612/17 *Google Shopping* [2021], Google, for instance, actively demotes within general search results pages any websites with the characteristics of a specialised search services – well aware that such services are best placed to successively expand to become general search services.

any innovative product less visible on their platforms if they pose a competitive threat to their own offerings.

In addition to suppressing innovations through the conditions for any intermediation, gatekeepers may also set the technical framework for carrying out business within their ecosystem in a way that prevents any significant innovation. For instance, through the technical settings of mobile devices such as their interoperability with other technologies or access to features and standards, gatekeepers may enable or prevent certain technologies from entering their ecosystem.[54]

4.3 Monitoring rivals' innovations for swift defensive measures

Besides blocking or hiding rival offerings on their core platform services, gatekeepers have several other options to effectively suppress significant innovation.

Gatekeepers have been very successful in spreading and deploying sophisticated surveillance tools to constantly monitor the development and performance of businesses within and even outside of their digital ecosystems.[55] Such monitoring is not limited to the dynamics in the markets for their core platform services but covers the developments in all relevant areas that may serve as starting point for a disruption.[56] Gatekeepers are therefore amongst the first to spot which new products or services are getting traction and pose a competitive threat. This enables them to defend their dominance in a highly targeted manner, either by acquiring any promising innovation or by anti-competitively preventing its success.[57] As has been observed in the field of

products. See Adrianne Jeffries and Leon Yin, 'When Amazon Takes the Buy Box, It Doesn't Give it UP' (*The Markup*, 14 October 2021) <https://bit.ly/3ObVRWP> accessed 22 June 2022.

[54] See the Apple-NFC case on this (above n 45); see also Recitals (43) and (55-57) Digital Markets Act (n 15) for web browsers and hardware functionalities.

[55] To this end, Google uses Google Analytics, Google Search Console and data from its ad tech services. Amazon famously measures everything within its ecosystem (see Colin Bryar and Bill Carr, *Working Backwards: Insights, Stories, and Secrets from Inside Amazon* (Macmillan 2021)). In 2013, Meta acquired Onavo, a surveillance company, with ''an eye towards identifying competitive threats for acquisition or for targeting under its anticompetitive platform policies,' see FTC, Case 1:20-cv-03590-JEB (13 January 2021) paras. 74-75 – *FTC v. Facebook*. As revealed by the FTC, Facebook used Onavo data to generate internal "Early Bird" reports for Facebook executives, which focused on 'apps that are gaining prominence in the mobile eco-system in a rate or manner which makes them stand out.'

[56] Google Analytics, for instance, provides data on the success of any website, irrespective on which market such website is active.

[57] See FTC (n 55) quoting an internal Facebook slide deck 'With our acquisition of Onavo, we now have insight into the most popular apps. We should use that to also help us make strategic acquisitions'; Lina M Khan, 'Remarks of Chair Line M. Khan' (Speech at CRA Conference, Brussels, 31 March 2022) <https://bit.ly/3HGp4Xo> accessed 22 June 2022.

online advertising (relating to Meta and Google[58] as well as Apple[59]), gatekeepers also (ab-)use such free measuring and performance tools to present their own offerings to business users as more effective and superior compared to innovative rival offerings.

4.4 Preventing the rise of innovations through "killer acquisitions"

Google, Amazon, Apple, Meta and Microsoft have acquired more than 400 companies from 2009 to 2020.[60] Many of those are seen as "killer acquisitions", i.e., acquisitions with the sole purpose to discontinue the target's innovation projects as they could potentially disrupt the acquirer's technology.[61] Meta famously purchased Instagram whose photo and video sharing features was perceived as an innovative threat. WhatsApp was purchased as its message service could have evolved into a social network. Today, there is wide consensus that neither of those acquisitions should have been allowed. However, current merger review also did not stop Meta from acquiring several other social networks which it then shut down completely.[62] The gatekeeper's strategy was and is straightforward – "simple – buy up any firm that shows even a modest potential to develop into a competitive threat".[63]

Some argue that such acquisitions would only increase the incentives to innovate because start-ups would hope for a quick and lucrative "exit".[64] However, society is not served if innovations are first developed at high costs, then purchased at even higher

[58] See CMA, 'Online platforms and digital advertising' (Market study, final report, 1 July 2020), para. 53: "This has led to the perception on the part of advertisers and agencies [..] that Google and Facebook are able to 'mark their own homework' for the measurement of viewability of ad impressions".
[59] See CMA, 'Mobile ecosystems' (Market study, final report, June 2022), para. 6.175; Eric Seufert, 'Apple privileges its own ad network with ATT. What's its privacy endgame?' (*Mobile Dev Memo*, 1 February 2021) <https://bit.ly/3naw8Ss> accessed 22 June 2022: 'advertisers running ads through Apple's Search Ads advertising platform (and measuring API) get more granular data about the campaigns they operate on Apple's own ad network than they do for those run on any other network (e.g. Facebook). This potentially makes it easier to optimise – and spend more money on – Apple ad network campaigns than campaigns run on other platforms.'
[60] Oliver Latham, Isabel Tecu and Nitika Bagaria, 'Beyond Killer Acquisitions: Are there more common potential competition issues in tech deals and how can these be assessed?' (2020) CPI Antitrust Chronicle May 2020 <https://bit.ly/3zVYBDp> accessed 22 June 2022.
[61] See Colleen Cunnigham, Florian Ederer and Song Ma, 'Killer Acquisitions', (2021) 129 Journal of Political Economy; OECD, 'Start-ups, Killer Acquisitions and Merger Control' (Background Note, DAF/COMP(2020)5, 2020).
[62] This includes the social networks Parakey (2007), FriendFeed (2009), Nextstop (2010), Divvyshot (2010), Beluga (2011), Gowalla (2012) and Lightbox (2012), a London-based photo sharing start-up. Tim Wu and Stuart Thompson counted as many as 39 killer acquisitions by Facebook between 2009 and 2019: 'The Roots of Big Tech Run Disturbingly Deep' (*The New York Times*, 7 June 2019) <https://nyti.ms/3yd2mTI> accessed 13 June 2022.
[63] Kanter (n 40).
[64] Katharina Warg, 'The Acquisition Option and Startup Innovations' (2022) Job Market Paper, <https://bit.ly/3HMUPhq> accessed 23 June 2022.

costs, only to then be shut down to preserve an existing inferior technology. This only increases prices without enhancing dynamic competition or technological progress.

4.5 Hampering the diffusion of rival innovation

Luckily not all start-ups are willing to sell significant innovations (that managed their way through the gatekeeper's protective terms and conditions into the ecosystem) to the incumbent. However, gatekeepers have several other means to suppress threatening innovation.

As outlined at 3.2, the minimum requirement to challenge an incumbent once a market has "tipped" is to gain a foothold, a critical user base that generates positive network effects. The essence of a disruption is that, by targeting the "low-end" (the basic requirements) first, a disruptor creates a sufficient overlap between the existing and the innovative product.[65] Gatekeepers have an incentive and the ability to prevent this from happening.

In a closed ecosystem, a gatekeeper controls every aspect of the user experience.[66] This includes the choice and architecture of the interfaces (touchpoints) available for business users to reach out to end users. Through such interfaces a gatekeeper can impact the matching of supply and demand. The gatekeepers typically operate several core platform services through which the majority of businesses and the majority of end users (need to) interact. App stores, web browsers, search engines and marketplaces match a substantial part of supply and demand.[67] Such intermediation power can be weaponised against disruptive products further down in the value chain, simply by preventing such product from accessing the relevant user groups. Even the most innovative web service, e.g., a specialised search service, will never get a footing if it is not found in general search results pages and/or an app store. These are the central touchpoints to reach the relevant end user base (searchers). The mere technical option of end users to also find and switch to such new services through different means at no costs (e.g., through direct access/call-ups) does not justify the assumption that they ever will and that this threat would discipline the incumbent.[68] By hiding new products or services on core platforms (e.g., devices, operating systems, app stores, results pages), gatekeepers can directly influence user behaviour and thereby determine the diffusion

[65] de Streel and Larouche (n 7) para 21 iii).
[66] See European Commission, 'Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay' (IP/22/2764, Press release of 2 May 2022) <https://bit.ly/3Oy59vT> accessed 22 June 2022 – 'Apple controls every aspect of the user experience in this ecosystem.'
[67] See Recital (20) Digital Markets Act (n 15)
[68] See Higher Regional Court of Berlin, indicative ruling of 11 February 2022, U 4/21 Kart, NZKart 2022, 215 – *Tipping-Risk*. For a concurring view see Evans (n 1) 17.

of innovations. They can use existing or may even create new user touchpoints[69] to exploit biases[70], subvert user autonomy or otherwise impair their decision-making.[71] These tactics can be used to prevent the majority of end users from ever becoming aware of any significant innovation and/or from switching to it. Such behaviour may also be used to weaken or fully disintermediate service levels that have the highest potential to come up with significant innovations.[72]

A gatekeeper may discourage or disable any switching to a new technology even further by precluding access to or interoperability with central technical features of its ecosystem. A disruptor will find it much harder to gain a foothold and convince the mainstream customers of the gatekeeper's core platform service to migrate to the disruptor's product if this hampers such customers' access or the quality of core hardware and software elements or features that they cherish within the gatekeeper's ecosystem.[73]

Moreover, where a gatekeeper also controls the intermediation of advertising and/or the systems for the fulfilment of payments (subscriptions) within its ecosystem, as in the case of Google, Meta and Apple, it may also hamper any marketing and subscription activities of a newcomer. If a disruptor cannot effectively advertise or sell its service within an ecosystem, without having to ask the very incumbent that it intends to disrupt, the diffusion of its innovation will be difficult.

More generally, gatekeepers are offering a broad array of ancillary digital services to businesses of all sizes and sectors, including payment services, cloud computing, monitoring or communication services to name a few. This can create "multiple nodes

[69] For instance, technically, operating systems are "upstream" of web browsers which are upstream of general and specialised search services. However, over the last years, several web browsers have started to integrate a news aggregation service directly on their homepage, thereby creating a new end user touchpoint upstream of search. Similarly, by integrating its "Display" feature in the starting page of Android phones, Google has pulled "forward" the intermediation between business users and end users (from search to operating system).

[70] User biases (or cognitive biases) are systematic patterns of deviation from norm or rationality in judgment. For example, the default or *status quo* bias is the tendency to hold to the current situation rather than an alternative situation, to avoid risk and loss (loss aversion). Thus, a decision-maker has the increased propensity to choose an option because it is the default option or the *status quo*. Such bias can affect economic decisions, as established by the Commission in the *Google Android* case with regard to the pre-installation of apps along with default setting and premium placement. See *Google Android* (Case AT.40099) Commission Decision [2018], paras 781, 782, 812, 851.

[71] Recital (70) Digital Markets Act (n 15).

[72] See (n 33) on disintermediation. For example, websites offering specialised search services (such as for hotels, flights and entertainment) pose the highest threat of disrupting Google's search-based ad business; in particular if they combine several such services. To prevent that such services reach a critical mass to expand, Google integrated such search functionalities into its general search service, thereby (at least partly) disintermediating the downstream search service level. A similar strategy can be observed when Google includes search and intermediation functionalities directly in the homepage of its web browser Chrome or even the home screen of Android devices.

[73] Compare de Streel and Larouche (n 7) para 28.

of dependency, any one of which [the gatekeeper] can exploit to dictate terms and get its way".[74]

Thus, by controlling the digital infrastructure within walled-off ecosystems, gatekeepers can largely influence which products or services end users detect, see, engage with, and ultimately use – and which they do not. In fact, the European Digital Markets Act contains a long list of practices the primary purpose of which is for a gatekeeper to prevent or discourage end users from finding, switching to and using rival (novel) products and services.[75] And that list includes only "those practices (i) that are particularly unfair or harmful, (ii) which can be identified in a clear and unambiguous manner [...] and (iii) for which there is sufficient experience".[76] Operators of walled-off ecosystems can create countless further hurdles for any innovation to get a foothold and to use that as a lever to grow.

4.6 Leveraging dominance to advantage own imitations of rival innovations

Even if an innovator succeeds in entering a market and getting a foothold, for instance with a low-end product, it will only ever topple over the incumbent if it can also convince the latter's mainstream users to switch. However, gatekeepers also have effective measures to prevent such "ultimate" defeat. An incumbent may deprive its mainstream users' incentive to switch by imitating and integrating the novel features of its rival's innovation into its own offerings. To speed up the process it may also acquire and integrate a direct competitor with an emerging innovation in a still nascent market.[77] Such inclusion has been observed many times in the past. If an incumbent swiftly integrates the main features developed in the market and rapidly scales up its own operations, thereby leveraging its broad user base, its users will not even have a reason to try out a separate service, i.e., to ever multi-home. Over the years, Google, for example, has integrated several upcoming search technologies (such as semantic, social or voice search) to prevent rivals from differentiating their offerings on the basis

[74] Khan (n 57) 3.
[75] See in particular Article 5 paras 3 to 5; Article 6 paras 3 to 6, 9, 12, Article 7.
[76] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector' *(Digital Markets Act)*' (15 December 2020) COM(2020) 842 final, Explanatory Memorandum, p. 5 <https://bit.ly/3ncBnkE> accessed 23 June 2022.
[77] Khan (n 57) 3.

of such technology.[78] Most recently, Apple has directly copied payment services offered by rival providers in its own Apple Pay offering.[79]

Such imitation strategy may also have been available in other sectors. However, because digital services are typically based on the same underlying software standards, despite being offered on separate markets, these services are closer interlinked than services within other industries. This makes it easier to integrate new services or features in existing, seemingly unrelated platform services, thereby leveraging the latter's market penetration to the former.[80] Hence, gatekeepers that control a digital ecosystem are likely to find it much easier than others to identify significant third-party innovations at an early stage, imitate them effectively and, most importantly, swiftly present such copy-cats in a prominent manner throughout their entire ecosystem as fulfilling at least the same functionalities as the original innovation. By means such as tying, bundling, pre-installation, self-preferencing, exclusivity agreements or discount schemes, incumbents can then ensure that their mainstream users follow their status quo bias[81] and stick with them. If the newcomer cannot grow, it cannot generate any positive network effects that are crucial to grow and succeed in digital markets.[82]

The power of such leveraging practices to stifle rivals' innovation has been well documented in the European *Google Shopping* case. Over the course of a decade, Google and its supporters had somewhat successfully[83] argued that promoting inferior own products within general search results pages while demoting more innovative rivals would constitute a pro-competitive product improvement.[84] Adopting the European Commission's reasoning[85], the General Court explained, however, that depriving rivals of the ability to reach end users significantly reduces their incentives and financial

[78] See Dan Nosowitz, 'Google Buys Metaweb, the One Company that Could Revolutionize Google Search' (*Fast Company*, 7 August 2010) <https://bit.ly/3QJ1i18> accessed 22 June 2022.
[79] See Martin Peers, 'Apple's Buy Now, Pay Later Move May Be a Little Late' (*The Information*, 6 June 2022) <https://bit.ly/3xK2Fnh> accessed 22 June 2022: 'Witness the cleverly named Apple Pay Later, a feature of the company's Apple Pay digital wallet and a direct copy of buy now, pay later services offered by Affirm, Klarna and Block's Afterpay. [J]ust another example of what's wrong with big tech.'
[80] Case T-201/04 *Microsoft v Commission* [2007] ECR II–03601, paras 1054, 1355, 1356.
[81] Status-quo bias describes the phenomenon that consumers prefer the more familiar choice over the less familiar option, even if the latter is potentially more beneficial.
[82] This is why Germany, for instance, has outright prohibited practices that hinder rivals from independently generating positive network effects (Sec. 20 para. 3a GWB), for a first precedent see Higher Regional Court of Berlin, indicative ruling of 11 February 2022, U 4/21 Kart, NZKart 2022, 215 – *Tipping-Risk*.
[83] *Streetmaps v Google* [2016] EWHC 253 (Ch) at 84.
[84] Thomas Graf and Henry Mostyn, 'Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives', (2020) 11 J. of European Comp. Law & Practice 561, 572; Aurelien Portuese, '*Fine is Only One Click Away*', (2017) 1 CoRe 198, 201.
[85] See Google Search (Shopping) (AT.39740) Commission Decision [2017], para 595: 'the Conduct is likely to reduce the incentives of competing comparison shopping services to innovate;' see also paras 593 and 596.

of the ability to reach end users significantly reduces their incentives and financial ability to innovate in a sector in which innovation is key for commercial success.[86] A similar conclusion had already been drawn by the Court in the *Microsoft* case on the tying of the Windows client PC operating system and Windows Media player.[87] In fact, most anti-competitive leveraging practices by digital gatekeepers are capable of ending the potential innovation and wealth creation of hundreds of companies.

Overall, due to its cross-market activities, a digital gatekeeper is likely able to monitor and effectively suppress even such innovations that do not originate from rivals within the gatekeeper's core platform market but stem from neighbouring or even remote markets anywhere within the ecosystem. Such power can be seen as the main reason why even disruptive innovations do not cause digital gatekeepers' sleepless nights.[88] Typically, disruptive innovations are that powerful for two reasons. First, because they grow "under the radar" of incumbent firms.[89] Second, because incumbents cannot do anything to stop them from displacing their product. For instance, VCR producers were powerless against the production and sale of DVDs and DVD producers could not technically prevent the rise of video-streaming services. Similarly, Nokia could not stop Apple from selling smartphones. Neither could Kodak prevent smart phone producers from integrating camera functionalities. In contrast, gatekeepers that control the assets and the infrastructure on the basis of which all digital services are provided within their ecosystem may very well even suppress those disruptive innovations that do not originate from any market on which they are active themselves. There are few "blind spots" in such systems to hide, and even less to grow independently without having to deal with the dominant incumbent. Accordingly, the prominent examples of dominant companies that have been toppled over in the past may not serve as a reassurance that the monopolies of today are equally contestable. To quote Keynes, "in the long run this is probably true [...]. But this long is a misleading guide to current affairs. In the long run we are all dead".[90]

[86] Case T-612/17 Google Shopping [2021] EU:T:2021:763, para. 171 "generating traffic initiated a virtuous circle [...] attracting more users and ultimately more revenue [...] which in turn meant that the undertaking concerned could invest more in improving or, at the very least, maintaining its competitive position in a sector – the digital sector – in which innovation is key to commercial success. Conversely, loss of traffic can lead to a vicious circle and, eventually, to market exit due to an inability to compete on essential elements such as the relevance of results and innovation, which are linked, since comparison shopping services innovate in order to improve the relevance of their results and thus attract more traffic and therefore more revenue".

[87] Case T-201/04 *Microsoft v Commission* [2007] ECR II–03601, para. 1088 (confirming the Commission's finding at para. 980 of the Commission Decision in such case).

[88] But see Evans (n 1).

[89] de Streel and Larouche (n 7) para. 9.

[90] Johan Maynard Keynes, *A tract on Monetary Reform* (Macmillan 1923) 80.

5 Creative destructions across digital ecosystems? – The lucrative ecosystem-oligopoly

The main, if not the only, "blind spot" that a gatekeeper may have are disruptions originating from outside of the digital ecosystem it controls. Inter- rather than intra-ecosystem disruptions. So are Google, Amazon, Apple, Meta and Microsoft sufficiently disciplined and incentives to innovate ensured because their ecosystems somewhat compete on a meta level and there is a constant threat that these companies disrupt each other's core platform services, as some have argued?[91]

Most likely not.

Since Google's famously failed attempt to overcome Facebook with the launch of the social network "Google Plus" back in 2011, we have not seen any full-blown attack on a core platform service of another ecosystem. We have seen measures to limit the scope of the other ecosystem or its underlying business model but no attempts to disrupt another Big Tech's "cash cow" service.[92] There may be several reasons for that.

First, gatekeepers are well aware of the power of the protective moats around the core platform services in other ecosystems. They are also aware of the multiple means available to a gatekeeper to even prevent a disruptive market entry in its ecosystem (see above). They know that in order to neutralise all incumbent advantages they would have to take on the entire other ecosystem, not just a particular service. The barriers for such attack are very high.

Second, any gatekeeper starting to invest in innovations to disrupt another gatekeeper would have to expect that latter to do the same and launch a counter-attack on the former. Given the comparable resources and technical means of their respective opponents, the likely financial damage suffered if, in retaliation to an innovation attack on a gatekeeper's core business this giant strikes back, is likely to be significant. In fact, such "retaliation effect" is likely to reduce innovation incentives no less than the "replacement effect" that discourages a dominant firm from investing into technology that may disrupt its *own* core business (above at 3.1).[93] The likely 'lose-lose' scenario for the gatekeepers serves as a strong deterrent to attack each other.

Third, with the notable exception of cloud services (which can be seen as a natural by-product to data-heavy own internet activities), the core business models of Google,

[91] Evans (n 1) 22.

[92] Amazon, Meta and Apple would have the funds and technical means to develop and include a full-blown general search functionality into their core services. Google, in turn, could develop its shopping offerings into a full online marketplace, as many price comparison sites have done before, including the offering of fulfillment services. It could also enhance the social network functionalities of YouTube.

[93] This is because in the latter case the innovator is may (at least) foresee and somewhat control to which extent its innovation will harm/replace its existing cash cow service. He/she may also freeze its innovation process at any time, while it has no control over the strength and durance of its rival's retaliation.

Third, with the notable exception of cloud services (which can be seen as a natural by-product to data-heavy own internet activities), the core business models of Google, Amazon, Apple, Meta and Microsoft are largely complementary rather than substitutive.[94] More importantly, at least over the last decade, these companies have all grown neatly side-by-side each other in terms of revenues and market capitalization. At a macro-level, each company contributed to their joint overall growth and thereby helped each other. That is because the largest growth still results from the overall increase in global internet consumption. Since 2015, nearly 3 billion people worldwide came online for the very first time.[95] "In the next four years, we expect another 1.2 billion new internet users".[96] Their user experience typically starts at a mobile phone.[97] Big Tech's joint goal is to increase such online usage. Their joint enemy is offline and non-consumption. Occupying the first touchpoints that shape the user experience and providing combined added value, together they all increased digitalisation and shifted consumer attention away from offline media and commerce to internet consumption – where these gatekeepers are unavoidable trading partners. "*Anything that increases Internet use ultimately enriches Google*", Google's chief economist Hal Varian[98] once said. The same is true for the other gatekeepers. Such common goal in enhancing overall consumption unites more than it divides. The more people Amazon and Meta pull online, the more will naturally also use Apple and Google products – and vice versa.

Fourth, against this background there are much stronger incentives for such gatekeepers to go out of each other's way rather than to interfere. It makes more economic sense for them to focus their (static) innovation efforts on their own products and to co-operate with the other gatekeepers to enhance their mutual total revenues rather than to disrupt each other's core platform services.

Over the last few years, more and more such co-operation emerged. Google has concluded many "Revenue Sharing Agreements" (RSA) with device manufacturers and web browsers[99] to use Google services, in particular the "cash cow" Google Search as a default service. The most valuable RSA was concluded with Apple. Apple now earns up to USD 12 bn per year simply for not introducing its own search service.[100] In effect, those

[94] Sale of mobile devices (Apple), search advertising (Google), display advertising (Meta), online marketplace (Amazon), desktop devices and operating systems (Microsoft); see above footnotes [33-38].
[95] Digital 2022 Global Overview Report <https://bit.ly/3NlnH1f> accessed 23 June 2022.
[96] Google Developers, 'Building better products for new internet users' (*Google Developers Blog*, 5 May 2022) <https://bit.ly/3bc33TY> accessed 23 June 2022.
[97] Digital 2022 Global Overview Report (n 95).
[98] Google chief economist Val Harian in interview with Steven Levy, 'Secret of Googlenomics: Data-Fueled Recipe Brews Profitability' (*Wired*, 22 April 2009) <https://bit.ly/3tOtlST> accessed 22 June 2022.
[99] *Google Android* (Case AT.40099) Commission Decision [2018], paras. 796(2)(c), 845, 1192; *United States v Google* (Case No. 1:20-cv-03010 (District Court, District of Columbia). DoJ amended complaint (15 January 2021), para. 4.
[100] DoJ amended complaint (n 99) para 118.

RSAs serve as 'no disruption-agreements'. Under the RSAs, the higher Google's revenues, the more its partner earns (for doing nearly nothing). Thus, there is an aligned interest to increase rather than challenge Google's monopoly revenues.[101] With a view to maximising their joint revenues, Apple and Google in particular have largely aligned their strategies also regarding privacy limitations for third parties[102] and conditions to access and use of app stores.[103] Already in 2007, former Google CEO Eric Schmidt joked with Steve Jobs that they "could just sort of merge the companies" and "could call them AppleGoo".[104] In a much younger document, a Google manager described the relationship with Apple as follows: "Our vision is that we work as if we are one company",[105]

Recent revelations relating to the "Jedi Blue" and "Project Bernanke" agreements[106] but also joint initiatives for the standardisation of central ad technology[107] reveal that also Google and Meta are co-operating very closely to prevent disruptions of their core advertising businesses. Further, Amazon and Apple meanwhile agreed that in future the Amazon marketplace will only offer Apple devices directly from Apple, not from any other merchants. We can assume that such emerged agreements are just the tip of the iceberg. Also, their several joint lobbying efforts[108] suggest that behind the scenes the current digital gatekeepers co-operate among each other with a view to defining their respective and joint spheres of influence.

[101] See DoJ amended complaint (n 99) para. 120 "Apple's RSA incentivizes Apple to push more and more search traffic to Google and accommodate Google's strategy of denying scale to rivals".
[102] See above footnotes [25] and [43] on Google Privacy Sandbox/Topics and Apple ATT.
[103] For instance, both charge a commission of 15% or 30% for any sales via an app store, and both disallow third party payments systems, see Manish Singh, 'Google Play drops commissions to 15% from 30%, following Apple's move last year' (*TechCrunch*, 16 March 2021) <https://tcrn.ch/3Oi5V0e> accessed 23 June 2022.
[104] Tim Wu, 'Steve Jobs, a New Mogul With Old Methods' (*slate*, 11 November 2010) <https://bit.ly/3OwCQy2> accessed 22 June 2022.
[105] DoJ amended complaint (n 99) para. 120.
[106] *Texas v. Google* (Case no. 1:21-md-03010-PKC (District Court, S.D. New York)) Complaint (14 January 2022), para 26.
[107] Amongst others, "in partnership" with the World Federation, both companies have proposed and are pushing for a new standard for the cross-media measurement of advertising which may present online advertising as being more effective than offline advertising. See Rahul Sachitanand, 'WFA says it has cracked cross-media measurement' (*campaign*, 17 September 2020) <https://bit.ly/39PMMUv> accessed 23 June 2022.
[108] Such as through funding the Connected Commerce Council, the Computer & Communications Industry Association (CCIA) and the Information Technology & Innovation Foundation (ITIF) to name few. See Eamon Javers and Meghna Maharishi, 'How Google and Amazon bankrolled a 'grassroots' activist group of small business owners to lobby against Big Tech oversight' (*CNBC*, 30 March 2022) <https://cnb.cx/3QGK308> accessed 22 June 2022.

Even where no agreements have been concluded between Google, Amazon, Apple, Meta and Microsoft, their narrow "attention oligopoly"[109] and common objective to increase online consumption increases the likeliness to engage in tacit collusion and oligopolistic parallel behaviour[110]. This further reduces any prospect of significant dynamic competition amongst them.

6 Schumpeter revisited in walled-off ecosystems

In order to prevent competition and disruption, you do not have to *own* all competitive resources yourself. It is sufficient to technically or commercially *control* them. The gatekeeper's operation of largely walled-off ecosystems with technically integrated business users allows them to exert such effective control over the use of innovation inputs. By setting the rules of the game and the technical parameters to play for every participant of a digital ecosystem, gatekeepers have endless means to suppress even radical innovation.[111]

Schumpeter would turn in his grave if he knew how some of his arguments on "creative destruction" are being used today to justify anti-competitive measures that destroy the creatives. Schumpeter was not against competition intervention. In fact, for him the main criterion for whether or not a market was competitive concerned its contestability.[112] The relevant question was not "how many firms are in this industry" but "what are the barriers to entry that are preventing firms from coming up with substitutes?"[113] As outlined above, the control of an ecosystem can create insurmountable barriers to enter markets and to grow, even for the most innovative

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

[110] According to theory of oligopolistic parallel behaviour, on markets with an oligopolistic structure, companies observe and anticipate the competitive decisions of their rivals very closely and attempt to prevent that any such decisions bear fruit, in particular by quickly adjusting their own offerings to that of a rival. Such parallel behaviour reduces any incentive for an oligopolist to alter its prices or products in the first place. There is, so to speak, an implicit understanding amongst the companies. See Reza Dibadj, 'Conscious Parallelism Revisited' (2010) 47 San Diego L. Rev. 589.

[111] See Robert Andrews, 'Google Won't Buy Ailing Newspapers, Could 'Merge Without Merging'' (*CBS News*, 8 February 2010) <https://cbsn.ws/3QFBqmr> accessed 13 June 2022 citing ex Google CEO Eric Schmidt: 'The good news is we could purchase them (newspapers). I think the solution is tighter integration. In other words, we can do this without making an acquisition. The term I've been using is 'merge without merging'. The web allows you to do that, where you can get the web systems of both organizations fairly well integrated, and you don't have to do it on exclusive basis.'

[112] Art Carden, 'The Essential Joseph Schumpeter: An Easy and Accessible Introduction to an Important and Complex Thinker' (*AIER*, 14 July 2020) <https://bit.ly/3xOHuQX> accessed 22 June 2022; For a detailed comparison of Schumpeter's approach and the Baumol'sche contestability theory (developed much later) see Ann Helwege and Ann Hendricks, 'Contestability and creative destruction: Two approaches to monopoly' (1985) 2 Review of Industrial Organization 218.

[113] Art Carden (n 112).

firms. Gatekeepers can use such control to spot and hinder even disruptive innovation[114], by depriving rivals of crucial resources or the means to diffuse any innovation within the closed ecosystem. Such "barriers to innovation" can insulate companies in today's high-tech economy for competition for decades.[115]

7 Consequences for competition policy

The protective moats and walls that digital gatekeepers have built around their "cash cow" services significantly reduce the incentives and abilities to innovate within such ecosystem and to disrupt the incumbent. Due to common interests and mutual interdependencies of the operators of the largest digital ecosystems, it also cannot be presumed that the lack of innovation within ecosystems (intra-ecosystem competition) is sufficiently outbalanced by innovation across ecosystems (inter-ecosystem competition).

In such a setting, competition policy may no longer assume that dynamic competition sufficiently disciplines even dominant companies and that there is a higher risk from over-enforcement than from under-enforcement.

Rather, where walled-off ecosystems are suppressing dynamic competition for core platform services, competition authorities need to pro-actively intervene to make such markets contestable again. A "weak contestability reduced the incentives to innovate and improve products and services for the gatekeeper, its business users, its challengers and customers and thus negatively affects the innovation potential of the wider online platform economy."[116] Hence, the protective moats need to be bridged and the protective walls broken down so that superior innovation can freely develop and, even more importantly, be rapidly adopted and diffused within any ecosystem. It may not be enough or even be counterproductive to artificially add more complexity to the system.[117] To take the risk of high investments in innovation, companies require planning security in the sense that if their investments lead to a superior product, such products must be able to reach the market. This primarily requires that the central competitive weapon that gatekeepers possess – their power to use their core platform services to hinder access to and growth within markets – is fully neutralised. We need competition and open platforms at each level of the digital value chain. Products and services need to find their way to end users on the basis of their quality, not on the basis of the incumbent's goodwill. This presupposes that every business has access to every

[114] de Streel and Larouche (n 7) para 47.
[115] Gilbert and Melamed (n 18) para. 679.
[116] Recital (32) Digital Markets Act (n 15).
[117] As proposed by Nicolas Petit and Thibault Schrepel, 'Complexity-Minded Antitrust' (2022) Working Paper, available on SSRN <https://bit.ly/3QETJZi> accessed 22 June 2022.

core platform service on a fair, reasonable and non-discriminatory basis. Specific obligations to keep intermediation fair and markets contestable (for innovation) such as in the European Digital Markets Act[118] as well as the American Choice and Innovation Online Act[119] are therefore the right approach. "Market participants, including business users of core platform services and alternative providers" should indeed "have the ability to adequately capture the benefits resulting from their innovative or other efforts".[120] Given that innovation often emerges from business users whose services rely on a platform of the very company whose service they threaten to displace, promoting fair access to platforms and keeping platforms contestable goes hand in hand.[121] Such obligations need to be complemented with speedy and efficient enforcement tools and specialised enforcement units. Where, due to network effects, an early lead and locking up of a market can be essential, swift intervention and remedies that fully prevent an anti-competitive practice to prevent such growth are crucial.[122] Otherwise, fines, even damages, for anti-competitive suppression of innovation may be treated as a worthy cost of the business to maintain a monopoly. The longer enforcement takes, the more opportunities are available to dominant incumbents for deploying their muscles to suppress any innovation.

Ultimately, we require a more ecosystem-specific, dynamic regulation that focuses on the overall strategy of gatekeepers to shield off competition and innovation. Reviewing anti-competitive conduct or acquisitions in isolation, or only with a view to the platform service directly affected (rather than the ecosystem as a whole), bears the risk of missing the crucial point.[123] A conduct relating to a seemingly remote service may have significant repercussions also for a gatekeeper's core platform service. The ecosystems of Google, Apple, Amazon in particular are so complex that enforcement authorities need to become experts in these spheres. Akin to the specific regulation of telecom markets, authorities need to consider a gatekeeper's overall strategy and be able to impose tailored obligations where and as long as they are indeed required. Specific regulatory bodies and specific regulatory provisions for general search engines, app stores and ad tech services appear most pressing in this respect. In any case, if we wish to see less destruction of the creatives and more creative destructions, legislators and enforcement authorities should finally remind digital gatekeepers of

[118] See Digital Markets Act (n 15).
[119] Introduced in House on 11 June 2021 (H.R:3816 - 117th Congress (2021-2022)) <https://bit.ly/39HcSJe> accessed 22 June 2022.
[120] Recital (33) Digital Markets Act (n 15).
[121] Recital (34) Digital Markets Act (n 14); Khan (n 57) 3.
[122] Khan (n 57) 3.
[123] Kanter (n 40): 'Reviewing moat-building conduct in a vacuum or in distinct parts risks misunderstanding the basic commercial realities at play. The anticompetitive effect of one aspect of the strategy is magnified by the other parts.'

their original promise: to create engines of opportunities rather than engines to stifle innovation and free markets.

Francesco Parisi[*] *– Ram Singh*[**]

WILL COMPETITION REDUCE ATTENTION COSTS IN SOCIAL MEDIA?

Abstract

Unlike other monopolies, social media networks almost uniformly give access to their services for free to everybody. Economists refer to these markets as "zero-price markets." The main, and often sole, source of revenue for the network owners comes from fees that are paid by advertisers. Network owners offer access to users in exchange for users' attention to advertisements. Economists refer to these implicit market exchanges under the heading of "attention economy." Regulatory solutions and antitrust remedies have been considered to foster cost reduction in the market economy. This paper investigates the conditions under which an increase in competition in the social media market would reduce the attention cost problem highlighted in the literature. Contrary to intuition, this paper shows that an increase in competition in the social media market could increase, rather than decrease, the attention costs imposed on users. Social media networks with monopoly power charge higher prices to advertisers to maximize their profit. Competition in the social media industry would lead to lower (competitive) prices for advertisers which lead to more advertising and higher attention costs imposed on users.

JEL CLASSIFICATION: K21, L10, D40.

SUMMARY

1 Introduction – 2 Effect of competition on attention costs - 3 Set-up of the model – 3.1 Attention costs without user's mobility - 3.2 Attention costs with user's mobility – 4 Conclusions

1 Introduction

In recent years, there has been a wealth of scholarship and public skepticism to problems elated to social media zero-price services and the attention costs imposed on users,[1] as reflected in the warnings of Justin Rosenstein, former Facebook and Google

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[1] During the last decade, several scholars in the legal and economic academic community have given attention to the problems of the attention economy. See, Erik Brynjolfsson and Joo Hee Oh, 'The Attention Economy: Measuring the Value of Free Digital Services on the Internet' (2012) <https://core.ac.uk/download/pdf/301358781.pdf> accessed 28 July 2022; David S Evans, 'The Antitrust Economics of Free' (2011) 7 Competition Policy International Journal 1; Michal Gal and Nicolas Petit, 'Radical Restorative Remedies for Digital Markets' (2021) 37 Berkeley Tech. L.J. 102; Michal Gal and Daniel L Rubinfeld, 'The Hidden Costs

Chief Engineer, who alerted, "If you are not paying for the product, you are the product."[2]

Social media platforms have been classified as monopolies by the Federal Trade Commission (FTC)[3] and the U.S. Department of Justice (DOJ),[4] although the nature of these monopolies and the associated social deadweight loss remain to be established,

L Rubinfeld, 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement' (2016) 80 Antitrust L.J. 521; Dipayan Ghosh, 'Don't Break Up Facebook - Treat it Like a Utility' (*Harvard Business Review*, 30 May 2019) <https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility> accessed 28 July 2022; Richard J Gilbert, 'Separation: A Cure for Abuse of Platform Dominance?' (2021) 54 Information Economics and Policy; Bruno Jullien and Wilfried Sand-Zantman, 'The Economics of Platforms: A Theory Guide for Competition Policy' (2021) 54 Information Economics and Policy; Andrew M Lindner, 'Attention for Sale' (2017) 16 Contexts 60; John M Newman, 'Antitrust in Attention Markets: Objections and Responses' (2020) 59 Santa Clara L. Rev. 743; John M Newman, 'Antitrust in Zero-Price Markets: Applications' (2016) 94 Wash. U. L. Rev. 49; John M. Newman, 'Antitrust in Zero-Price Markets: Foundations' (2015) 164 U. Pa. L. Rev. 149; Francesco Parisi and Elvira C Parisi, 'Rethinking Remedies for the Attention Economy' (2022) Research in Law and Economics (forthcoming); Dana Wagner 'Is Free an Antitrust Issue?' (*Google Public Policy Blog*, 10 July 2009) <https://publicpolicy.googleblog.com/2009/07/is-free-antitrust-issue.html> accessed 28 July 2022; Scott Wallsten, 'Competition Analysis in the Attention Economy: It's About Time' (*Technology Policy Institute*, 5 February 2020) <https://techpolicyinstitute.org/2020/02/05/competition-analysis-in-the-attention-economy-its-about-time/> accessed 28 July 2022; Tim Wu, 'Blind Spot: Attention Economy and the Law' (2019) 82 Antitrust Law Journal 771; Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads*' (Alfred A Knopf 2016); Tim Wu, 'Attention Brokers' (2015) <law.nyu.edu/sites/default/files/upload_documents/Tim%20Wu%20%20Attention%20Brokers.pdf> accessed 28 July 2022.

[2] The warning was made during an interview in the documentary 'The Social Dilemma' (2020) by Jeff Orlowski (Director). In the same documentary, Yale Professor Edward Tufte, interestingly noted that there are only two markets in which "consumers" are referred to as "users": illegal drugs and software.

[3] In its suit against Facebook, *Federal Trade Commission v. Facebook, Inc.*, No. 20-03590 (D.D.C. filed Dec. 9, 2020, refiled amended Aug. 20, 2021) the Federal Trade Commission (FTC) along with 46 other state attorneys general, focused on the market for attention. The FTC noted that 'Facebook monetizes its personal social networking monopoly principally by selling advertising, which exploits a rich set of data about users' activities, interests, and affiliations to target advertisements to users,' seeking to 'leverage [...] high engagement and frequent contact with users.' Further, the FTC alleges that '[b]y monopolizing personal social networking, Facebook [...] deprives advertisers of the benefits of competition, such as lower advertising prices and increased choice, quality, and innovation related to advertising.'

[4] The House Antitrust Subcommittee recommended structural separations because of the vast amounts of data social media networks possess and the ability to use that data to exclude rivals, the exploitation of their dominance in one market as leverage in other markets, the ability to tie products and services, and the ability to use supra-competitive profits from dominant markets to subsidize entry into other markets. Structural separations seek to 'eliminate the conflict of interest faced by a dominant intermediary when it enters markets that place it in competition with dependent businesses.' Structural separations may include '(1) ownership separations, which require divestiture and separate ownership of each business; and (2) functional separations, which permit a single corporate entity to engage in multiple lines of business but prescribe the particular organizational form it must take.' Subcommission on Antitrust, Commercial, and Administrative Law of Comm. on the Judiciary, Investigation of Competition in Digital Markets, [2020] 378–81. The proposed enforcement measures advocated for bright-line rules and structural presumptions in concentrated markets, increased protection for potential rivals, nascent competitors, and startups. The enforcement measures also proposed strengthening the vertical merger doctrine, among other measures to strengthen the antitrust laws in the U.S.

both theoretically and empirically.[5] According to conventional economic wisdom, competitive forces can curb the profit opportunities of monopolistic firms to the benefit of users. In recent years, structural remedies were advocated for regarding Facebook in 2019 by Massachusetts Senator Elizabeth Warren, Texas Senator Ted Cruz, and former Secretary of Labor Robert Reich. They argued that antitrust remedies, including a potential "break up" of the social media giant, were needed to limit the "insidious effects" that had been seen pertaining to the activities carried out on Facebook and similar networks (Ghosh, 2019). In October of 2020, the House Antitrust Subcommittee (U.S. House of Representatives), issued a report recommending several ways to mitigate Facebook's market power, including "structural separations" of the company and increased enforcement measures.[6]

Although the recent financial reports reveal that the user base of Facebook is naturally shrinking without the force of legal intervention,[7] questions have been raised as to whether the traditional instruments used to tame the abuse of a monopolistic position fit the needs of regulators in social media, zero-price markets.[8] Equally concentrated digital markets can behave competitively or non-competitively, depending on the degree of substitutability of the platforms. Some zero-price networks are unable to maintain high attention costs in a competitive market. For example, internet radio stations offer similar products, and their substitutability is high. Listeners have no ties to specific radio stations and can migrate from one station to another by clicking a button, without breaking away from their social networks. In these particularly substitutable zero-price markets, competition can help reduce advertisements and attention costs. As it will be shown in our analysis, things are different for social media networks.

[5] Parisi and Parisi (n 1) discuss the unique nature of social media "monopolies," observing that zero-price monopolies create a social deadweight loss, that is not directly analogous to the deadweight loss created by traditional positive-price monopolies.

[6] More generally, structural remedies have been advocated for the digital industry in both the U.S. and the E.U., at least as a preventive measure with respect to prospective mergers: see, for example, Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley and Philip Marsden, *Unlocking digital competition: Report of the Digital Competition Expert Panel* (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 28 July 2022; Stigler Committee on Digital Platforms, 'Final Report' (Chicago Booth, Stigler Center for the Study of the Economy and the State, 2019) <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> accessed 28 July 2022; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (eds.), 'Competition Policy for the digital era: Final report' (European Commission, 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 28 July 2022.

[7] Facebook's earnings report on 4 February 2022 showed the social media platform losing users for the first time in 18 years of operation. Facebook pointed to TikTok's competition for users as one of the factors that contributed to the shrinking in its users' base.

[8] In different contexts, Evans (n 1) and Gal and Petit (n 1) have suggested that the traditional instruments used to tame the abuse of a monopolistic position do not fit the needs of regulators in social media, zero-price markets.

advertisements and attention costs. As it will be shown in our analysis, things are different for social media networks. The model is intended to examine the attention monopoly paradox of social media platforms, identifying the conditions under which the counter-intuitive positive effect of competition on attention costs might be observed. This paper will consider the effects of competition on attention costs when users have varying levels of mobility. In a competitive environment, social media networks also want to render their platform more appealing to new and existing users, by reducing advertisements, but – as it will be shown in the following paragraph – their ability to do so will be impaired.

2 Effects of competition on attention costs

In this paper we address the question of whether an increase in competition in the social media industry can help decrease attention costs. Attention costs are those costs imposed on consumers by the product such as the time users spend on a social media advertisements or unsolicited information they are exposed to.[9] Attention costs are costs imposed upon users of social media platforms when they use these products. Because attention costs are bundled with the free services offered by social media and imposed upon the users without an option to opt out of them, they are generally regarded as potentially problematic.[10] We investigate whether the equilibrium level of advertising observable in a competitive market is lower than the advertising observed in a social media monopoly. We develop a simple model comparing the equilibria obtainable in a social media monopoly to those obtained when additional platforms become available to users and advertisers. The analysis unveils an interesting counter-intuitive result, which challenges the idea that more competition reduces deadweight loss to the benefit of consumers. In the specific case, we show that, even if market de-concentration could be sustained by regulatory intervention,[11] competition between social media networks leads to an increase in advertising and would drive up attention

[9] Aileen Nielsen, 'How to measure and regulate the attention costs of consumer technology' (*TechStream: Brookings Institute*, 4 November 2021) <https://www.brookings.edu/techstream/how-to-measure-and-regulate-the-attention-costs-of-consumer-technology/> accessed 28 July 2022, addressed the issue of measuring attention costs of consumer technology in the modern economy.

[10] For the purposes of this paper, we consider attention costs as being the primary cost of social media use, which is otherwise free to the user. There are often other costs associated with the use of social media, such as the exchange of personal data. Further, Nielsen (n 9) suggested that impacts of cognitive performance as well as distraction from external stimuli both be considered when calculating the "attention cost" of consumer technology.

[11] Parisi and Parisi (n 1) suggest that social media networks are a unique form of natural monopolies, due to the "network effects" that they generate on the consumption side for their users (in addition to the standard economies of scale and scope on the production side). An increase in the number of users makes a platform more attractive to both users and advertisers (eg, by fostering easier communication, networking opportunities, etc). As a result, divestiture of social media networks may not be sustainable in

social media networks leads to an increase in advertising and would drive up attention costs imposed on users. A social media monopoly can charge higher prices to advertisers. To maximise their profit, social media monopolies would restrict the quantity of advertising and impose lower attention costs on users. We shall refer to this counterintuitive result as the "attention monopoly paradox."

3 Set-up of the model

In the following, we provide a model to examine the attention monopoly paradox of social media platforms, identifying the conditions under which the counter-intuitive positive effect of competition on attention costs might be observed.

We consider social media platforms with the following characteristics: (i) the marginal cost of serving additional users is almost zero; (ii) users get access free of cost (iii) strong network effects exist for users (i.e., the users may find it undesirable to switch across media platforms, because they may not want to leave their social networks).

In our setup, there are three players: (1) social media platforms; (2) social media users; and (3) firms advertising on social media. In this paper, we focus on the first two players. A social media platform can be set up at a fixed-cost, F. We consider an existing number N of users of social media, spread across the available platforms. Assume that each user spends a fixed amount of time on a social media platform. Each platform provides free access to the platform and users do not pay any price (in monetary terms) for using social media. Without loss of generality, let's assume that when multiple platforms are available, a user utilises only one of the platforms. The choice of a platform might depend on several factors (e.g., number of friends using a given platform, quantity of advertisements, and attention costs imposed on each platform, etc.). Depending on the relative magnitude of these effects, a user may or may not be induced to switch across platforms, if the option of more than one platform is available.

The source of revenue for a social media platform is the advertisement space purchased by firms. Firms want to advertise their products on social media because advertisements help firms increase their sales, and maximise profits. A social media platform offers advertising services at a price. The quantity of the advertisement shown by a platform can be thought of in terms of the total number of eye-ball hours spent on viewing advertisements by the users. Therefore, one way to quantify the total advertisement services is in terms of the total time spent by all users on viewing the contents of advertisements.

in the long run, because users will simply converge to a single network to enjoy the benefits of being connected to each other.

Let $Q(p)$ denote the total demand function for advertising services (from all advertising firms combined), i.e., $Q(p)$ denotes the total number of eye-ball hours of attention demanded at price p. Let, $p(Q)$ denote the inverse demand function, with $p'(.) < 0$; $Q'(.) < 0$ and $\lim_{p\to\infty} Q(p) = 0$. From the supply side, the total demand is shared across the available platforms. If there are two platforms, for any given price p the total demand can be expressed as the sum of the demand met by the two platforms, i.e., $q_1(p) + q_2(p) = Q(p)$. It is plausible to assume that $q_1(p)$ and $q_2(p)$ depend on and are proportional to the number of users – the larger the number of users on a platform is, the higher its share of the total demand will be.

There is a cost to providing the advertising services because the process requires the platform to make users devote some of their attention to the advertisements. Besides the indirect cost incurred by redirecting users' attention to the ads and possibly rendering the platform less attractive to users, advertising requires marketing and administrative tasks by the social media platform for the sale of advertisement space. This may also entail the use of AI to identify the set of users who would be most interested in the advertisement of a given product, screening ads that are appropriate for the target users, and designing native ads that blend with the content of the media page. All these costly techniques provide greater incentives for the users to pay attention to targeted advertisement and greater returns to advertisers.[12] Formally, a platform i providing q_i amount of advertising services has to incur costs $c(q_i)$; $c'(.) > 0$. So, the operative profits for platform i can be expressed as $p(Q)q_i - c(q_i)$.

Advertisements lead to greater sales and profits at firm level. A firm can advertise its products on all of the available platforms. Since our focus is on the platforms and their users, we assume the aggregate payoffs of all the advertising firms and their consumers (i.e., profits of firms plus consumer surplus enjoyed by their consumers) are constant and taken to be zero for simplicity.

As mentioned above, the platforms do not charge any fee to users. The users derive benefit from the social media without paying any monetary price. Let u denote the direct benefit received from this free service by a social media user. Given the network effects, u depends on the number of users on the platform. The larger the number of users on a platform is, the greater the direct benefit to an individual user will be. Formally, u is an increasing and (weakly) convex function of the number of users on a platform, i.e., $u' > 0$ and $u'' \geq 0$. To recoup its start-up cost and sustain profitability, the platforms impose 'attention costs' on the users through advertising. That is, a social media user exposed to advertisements incurs attention costs in terms of time spent and

[12] Targeted advertisements are ones that use data to focus on consumers' traits, interests, preferences, etc., to better engage these consumers and lead to higher conversion rates. Native ads are ads that match the look, feel and function of the surrounding media content in which they appear.

possible health costs. Although some of the advertisements may be informative and beneficial to the users, others may be perceived as an unwanted encroachment on the users' time. In the interest of generality, let us denote the net balance of undesired advertisements as A. Let us also assume that all users on a platform are exposed to the advertisements shown by the platform. Let A be a function of the users' total exposure to advertisements. Assume $A' > 0, A'' \geq 0$. For a platform user, the net payoffs thus become, $U = u(.) - A(.)$, which depend on the number of users on the platform and the number of advertisements shown on the platform.

In order to address the question of whether competition will help correct the social media attention cost problems, let us begin our analysis by assuming that the advertising firms can switch between platforms costlessly or choose to advertise on different platforms simultaneously. As far as the mobility of users is concerned, in the real world social media users form networks and generally face costs in moving from one platform to another (and may find it less convenient to use two platforms simultaneously), in the following we will consider the social media paradox under both users' mobility scenarios.

As a benchmark of comparison for both scenarios, let's consider the attention cost equilibrium observable when there is only one social media platform. The monopolistic platform will choose q to maximise its profits. Since the number of users is given, there is no risk of losing a user. So, the optimization problem for the social media monopoly is to choose $q(= Q)$ to solve:

$$\{p(Q = q)q - c(q)\}$$

Assuming, $c(q) = cq$. Let the solution be $\underline{q}$. That is, under a monopolist platform, all users combined will spend $\underline{q}$ eye-ball hours on viewing advertisements on the platform. So, the average exposure to advertisements is $\frac{\underline{q}}{N}$. That is, a user is exposed to $\frac{\underline{q}}{N}$ amount of advertisements with corresponding attention costs equal to $A\left(\frac{\underline{q}}{N}\right)$. The net benefits to a user are: $u(N) - A\left(\frac{\underline{q}}{N}\right)$. The total attention costs for all users is $N\ A\left(\frac{\underline{q}}{N}\right)$.

The aggregate benefits, B, under monopoly can be taken as the sum of the payoffs of the social media monopoly and the users. That is,

$$B(Monopoly) = p\left(\underline{q}\right)\underline{q} - c\underline{q} - F + N\left[u(N) - A\left(\frac{\underline{q}}{N}\right)\right] \qquad (1)$$

We can now compare the above equilibrium to the one obtainable by introducing competition among social media platforms. In Paragraph 2.2 we will consider the effects

of competition on attention costs when users have no mobility, and in Paragraph 2.3 we will consider the effects of competition on attention costs when users have full mobility.

3.1 Attention Costs Without User's Mobility

In this first scenario, we consider the case where users cannot switch across platforms. This may be the case where there are close ties and network effects among the users on a platform, and coordination costs prevent individual users to switch platforms, even when the current platform imposes large attention costs on them.

We can now compare the equilibrium of the social media monopoly to the one obtainable by introducing competition among social media platforms, when users face high mobility costs. Let's begin assuming that there are two platforms competing for the advertisement revenue. Let n_1 and n_2 denote the number of users on platform 1 and 2, respectively. For simplicity, assume each platform has equal number of users; so, $n_1 = n_2 = \frac{N}{2}$. For a given price, the total demand is split between the two platforms as $q_1(p)$ and $q_2(p)$; $q_1(p) + q_2(p) = Q(p)$. In particular, in view of $n_1 = n_2$, at a given price p, the total demand is divided equally between the two platforms; $q_1(p) = q_2(p) = \frac{Q(p)}{2}$. Therefore, the platform i will choose supply of advertisement services as in a duopoly game, i.e., choose q_i to solve

$$\max_{q_i}\{p(Q)q_i - cq_i\}$$

Let the solution be q_i^D. Given the symmetry between the two platforms, $q_1^D = q_2^D = q^D$. The total supply of advertisement will be $2q^D$. In view of our assumptions on the demand function, it is easy to see that $2q^D > \underline{q}$. Since a platform has $\frac{N}{2}$ users, under duopoly each user is exposed to $\frac{2q^D}{N}$ amount of advertisements. So, the average attention cost is $A\left(\frac{2q^D}{N}\right)$. Note that $\frac{2q^D}{N} > \frac{\underline{q}}{N}$, and hence $A\left(\frac{2q^D}{N}\right) > A\left(\frac{\underline{q}}{N}\right)$. The total attention costs from both platforms is $NA\left(\frac{2q^D}{N}\right)$. This brings to light an important counterintuitive result.

Proposition 1: *When users face high mobility costs, the average and total attention costs imposed on users under a monopoly are less than under a duopoly,* $N\,A\left(\frac{\underline{q}}{N}\right) < NA\left(\frac{2q^D}{N}\right)$. *A social media monopoly pollutes its platform with fewer advertisements.*

Corollary 1: *When users face high mobility costs, the attention cost problem is amplified when the social media industry becomes more competitive, with a larger number of platforms.*

In other words, the attention monopoly paradox is amplified when the social media industry becomes more deconcentrated. The attention costs imposed on users are not curbed, but they further increase when competition in the social media industry increases.

To see this, consider the case when there are three platforms, i.e., there is a triopoly. As demand is shared equally by the platforms, under triopoly platform *i* will solve

$$\max_{q_i}\{p(Q\ )q_i - cq_i\}$$

Let the solution be q_i^T. In view of the symmetry of the profit maximization problems, $q_1^T = q_2^T = q_3^T = q^T$. So, the total advertisement will be $Q = 3\ q^T$. It is easy to see that $3\ q^T > 2q^D > \underline{q}$. That is, as the number of social media platforms increases, the quantum of total advertisement time will also increase. Moreover, an average user is exposed to $\frac{3q^T}{N}$ amount of advertisement, which is greater than the duopoly case and to the detriment of social media users.

The advertisement revenue for all three platforms combined will also increase: $p(Q)Q = p(3\ q^T)3\ q^T$. That is, $p(Q)Q$ is now larger than the duopoly case, but the total operational profits of all platforms, $[3p(3\ q^T)\ q^T - 3c(\ q^T)]$, is actually less than the total profit in duopoly.

We can now compare the aggregate welfare of platforms and users under monopoly, duopoly and triopoly. First consider, the case of the duopoly with the monopoly alternative. For the duopoly case the aggregate benefit of the platforms and the users is

$$B(Duopoly) = 2[p(2q^D)q^D - cq^D - F] + N\left[u\left(\frac{N}{2}\right) - A\left(\frac{2q^D}{N}\right)\right] \qquad (2)$$

As shown above, compared to monopoly, the users are clearly worse-off under duopoly. The platforms are also worse-off as their operating profits and net profits are lower under duopoly. It can be easily shown that this effect is exacerbated with an increase in competition as the number of platforms increases. In the case of triopoly, a user's benefit is $u\left(\frac{N}{3}\right)$ and the average attention cost is $A\left(\frac{3q^T}{N}\right)$. The aggregate benefit of the users and platforms combined is given by

$$B(Triopoly) = 3[p(3q^T)q^T - cq^T - F] + N\left[u\left(\frac{N}{3}\right) - A\left(\frac{3q^T}{N}\right)\right] \qquad (3)$$

Note $u\left(\frac{N}{3}\right) < u\left(\frac{N}{2}\right) < u(N)$ but $A\left(\frac{3q^T}{N}\right) > A\left(\frac{2q^D}{N}\right) > A\left(\frac{q}{N}\right)$. That is, under triopoly the users' benefit will be less than under a duopoly and hence less than under a monopoly. Attention costs further increase under a triopoly beyond their level under duopoly,

which is greater than the attention costs under the monopoly case. Therefore, users are worse-off as competition increases. The net payoff for all the platforms is given by $3[p(3\,q^T)\,q^T - c\,q^T - F]$ which is less than the duopoly case. Therefore, the platforms' payoffs similarly decrease with the level of competition in the industry. This is an interesting result because competition usually corrodes producers' profit while enlarging consumers' surplus and overall welfare. The analysis thus far carried out reveals that introducing competition in a social media monopoly reduces the welfare of *both* social media platforms and social media users. Formally, comparing (1), (2) and (3), we get

$$B(Triopoly) < B(Duopoly) < B(Monopoly) \tag{4}$$

That is, the effect of increased competition among the social media platforms is to reduce the aggregate benefits. The last remaining piece of the puzzle, which we do not formally address in this paper would be to assess the overall social welfare effect of competition in the social media market, by taking into account the effect of competition on the welfare of the advertising firms and their prospective consumers. We can conjecture that if the advertisements have purely redistributive effects and do not affect the total profits across the advertising firms or the total demand they face, or the surplus enjoyed by their consumers,[13] introducing competition in the social media industry would make things worse with respect to aggregate social welfare. Even when the adverting firms all together gain from increased advertisements, as long as this effect is relatively small, the overall welfare under duopoly would be smaller than under monopoly, and this negative effect on welfare would be exacerbated in the triopoly case.

[13] Clearly this is a simplifying assumption. In principle, advertisements can affect not only the distributions of sales and profits but also their aggregate levels. The analysis of these effects hinges on a variety of effects that have been extensively studied in the literature which fall outside the direct scope of our research. Studies have shown that advertising may be a rational investment for individual firms, but may not necessarily be beneficial for the aggregate profitability of an industry. When advertising aims at increasing the market share of a firm (at the expense of the market share of other firms), without increasing the overall demand on the market, firms will face a zero-sum cooperation problem: advertising will be a dominant strategy leading to lower payoffs in the industry. When advertising increases market demand the total payoff of the industry can possibly go up or remain unaffected. Aggregate sales in turn will have consequences in terms of the consumer surplus. To sum up, competition among social media for advertisements cuts both ways. In some cases, it could be good for the advertising firms and their consumers in terms of π(Q), but it would always adversely affect the net payoffs of the social media platforms and the attention cost by their users.

3.2 Attention Costs With User's Mobility

The effect of competition on the attention costs imposed on users is different when users do not face mobility costs and can freely switch from one platform to another. To see this, consider a scenario where users do not have special ties with the platform and can switch across platforms without incurring any costs, and where choices to switch from one platform to the other are driven by the level of undesired advertisement. Generally speaking, this may be describing the attention cost equilibrium of internet radio stations, offering similar music products, where listeners have no specific ties to radio stations and can switch from one station to another by clicking a button.[14] In this case, we will see a different effect of competition on the level of attention costs that are sustained in an equilibrium.

Proposition 2: *When users face low mobility costs, the average and total attention costs imposed on users are reduced by competition.*

As a benchmark of comparison for the monopoly case, we shall refer to the results previously derived in Paragraph 2.2.1. Next, consider the case of duopoly with users' mobility. Suppose there exists an equilibrium with two active platforms. Let the equilibrium number of users in the two platforms be n_1 and n_2, respectively. Let the equilibrium choice of advertising services be q_1 and q_2. The average user's benefit in the two platforms is given by $U(n_1, q_1) = u(n_1) - A(q_1)$ and $U(n_2, q_2) = u(n_2) - A(q_2)$, respectively. In equilibrium, $U(n_1, q_1) < U(n_2, q_2)$ cannot hold; otherwise users would switch to the second platform. Similarly, $U(n_1, q_1) > U(n_2, q_2)$ cannot hold. So the only possible equilibrium is with $U(n_1, q_1) = U(n_2, q_2)$.

Let us begin by considering the case without network effects, where $u(.)$ does not depend on the number of users. Without loss of generality, assume $n_1 = n_2$ and $u(n_1) = u(n_2) = \underline{u}$. Now, $U(n_1, q_1) = U(n_2, q_2)$ implies $A(q_1) = A(q_2)$, i.e., $q_1 = q_2$. When the users' benefits from a platform do not depend on the number of users on the platform and the demand for the platform is only driven by attention costs, the equilibrium will be characterised by the same level of advertisements across the platforms.

Note, however, that even if users of a platform have no connection with one another and the size of the platform does not affect the users' benefits, users are important for

[14] We examine this case to compare equilibria, not because we think that free user mobility is representative of the social media market. Parisi and Parisi (n 1) pointed out that radio stations and social media networks differ in one fundamental characteristic: unlike radio stations, social media networks have low substitutability—users are tied to one or another network, because migrating from one network to another has effects on their ability to maintain ties with other members of their social network. In other words, strong network effects can lead users to stay with one social media network even when other platforms might impose lower attention costs through advertisements.

the platforms. The larger the number of users on a platform, the higher is the market share of the platform in the advertisement services. Under such a condition, starting from $q_1 = q_2$, consider the effect of a marginal decrease in advertisement by platform 2. Such a move would reduce attention costs and would make platform 2 the preferred choice for all the users. Users would migrate to that platform. To stay in business, platform 1 will have to follow suit. The process of reducing advertising services would continue until both platforms choose $q_1 = q_2 = 0$. If, as discussed above, platforms providing q_i amount of advertising services have to incur costs $c(q_i)$; $c'(.) > 0$, and the platforms do not have other forms of revenue, say from sale of users' data-based services, the equilibrium level of advertising would be the quantity generating a marginal revenue equivalent to Bertrand price competition, where q_1 and q_2 would be set to generate the revenue necessary to cover the marginal operational cost of the platform, $c'(.)$.

4 Conclusion

This paper unveiled an interesting attention monopoly paradox. When platform users have network ties and low mobility, high market concentration in the social media industry may be beneficial to consumers inasmuch as it would reduce the equilibrium level of advertising imposed on users. At the limit, the preservation of a monopoly would be a good way to limit the attention costs imposed on users. This conclusion parallels that of Buchanan[15], who argued that the provision of addictive drugs under an illegal monopoly provider, such as the Mafia, would increase price and restrict output of drugs compared to the conditions of perfect competition. Similarly, by charging higher prices to advertisers, a social media monopoly will supply less, rather than more, advertising space to advertising firms. The social media price setting power would be beneficial to users (unless users derive a positive net benefit from their exposure to advertising), since a lower amount of their attention would be polluted by unwanted ads.

The different results obtained when introducing users' mobility should be informative for policy analysis. The policy instruments that can be used to correct attention cost problems when users face mobility costs (such as in the social media industry) should not be extended to scenarios where users face no switching costs (such as in the internet radio industry). Policy instruments aimed at forcing competition in the social media market would likely exacerbate the attention economy problem that policymakers are attempting to correct.

[15] James M Buchanan, 'A defense of organized crime?', in Simon Rottenberg (ed), *The Economics of Crime and Punishment* (The American Enterprise Institute 1973).

*Oscar Borgogno, Michele Savini Zangrandi**

DATA GOVERNANCE: A TALE OF THREE SUBJECTS

Abstract

Systematic data exploitation through digital means lies at the very heart of the current platform economy. The regulatory boundaries posed by legislation to what firms and individuals can do with this intangible asset fall under the broad concept of data governance. Against this background, the article argues that the three major regulatory policy fields critical in shaping a country's data governance framework are data control, national security and competition law. These legislative strands have a profound impact on the platform economy and overlap with each other in a significant manner. In exploring the complex trade-offs, this paper reaches two broad conclusions. First, multiple and diverse regulatory domains intersect the digital space, with overlapping and sometimes unpredictable consequences. Second, given the transnational nature of digital activity, international coordination and dialogue are of the utmost importance.

JEL CLASSIFICATION: F53; K21; K24; L38.

SUMMARY

1 Introduction: the rise of Data Governance - 2 Three levers of data governance - 2.1 Lever 1: data control and data access regulations - 2.2 Lever 2: national security regulations - 2.3 Lever 3: competition policy - 3 Overlaps and trade-offs - 3.1 Competition and data protection - 3.2 National security and data protection - 3.3 Competition and national security - 4 Conclusions

1 Introduction: the rise of data governance

Data governance can be broadly defined as the set of rules and enforcement mechanisms that discipline collection, access, storage and processing of third-party data. In the context of the increasing degree of digitalization, this is a topic of intuitive importance, and vast complexity: the ability to collect, merge or exploit datasets, can make the fortune of firms or countries, yield enormous opportunities, or generate unmanageable risks.

The reason why data governance deserves close attention by legal scholars and policy makers is the widely acknowledged function that massive data exploitation is going to have in the rise of both Internet of Things (IoT) and Artificial Intelligence (AI) applications. Indeed, as data-enabled services hold the promise to strengthen

* Both Bank of Italy. Any opinions expressed in this paper are personal and are not to be attributed to the Bank of Italy. The authors are grateful to the anonymous reviewers, Paolo Angelini, Giovanni Veronese and Claudia Biancotti for thoughts and comments, which have led to significant improvement of the paper.

competition and boost innovation in both existing and newly arising markets, there is room for customers and businesses to benefit considerably from a data-driven economy.

Well-designed data governance frameworks are essential to ensure individuals trust, allowing firms to thrive by extracting value from information and delivering tailored services with significant added value for consumer welfare. Accordingly, the free movement of data has been emerging as a new mantra of international debates on data governance, with the goal of laying the foundation for the development of new innovations based on big data exploitation, such as AI and the IoT. AI environments are inherently dependent on data as an essential raw material, particularly with regards to machine learning and deep learning. Since AI functioning is based on the identification of patterns in available datasets and the subsequent making of predictions and correlations able to solve technical problems, the presence of large amounts of information to be processed is crucial to its functioning. Hence, emerging technologies need continuous access to streams of data from several sources, generated by machines and connected devices.

The dependence of IoT and AI applications on the enormous diversity of data sources and types requires serious effort to ensure interoperability, format standardization as well as an efficient system of personal information management. Indeed, IoT hinges on standards and interoperable communication protocols which allow a dynamic global network infrastructure consisting of physical and virtual 'things' (such as traditional and autonomous vehicles, mobile phones, home devices, and so on). These devices are integrated by means of intelligent interfaces and create smart environments where each item is able to interact in order to improve its own usefulness.

Yet, data governance is seldom discussed outside of limited policy circles. This is partly due to its vague cross-sectoral application: no individual regulation disciplines the subject in a comprehensive fashion while several regulations discipline sections of it. Because of the dominance of digital platforms, data governance amounts, for most intents and purposes, to platform governance – an activity that in the global race to digital supremacy escalates quickly into (geo)political tensions.

In order to shed new light on the functioning and inner conflicts of the subject, this article focuses on three major regulatory fields which appear critical in shaping a country's data governance framework: data control, national security and competition policy. Data control regulation defines the rules for access, use and re-use of personal data. National security regulations determine (the increasingly broad) set of data-types and uses which are off-limits. Competition regulation sanctions the behaviour and business practice of the digital "market makers". These legislative strands have a profound impact on the digital economy and substantial degrees of overlap with each

other: tinkering with elements of one regulation, often leads to unintended effects in the others' domain.

In its very essence, the architecture of data governance can be thought of as a triangle-based pyramid (Fig. 1), where data governance, at the top, rests on three separate regulatory levers – which are nonetheless all connected with each other at the base.

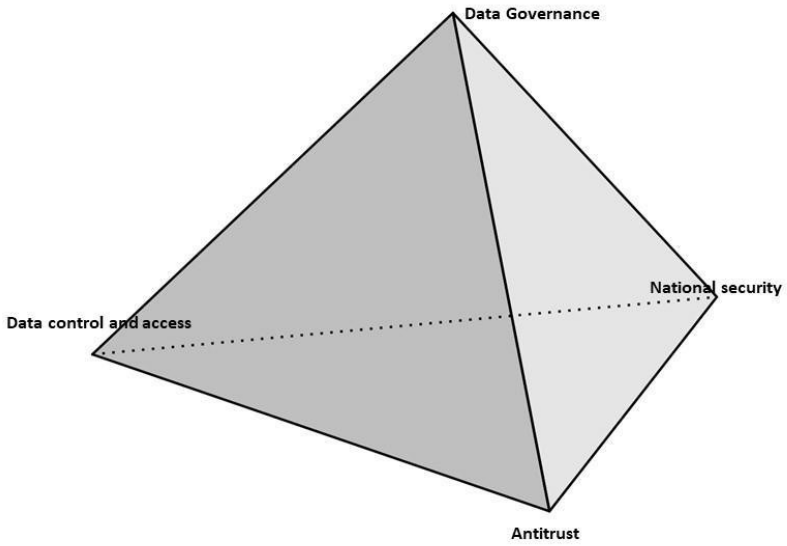

Fig. 1: the data governance pyramid

This paper discusses the role that each of these regulatory levers play, and the complex web of overlaps and trade-offs that exist when they apply to the digital sphere. In exploring these interactions, this article aims to support the policy maker and regulators in understanding the key levers under the nebulous hood of data governance.

The article is structured as follows. Paragraphs 2.1, 2.2 and 2.3 are respectively dedicated to the role that data control, national security and antitrust regulations play in the definition of national data governance frameworks. Paragraph 3 is dedicated to the multiple overlaps and trade-offs among the three legislations. Paragraph 4 concludes.

2 Three levers of data governance

2.1 Lever 1: data control and data access regulations

The multifaceted set of rules on access, sharing and re-use of data between firms, individuals and public entities is a major pillar of data governance. Owing to the economic potential of data-enabled applications, such as Internet of Things (IoT) and Artificial Intelligence (AI), these regulations are often flagged as crucial factors in unlocking economic growth.[1]

In its very essence, data control is the overarching element at the base of modern privacy legal frameworks.[2] Indeed, such a broad concept encompasses different aspects of how personal information can be legitimately gathered and used by third parties. First, we find rules that determine the conditions for primary collection of personal data. Second, there are rules setting the legal perimeter within which data-enabled service providers can access personal information that has already been collected by other providers (business-to-business data sharing, B2B data sharing).[3] Third, there are rules providing for the flow of privately held data into the public sphere (business-to-government data sharing, B2G data sharing).[4] Fourth, we find provisions mandating public bodies to share publicly held data with businesses and individuals (government-to-business, G2B data sharing).[5]

[1] Organisation for Economic Co-operation and Development, Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies (Report, 2019), 26.

[2] As rightly pointed out by Alessandro Acquisti, Curtis Taylor and Liad Wagman, 'The economics of privacy' (2016) 54 Journal of Economic Literature 2, 442–492, different dimensions and definitions of privacy emerge from the literature, such as privacy as control over usage versus privacy as protection against access of personal information.

[3] This is the case of the access-to-account rule enshrined in the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, [2015] OJ L337, Art. 67.

[4] In France, the law for a digital republic allows the public sector to access certain privately held data of general interest. French legislation, 'Loi No 2016-1321 du 7 octobre 2016 pour une République numérique'. See also: High-Level Expert Group on Business-to-Government Data Sharing, 'Towards a European strategy on business-to-government data sharing for the public interest' (Report, 2019), 35. For an economic assessment of the matter at the EU level, see: Martens Bertin, and Duch Brown Nestor, 'The economics of business-to-government data sharing' (JRC Technical Report, 2020). On how to shape effective data sharing partnerships between public and private actors, see: Claudia Biancotti, Oscar Borgogno, Giovanni Veronese, 'Principled data access: building public-private data partnerships for better official statistics' (2021) QEF Banca d'Italia 629.

[5] This is the case of the EU the Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172 on open data and the re-use of public sector information. Indeed, public sector information (PSI) is acknowledged as a valuable resource for the digital economy both in terms of raw material for data-enabled services but also for the delivery of more accurate decision-making in society.

Data access regulations – including privacy – generally find their expression in the right of control over data. In those jurisdictions enjoying a comprehensive data control and data access legal framework, such as the European Union, the right of control empowers individuals to move their own data from one data controller to another,[6] ultimately alleviating platform lock-in problems.[7] Moreover, data control also applies in business-to-business and business-to-government dealings, where the growth enhancing potential of data sharing is tapered both by the legitimate interests of individuals and by the reticence and mistrust of private firms.

Regulatory approaches to data control and data access regulations differ widely across countries.[8] In the European Union (EU), Canada, and Japan access to personal data is allowed within strict limits on which information can be collected, which uses it can be put to, who can access it, and how long it can be retained for. The United States does not have a comprehensive federal legislation, with privacy limitation broadly seen as an undue impediment to trade and innovation.[9] Russia and China, conversely, follow a different approach, centered on the concept of cyber-sovereignty. Here data is considered a national strategic asset, which must therefore be stored locally. Recent developments in China see strong data control and data access regulations alongside unbounded access rights on part of state and government agencies.

The reminder of this paragraph provides an overview of the EU efforts at shaping its data-space. With the introduction of data access regimes sanctioned by the General Data Protection Regulation (GDPR) in 2016, the EU has spelled out – arguably – the most cohesive, principled approach to data governance so far. This approach has seen a

[6] Paul De Hert, Vagelis Papakonstantinou, Gianclaudio Malgieri, Laurent Beslayc, Ignacio Sanchez 'The right to data portability in the GDPR: Towards user-centric interoperability of digital services' (2018) 34 Computer Law and Security Review 193.

[7] In economics, data lock-in, also known as customer lock-in, makes an individual dependent on a service provider because she is unable to opt for a rival provider without substantial switching costs. See European Commission, 'Stronger protection, new opportunities - Commission guidance on the direct application of the General Data Protection Regulation as of 25 May 2018', (Communication) COM (2018) 43 final: "Since it allows the direct transmission of personal data from one company or organisation to another, the right to data portability will also support the free flow of personal data in the EU, avoid the 'lock-in' of personal data, and encourage competition between companies." Cf. Oscar Borgogno and Giuseppe Colangelo, 'Data, Innovation and Competition in Finance: The Case of the Access to Account Rule' (2020) 31 European Business Law Review 4, 573.

[8] Indeed, the dichotomy personal-non-personal data is likely to prove extremely challenging to apply in real world scenarios when there is a need to deal with complex sets of data generated by different sources, ultimately capable of being referred to specific individuals thanks to big data analytics and cross-referencing.

[9] To date, the most relevant state data privacy state legislation within the US is the California Consumer Privacy Act 2018 (CCPA). Signed into law on June 28, 2018, it went into effect on January 1, 2020. The CCPA is cross-sector legislation that provides for broad individual consumer rights and imposes significant duties on entities or individuals that gather personal information about or from a California resident.

reasonable degree of uptake in other countries. However, whether the EU's approach will prove appropriate, or even enforceable remains an open question.

The EU GDPR sets out a comprehensive legal framework on data control and data access regulations with rules hinged on overarching principles of lawfulness, fairness, purpose limitation, data minimization and ultimately of transparency and accountability.[10] The right to data portability, enshrined in article 20 of the GDPR, has been recognised as a breakthrough in the realm of personal data protection law.[11] According to the Working Party 29[12], the right to data portability is framed as a building block of a wider framework of "workable mechanisms for the data subject to access, modify, delete, transfer, or otherwise further process (or let third parties further process) their own data".[13]

In addition to GDPR-sanctioned data portability, the European Commission has put forward a large array of sector-specific regulatory initiatives on data access, also targeting non-personal data.[14] Notably, the Second Payment Service Directive (PSD2) sets out a sector-specific access to account data rule[15], the Regulation on free-flow of non-personal data addresses data sharing practices in the commercial arena (business-to-

[10] See for example the rules on data protection by design and by default rule under art. 25 GDPR; the reporting duties as the breach notification obligation under art. 33 GDPR; and the appointment of a Data Protection Officer under art. 37 GDPR, is a first precondition for the fulfilment of businesses' accountability. In this context, specific consideration is to be given to the data protection impact assessment and prior consultation under art. 35 and 36 GDPR, requiring data controllers to identify the risks to the fundamental rights and interests of natural persons directly stemming from processing technologies and to "be able to demonstrate that processing is performed in accordance with" data protection law. Moreover, as highlighted by art. 24(1) GDPR, controllers shall implement technical and organisational measures, which have to be adequate to the nature, the scope, the context and the risks of the enacted data processing.

[11] From a substantive point of view, data portability encompasses three different and complementary rights: (1) the right to receive data provided by data subject; (2) the right to move those data to another controller; and (3) the right to have the personal data transferred directly from one controller to another.

[12] The Article 29 Working Party (Art. 29 WP) is the independent European working party that dealt with issues relating to the protection of privacy and personal data until the entry into application of the GDPR.

[13] Article 29 Data Protection Working Party, *Opinion 03/2013 on purpose limitation* (Opinion, 2013), 47.

[14] Indeed, businesses also collect, process and share data that are inherently of non-personal nature, as energy or environmental data.

[15] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, [2015] OJ L337, Art. 67.

re-use of government information.[17] While these initiatives differ in terms of scope, they all aim to promote smooth and trusted forms of data sharing.[18]

Additional proposals aim at shaping the EU data governance landscape. In November 2020, the Commission presented a proposal for a Data Governance Act aimed at enabling the sharing of sensitive data held by public bodies and private actors.[19] By the end of 2021 the Commission is expected to present the proposal for a Data Act with the goal of fostering business-to-government data sharing for the public interest, supporting business-to-business data access, and assessing the intellectual property rights framework with a view to further enhance data access and use.

The European data access framework is increasingly taken as an international benchmark, with particular emphasis on retail markets (such as banking services and energy).[20] In the US, the July 2021 Executive Order on Executive Order on Promoting Competition in the American Economy marks a renewed push towards data access regulation. The Order encourages the Director of the Consumer Financial Protection Bureau to introduce new rules facilitating "the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products".[21] In Australia, the Government proposed the "Data Availability and Transparency Bill 2020" in order to establish a scheme for the sharing of 'public sector data' by 'data custodians' to 'accredited users'.[22] In the same vein, the Australian Government set up the Consumer Data Right that gives individuals greater control over their own data, including the ability to securely share data with a trusted

[17] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) [2019] OJ L172/56.
[18] It is worth pointing out that two main distinctions emerge from the access rules emerging worldwide. The first hinges on the binding character of each sharing regime. Whereas the GDPR, the PSD2 and the Open Data and Public Sector Information Directive entrust specific data holders with a duty to share data whenever so requested, the Regulation on a framework for the free-flow of non-personal data merely provides for a general freedom to move data within the Internal Market. The second involves the scope of the different mechanisms designed by the European legislator. Notably, whereas the XS2A rule is a sector-specific rule inherently aimed at delivering data sharing within the retail financial sector, the other frameworks establish general-purpose data sharing regimes that apply, with different degrees, across industries to the whole economy.
[19] European Commission, 'Proposal for a Regulation of the European Parliament And of the Council on European data governance' (Data Governance Act) COM/2020/767 final.
[20] Interestingly, data access regulations can be regarded as a prominent example of the regulatory power gained by the European Union worldwide. As these reforms are followed by foreign legislators and policy makers, they complement the market-led "Brussels effect", namely the process of unilateral regulatory globalisation caused by the European Union *de facto* (but not necessarily *de jure*) externalising its laws outside its borders through market mechanisms. Cf. Anu Bradford, *The Brussels effect: How the European Union Rules the World* (OUP 2020).
[21] The White House, *Promoting Competition in the American Economy* (Executive Order, 2021).
[22] Australian Government, *Data Availability and Transparency Bill 2020*.

third party.[23] Also the Government of Canada, at the request of the Canadian Competition Bureau, undertook a review process of open banking in 2018 and by the end of 2021 the Advisory Committee is expected to deliver final considerations on consumer privacy, security, and data access.

Overall, the introduction of the right to data portability under the GDPR offers an opportunity to gauge the impact of data sharing rules. On one hand, several studies questioned the effectiveness of data portability in fostering market contestability.[24] Others warned against the entrenchment of dominant incumbents data sharing might engender.[25] On the other hand, the benefits of an industry led approach – such as the Data Transfer Project launched by Microsoft, Google, Twitter and Facebook in 2018 to facilitate reciprocal movement of data[26] – appear equally uncertain and tilted in favor of big players. Leaving market players free to determine data rules and standards can lead to breaches and abuse, as demonstrated by the Cambridge Analytica scandal.[27]

Finally, one cannot understate the issue of enforceability. Since its launch, the application of GDPR has been mired by circumvention and lack of enforcement,[28] a precedent that does not bide well to the incoming set of additional EU measures in the

[23] The Consumer Data Right was enacted by the Treasury Laws Amendment (Consumer Data Right) Act 2019 (Cth), which inserted a new Part IVD into the Competition and Consumer Act 2010.

[24] See Michail Batikas, Stefan Bechtold, Tobias Kretschmer, Christian Peukert, 'European Privacy Law and Global Markets for Data' (2020) CEPR Discussion Paper 14475. In the same vein, Michal S Gal, Oshrit Aviv, 'The Competitive Effects of the GDPR' (2020) 16 Journal of Competition Law and Economics 3. See also Wing Man Wynne Lam and Xingyi Liu, 'Does data portability facilitate entry?' (2020) 69 International Journal of Industrial Organization, arguing that data portability may hinder switching and entry due to the demand-expansion effect where the prospect of easier switching due to data portability may induce consumers to provide even more data to the incumbent, hence strengthening the incumbency advantage.

[25] Damien Geradin, Theano Karanikiotie, and Dimitrios Katsifis, 'GDPR Myopia: How a Well-Intended Regulation ended up Favoring Google in Ad Tech' (2020) 1 European Competition Journal; Garrett A. Johnson, Scott K. Shriver, and Samuel G. Goldberg, 'Privacy & market concentration: Intended & unintended consequences of the GDPR', Working Paper <https://www.ftc.gov/system/files/documents/public_events/1548288/privacycon-2020-garrett_johnson.pdf> accessed 10 June 2022.

[26] See Facebook, Google, Microsoft, and Twitter, *Data Transfer Project Overview and Fundamentals* (White Paper, 2018), 4. The four firms announced the launch of a joint open-source initiative called the Data Transfer Project with the objective of easing user data transfer among their platforms. According to their declarations, such a new data portability mechanism will remove the infrastructure burden on providers and users related to portability of data from one company to another: "[T]he future of portability will need to be more inclusive, flexible, and open. We believe users should be able to seamlessly and securely transfer their data directly from one provider to another." Even though the project unfolded quite slowly over the years, it is still actively pursued by its proponents. For instance, on 30 July 2019, Apple announced that it will be joining the project, allowing data portability in iCloud. Moreover, on 2 December 2019, Facebook announced the ability for users to transfer photos and videos to Google Photos, originally available only in a select few countries.

[27] Paul Przemyslaw Polanski, 'Some thoughts on data portability in the aftermath of the Cambridge Analytica scandal' (2018) 7 Journal of European Consumer and Market Law 141.

[28] Filippo Lancieri, 'Narrowing Data Protection's Enforcement Gap' (2022) 74 Maine Law Review 1.

data-space. While a host of private lawsuits by civil society groups could prod regulators into action, the interconnected nature of the data economy implies extraterritorial enforcement – a measure with geopolitical consequences.

As showed by the European experience, data governance frameworks are set to be influenced by privacy legislation in a significant fashion. Regardless from the level of importance attached to the protection of personal information from different jurisdictions (which varies according to cultural and geo-economic factors), it is undisputable that the extent to which individuals are empowered over the exploitation of their own data is major building block of data governance.

2.2 Lever 2: national security regulations

Data Data governance is increasingly recognised as a topic of national security relevance.[29] Preserving sensitive government and military information as well as the physical and logical integrity of the communication infrastructure has long been a core mission of a country's security apparatus. In recent years, however, concerns have been raised with the national security implications of hostile access – legal or otherwise – to sensitive personal information.

In its traditional form, national security issues affect the data governance space through cybersecurity regulation. Novel concerns, conversely, motivate heightened investment screening as well as increased scrutiny over retail personal data collection and handling. This paragraph addresses the impact of these measures on data governance.

First, cybersecurity norms aim at preventing illicit access to information by imposing heightened security requirements on critical infrastructures or entities. While cybersecurity regulation does not discipline data access per se, it recognises the critical nature of information and the presence of hostile actors. These technical and legal requirements shape a country's data governance landscape by limiting digital operators' ability to rely on certain service providers. In the EU, the 2016 Network Information Security (NIS) Directive[30] identifies digital infrastructure and critical digital service providers (online market places, cloud and online search engines) subject to heightened security requirements. The NIS2 proposal might expand further the perim-

[29] Matthew J. Slaughter and David H. McCormick, 'Data Is Power. Washington Needs to Craft New Rules for the Digital Age' (2021) Foreign Affairs <https://www.foreignaffairs.com/articles/united-states/2021-04-16/data-power-new-rules-digital-age> accessed 13 June 2022.
[30] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194.

data centers.[31] In the financial sector, the Digital Operational Resilience Act (DORA) proposal[32] subjects all critical third party services providers to the financial sector to heightened security standards and regulatory supervision. Crucially, as critical third party services providers are required to establish a business presence within the European Union' territory in order to serve the financial sector, the regulation bans data flows towards nonresident operators.

Second, foreign investment screening in critical sectors is a well-established practice to ensure national security objectives. The scope of investment screening regulation, however, has recently seen a substantial expansion in recognition of the strategic importance of personal information.

In the US, the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) extended the definition of *screenable* transactions to foreign investments yielding non-controlling stakes on sensitive personal data of United States citizens that may be exploited in a manner that threatens national security. This includes identifiable (or re-identifiable) personal data regarding financial conditions, insurance, private communication, geolocation, health, biometric information, government and security status, and genetic test results. With the exception of genetic test results, transactions in these data-categories are considered relevant when they involve specific populations (such as security or government personnel) or more than one million US citizens.

In the EU, the 2019 FDI screening Regulation, which sets out a procedure for investment screening coordination within the common market, includes transactions involving access to sensitive information, including personal data, within a specific *screenable* activity. Given the broad definition of personal data under the GDPR, the set appears particularly broad.[33] In practice and as an example, concerns over the treatment of sensitive personal data appear to have prompted the Italian Government to apply its investment screening powers to a transaction involving the acquisition of a minority stake in the payment company Satispay on part of Chinese behemoth Tencent.[34]

[31] European Commission, Proposal for directive on measures for high common level of cybersecurity across the Union Proposal for directive on measures for high common level of cybersecurity across the Union (2021) COM/2020/823 final

[32] European Commission, Proposal for a regulation on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 (2020) COM/2020/595 final.

[33] GDPR, art. 4(1): "*Any information relating to an identified [...] natural person [or a] natural person [...] who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*".

[34] Satispay S.p.A. is an Italian company that controls the Luxemburg registered Payment institute Satispay Europe SA. See Francesco Bechis, 'Cina e fintech, golden power su Tencent. Cosa c'è dietro' (Formiche.net, 8 April 2021) <https://formiche.net/2021/04/cina-fintech-golden-power-tencent-draghi/>.

Third, concerns have been raised with the national security implications of hostile-yet-legal access to sensitive personal data. These constitute the logical extension of the concerns over safety and integrity of the communication infrastructure that led the US and several allied countries to ban Huawei (and sometimes ZTE) components from their telecom infrastructure. Whereas concerns with Huawei contemplated the risk of mass espionage through network control, the same risks apply to app-enabled retail data collection.

Although national security issues arising from the activity of hostile retail apps have yet to result in specific regulations, this appears in the works. In the US, for instance, they resulted in the August 2020 Trump administration Executive Orders banning Chinese Apps TikTok and WeChat. The bans never effectively entered into force as they were stayed in first-circuit court,[35] and subsequently withdrawn by the Biden administration for reformulation. Their language is nonetheless instructive, and (as shown in the subsequent paragraph) the concern they spell out appears still present in the current Administration.

According to the Executive orders: "the spread in the United States of mobile applications developed and owned by companies in the People's Republic of China (China) continues to threaten the national security, foreign policy, and economy of the United States. [...] TikTok automatically captures vast swaths of information from its users, including Internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information — potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage."[36] And, "Like TikTok, WeChat automatically captures vast swaths of information from its users. This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information."

The Biden administration followed a more institutional approach by withdrawing the outright bans and ordered a major assessment of concerns related to hostile apps. Specifically, and in line with Trump Executive Orders, the June 9, 2021 Executive Order on Protecting Americans' Sensitive Data from Foreign Adversaries, recognises that the increased use of apps developed by foreign adversaries, including China, threatens the

(Formiche.net, 8 April 2021) <https://formiche.net/2021/04/cina-fintech-golden-power-tencent-draghi/>.

[35] See Christian Shepherd and Demetri Sevastopulo, 'Trump suffers blow after California judge blocks WeChat ban' (Financial Times, 20 September 2020) <https://www.ft.com/content/cf02c37f-a46f-4fb0-a7ae-3c21c20fbdd6 > accessed 13 June 2022.

[36] The White House, *Executive Order on Addressing the Threat Posed by TikTok* (Executive Order by Donald J. Trump, 6 August 2020).

national security, foreign policy, and economy of the United States. Thus, the new order mandates a thorough evaluation of the threat and the assessment of policy options, which is expected for the last quarter of 2021.

From a broader perspective, the increasing attention paid by American and Chinese policy makers over the strategic opportunities and vulnerabilities arising from the data economy signals an important factor that scholars need to take into account. That is to say that national security concerns are inextricably rooted within any data governance legal framework. To put it simply, economic and social relationships within the digital economy can only be investigated by considering the limits and frictions triggered by geo-politic dynamics between different jurisdictions.

2.3 Lever 3: competition policy

Due to the dominant role that digital platforms play in the digital economy, data governance issues are interrelated with platform governance dynamics. Digital platforms are the "market makers" of the digital economy, shaping its governance through business decisions. In disciplining anti-competitive behaviour of digital operators, allowing or denying mergers of digital businesses – and thus of datasets – and imposing remedial actions such as fines, divestments and commitment decisions, competition law enforcement plays a critical, albeit unrecognised role, in defining a country's data governance framework.

This paragraph explores recent developments in competition regulations and its impact on data governance frameworks.

The rise of digital markets poses structural questions for competition policy. Digital markets are characterised by network effects, economies of scale and scope, and cross-sectoral spill-overs. Taken together, these generate barriers to entry that make digital markets not easily contestable, prone to tipping, and highly concentrated.

Digital platforms, in their twin role of market makers and market participants, are the crux of the problem. In the digital environment, platforms operate the marketplace while they provide their own products and services in competition with rival sellers. Unlike other market participants, they also act as private regulators (they set the market's rules) and gatekeepers (they control market participant's access to their clients or their clients' behavioural data). This conflation of roles is likely to entrench their dominant position, shielding them from effective competitive pressures.

Traditional antitrust struggles to keep up. Timely application of antitrust law is crucial to ensure healthy competitive dynamics. However, traditional ex-post antitrust enforcement proved unfit to tackle the challenges generated by rapidly changing digital markets. Competition investigations are lengthy processes, often unable to address structural market problems. By the time an infringement is condemned, and remedies

imposed, the firm at stake is likely to have already monopolised the target market. When this happens, the antitrust toolkit is unable to restore the conditions existing before the infringement. The seven-year-long European Google Shopping investigation and subsequent litigation provide a good example of how complex and burdensome the competitive assessment can be when it comes to some practices performed by vertically integrated platforms.[37]

Moreover, preventive antitrust actions, in the form of merger control, struggles to cope with the challenges posed by the data economy. In theory, merger scrutiny represents a major tool to address structural competitive problems. Nonetheless, it is widely acknowledged that competition authorities have under-enforced antitrust rules in the digital environment.[38] Over the last five years, tech giants have been probed for engaging in "killer acquisitions" and erecting barriers by creating "digital conglomerates". Despite such concerns, very few of the mergers in question have faced scrutiny by competition agencies, or were successfully challenged by private plaintiffs and public agencies in the EU and US.

Under most merger control frameworks, enforcers are often expected to apply traditional business metrics to the digital environment. The main metric for guiding merger control regimes is turnover rather than more relevant ones, like the amount paid by the acquirer. As many digital start-ups provide their services free of charge, they generate low revenues while retaining a substantial economic value in terms of user knowledge, user data or network effects. Good examples were the $1 billion acquisition in 2012 of Instagram by Facebook and the acquisition in 2013 of the Israeli mapping services provider Waze by Google for $1.3 billion. Similarly, the $19 billion acquisition of WhatsApp (a company with a turnover of around ten million dollars) by Facebook was reviewed by the EC only based on a specific request by Facebook in order to benefit from the one-stop-shop review provided by the European Commission.[39] None of these transactions would have attracted merger scrutiny at the EU level under current law.

Across the world, policy makers are considering options to overhaul competition law to make it fit for the new digital era. Options span from lowering legal standards and the evidentiary burdens faced by public agencies, to a wide range of ex-ante prohibition or obligations[40] that sidestep traditional case-by-case economic analysis. Revamped mer-

[37] General Court, 10 November 2021, Case T-612/17, *Google LLC and Alphabet Inc. v. European Commission*.
[38] Mike Walker, 'Competition policy and digital platforms: six uncontroversial propositions' (2020) 16 European Competition Journal 1.
[39] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 4(5).
[40] Austrian Competition Authority, 'Digitalisation and Competition Law' (Position Paper, 2020) 10; European Commission *New Competition Tool* (Inception Impact Assessment, 2020) 3, stating that the aim of

merger control also plays a central role, for example, in proposals for the overhaul of European competition.[41] Such calls to overhaul antitrust rules risk to trigger unintended consequences on the digital economy. Two instances provide a sense of the impact of recent, or perspective regulation.

The first instance is one where reforms that aggressively target large platforms take limited consideration of the diversity in platforms' business model. The European Commission's infringement decision against Google in 2018 provides an example. In 2018 the Commission issued a $5.1 billion fine to the firm for abuse of its dominant position with reference to its mobile operating system Android,[42] mandating Google to unbundle Google Play Store, Google Search App and Google Chrome from the operating system. The injunction – currently challenged at the European Court of justice – would force a major change in Google's business model. Simply put, mobile operating systems follow two different business models. Google's business method is hinged on an open platform that generate revenues through targeted advertisement. Apple's model, conversely, is based on a closed environment, that generates revenue through the sale of mobile devices.

The second instance relates to tailored regulatory interventions aimed at constraining platform's business freedom. There is a growing consensus that competition enforcement should be supplemented by tailored regulation. Notably, the European Commission released in December 2020 a proposal of a new regulation (the Digital Market Act - DMA) under which firms considered as gatekeepers would be prevented from engaging in a wide ranging of self-preferencing conducts.[43] On April 7, 2021 the UK the Government established a Digital Market Unit (DMU) within the Competition and Markets Authority (CMA) that will be tasked with overseeing a new

would strive to tackle; U.S. House of representatives, 'Investigation of competition in digital markets, majority staff reports and recommendations' (Report of the Subcommittee on antitrust, commercial, and administrative law, 2020) 392. Conversely, a remarkable exception is represented by the common position of G7 competition authorities and, apparently, by the report prepared for the European Commission. According to this view, the challenging issues raised by digital markets can be successfully addressed with existing toolkits since antitrust ensures a flexible framework and a fact-based, cross-sectoral and technology-neutral analysis. See: G7 Competition Authorities, Common Understanding on Competition and the Digital Economy (Statement, 2020).

[41] Germany, for instance, has already introduced a new jurisdictional €400 million threshold based on the value of the transaction rather than the turnover of target companies.

[42] European Commission, 18 July 2018, Case AT.40099, *Google Android*. According to the Commission, Google engaged in the following illegal conducts: (1) tying Google's search and browser apps, (2) illegal payments to device manufacturers and mobile network operators conditional on exclusive pre-installation of Google Search; and, (3) illegal obstruction of development and distribution of competing Android operating systems.

[43] The proposal is currently pending for approval by the European Parliament and the Council.

regulatory regime for platforms deemed to have "strategic market status".[44] Similarly, Germany in January 2021 amended its Competition Act to better protect competition in times of digitization. The new law empowers the Bundeskartellamt (German competition authority), with a competition instrument meant to address large digital platforms' behaviours.[45] Finally, in June 2021, the U.S. House of Representatives has unveiled a five-bill antitrust package designed to curb the market power of large online platforms representing "critical trading partners."[46]

Due to the alleged inability of traditional competition law enforcement to address competitive distortions in digital markets, these regulatory proposals depart from the experience and lessons developed by antitrust legal systems over the years with an inevitable impact on digital platforms' business model. Limitations on self-preferencing included in the DMA proposal constitute a remarkable example of such new regulatory approach to competition policy.[47] A substantial fraction of the disputes involving digital platforms stem from their degree of vertical integration, with the corresponding incentive to favour their own activities. Yet, vertical integration is not by itself detrimental to competition. To the contrary, vertical integration has been found to increase consumer welfare and foster competition in many instances.[48] Leaving aside the complexities of economic analysis, mandating an overarching neutrality obligation on gatekeepers might simplify the work of antitrust agencies, but it could as well hinder the benefits of competition and innovation.

Both instances demonstrate the large, if indirect, impact that antitrust policy can have on a country's data governance framework. In the first instance, forcing Google to adopt a more closed ecosystem (similar to Apple's) would send an economy-wide signal against certain types of open data-intensive business models. In the second instance,

[44] As recommended by the UK Digital Competition Expert Panel, *Unlocking digital competition* (Report, 2019) 5.

[45] Jens-Uwe Franck, Martin Peitz, 'Taming Big Tech: What Can We Expect from Germany's New Antitrust Tool?' (Oxford Business Law Blog, 22 February 2022) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/02/taming-big-tech-what-can-we-expect-germanys-new-antitrust-tool> accessed 13 June 2022.

[46] See H.R. 3816, 'American Innovation and Choice Online Act'; H.R. 3825, 'Ending Platform Monopolies Act'; H.R. 3826, 'Platform Competition and Opportunity Act'; H.R. 3843, 'Merger Filing Fee Modernization Act', and H.R. 3849, 'Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act'.

[47] Regulation (EU) on contestable and fair markets in the digital sector (Digital Markets Act). The text approved by the Permanent Representatives Committee (Coreper) is available at < https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf > accessed 13 June 2022. European institutions have recently reached a political agreement on 25 March 2022 the DMA, which, amongst its other provisions, will introduce interoperability obligations for online platforms having a gatekeeping position.

[48] This is acknowledged by the Commission in its Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6.

restrictive ex-ante regulation might calcify (or permanently disband) existing business models, with a lasting impact on innovation dynamics within the platform economy. Arguably, the conflation of industrial and competition policy generates an additional complexity for policy makers dealing with data governance.

Finally, as regulation is rarely shaped by cost-benefit analysis alone, it is important to keep in check the two factors of broad influence in the re-shaping of competition policy. The first is the agenda of digital platforms. Platforms count amongst the most lavish lobbyists, on both sides of the Atlantic, and wield therefore margins of influence on the legislative process. Lobbying expenditure on part of digital platforms has increased substantially over the years in the US, both in absolute and relative terms (Fig. 1). In the EU Google and Microsoft class as the top two in lobbying expenditure since 2017, while Facebook ranked fourth in 2020.[49] The second is the (geo)political role that platforms play in the global race for digital supremacy, discussed in paragraph 3.3.

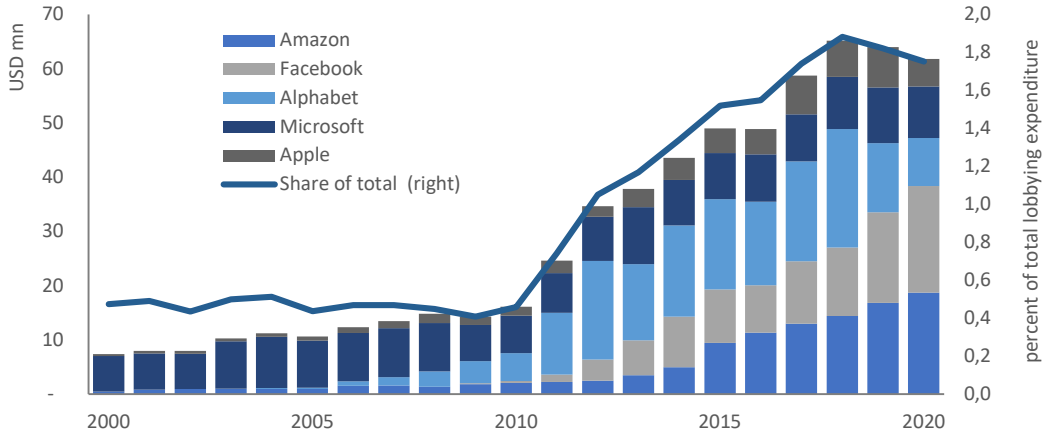

Fig. 2: Platform lobbying expenditure in the US[50]

3 Overlaps and trade-offs

This discussion has thus far dealt with the data governance implication of three major, yet separate, strands of regulation. To complete it, we need to discuss the most apparent overlaps and trade-offs among these strands regulations. This endeavor goes beyond the mere attempt to illustrate the current regulatory dynamics underpinning the data economy as it is driven by an explicit policy oriented purpose. By benefitting

[49] Authors' extrapolation from <https://lobbyfacts.eu/> accessed 13 June 2022.
[50] Source: author's elaboration from www.opensecrets.org. OpenSecrets is a nonpartisan, independent and nonprofit, research group that tracks money in U.S. politics and its effect on elections and public policy.

from a clear understanding of the mutual interconnections between the data governance building blocks, legislators and market supervisors can operate in a more sensible manner when dealing with the challenges brought by the digital economy.

This paragraph proceeds in this sense. Paragraph 3.1 addresses overlaps and trade-offs between competition and data protection, paragraph 3.2 between data access and national security and paragraph 3.3 between national security and competition.

3.1 Competition and Data Protection

The regimes of competition and data protection have developed in silos for the last 20 years. Their respective rules and principles have thus been applied irrespective and in isolation of each other. According to the traditional "law and economics" approach, data protection together with consumer law tackle information asymmetries and behavioural weaknesses of individuals whereas antitrust law focuses on anti-competitive practices (such as cartels and abuse of monopoly power).

This clear separation hardly applies in the context of the digital economy, where information asymmetries are intertwined with competitive dynamics. As the conduct of firms in digital ecosystems has blurred the boundaries between legal fields, antitrust has increasingly crossed the path of data protection. Indeed, several scholars argue that there is room to apply data protection and competition regimes in a more coherent way to better protect consumer welfare.[51]

The digital economy differs from its physical counterpart in that the "relevant locus of competition" is often product quality rather than mere price. A healthy competitive environment should therefore see competition take also place in terms of privacy-related quality of services. In this sense, data protection should be regarded as a non-price parameter of quality, allowing consumer choice over their optimal level of data protection.[52] It follows that antitrust enforcers should pay attention not only to prices and innovation dynamics, but also to the effective level of privacy granted to consumers. Sound antitrust enforcement should therefore be able to tackle anti-competitive practices based on data exploitation.[53]

[51] Marco Botta, Klaus Weidemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: the Regulatory Dilemma in the Facebook Odyssey' (2020) 64 The Antitrust Bulletin 3.

[52] At the Subcommittee's oversight hearing in November 2019, Makan Delrahim, the Assistant Attorney General of the Justice Department's Antitrust Division, testified that because privacy is a dimension of quality, protecting competition "can have an impact on privacy and data protection.", Antitrust Agencies Hearing at 15 (statement of Makan Delahim, Assistant Attorney General, United States Dep't of Justice Antitrust Div.) 56.

[53] Christopher Kuner, Fred H Cate, Christopher Millard, Dan Jerker B Svantesson and Orla Lynskey, 'When Two Worlds Collide: The Interface Between Competition Law And Data Protection' (2014) 4 International Data Privacy Law 247, 247.

Competition in the privacy-space might already be visible in the market. The recent Facebook-Apple spat regarding the introduction of privacy friendly default options on Apple devices provides a clear example. In April 2021, Apple announced that the new version of its operating system would have a default option denying access to certain types of user information, used (among others) by Facebook to provide targeted advertising. While Facebook publicly complained of Apple's purportedly anti-competitive behaviour, observers hailed Apple's decision as the result of healthy competition in the privacy-space.[54] To Facebook's credit, concerns that Apple's behaviour might serve to its own advantage led the European Commission to make clear that privacy policies must not give preferential treatment to a provider's apps over those of its competitors. On the same issue, the French antitrust authority has recently rejected the request for interim measures against Apple's adoption of the App Tracking Transparency (ATT) framework for applications on iOS 14, which creates new consent and notification requirements for app publishers.[55]

Market authorities have already started to work across regulatory borders. The antitrust investigation of the Bundeskartellamt against Facebook in 2016, constitutes the first attempt to integrate privacy interests into an abuse investigation.[56] Taking data protection law as a benchmark for evaluating exploitative behaviour under competition law, the Bundeskartellamt reached the view that Facebook's collection and use of data from third-party sources is an antitrust violation with serious exclusionary effects on competitors. According to the Bundeskartellamt, Facebook would have achieved an unlawful competitive advantage vis-a-vis users and competitors by imposing terms of service in violation of European data protection law. As a result, the social platform was able to entrench its dominant position in the market for social media and consolidate its influence on advertising markets. The decision is currently litigated in the Dussendorf court, which has recently decided to refer questions for preliminary ruling to the European Court of Justice.

There are also signs that data protection parameters can be integrated into merger control analysis. In the 2014 Facebook/WhatsApp merger clearance, the European Commission noted that security and privacy were one of the many parameters of

[54] Facebook complained that Apple is using its "dominant market position to self-preference their own data collection while making it nearly impossible for their competitors to use the same data". Hannah Murphy, 'Apple and Facebook trade accusations over data privacy' (2020) Financial Times < https://www.ft.com/content/54c54efb-7c80-4468-bf8f-c646e2bbe07f > accessed 11 June 2022.

[55] Autorité de la concurrence, Decision 21-D-07 of 17 March 2021 regarding a request for interim measures submitted by the associations Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet in the sector of advertising on mobile apps on iOS (2021).

[56] Bundeskartellamt, 'Proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules' (Press Release, 2 March 2016).

competition applicable to the case, along with the user base, price, perceived trendiness, and the reliability of the communications service.[57] The merger was nonetheless allowed because Facebook and WhatsApp were not considered as close competitors and consumers would have continued to have a wide choice of alternative communications apps after the transaction.[58] Conversely, in the 2016 clearance of the Microsoft/LinkedIn merger, the European Commission required Microsoft to enter in addition a number of commitments to avoid that the market for professional social networks would tip in favour of LinkedIn ultimately marginalizing competitors offering a greater degree of privacy protection than LinkedIn.[59] More recently, the European Commission cleared the acquisition of FitBit by Google despite several economists publicly calling for the Commission to block the transaction.[60] They worried that the merger would have allowed Google becoming dominant in 'health tech' markets, uniquely combining its existing data with the information gathered from Fitbit thereby undermining the ability of rivals to compete.[61]

From a welfare perspective, the integration of data protection principles into competition enforcement is a welcome development.[62] As competitive dynamics within the digital economy show, antitrust problems are intertwined with information and behavioural imbalances between firms and consumers. A separate application of the two disciplines might therefore lead to suboptimal enforcement decisions.[63] Prioritizing economic efficiency over data protection might exacerbate the market failures the two practices are supposed to tackle.[64]

Coordination between competition and data or consumer protection authorities appears therefore necessary within the digital space. An example of this is the recent

[57] Case 7217/2014, *European Commission, Facebook/WhatsApp* (3 October 2014), paras 87–90.
[58] Following the WhatsApp's updates to its terms of service in August 2016 allowing the possibility of linking WhatsApp users' phone numbers with Facebook users' identities, the European Commission imposed as 110 million euro on Facebook for providing misleading information during the merger investigation.
[59] Consequently, Microsoft entered into a number of commitments to address the competition concerns in the market for professional social networks that were also linked to the impact on privacy as a non-price parameter of competition.
[60] Pierre Régibeau, 'Why I agree with the Google-Fitbit decision' (Voxeu, 13 March 2021) < https://voxeu.org/article/why-i-agree-google-fitbit-decision > accessed 13 June 2022, arguing: "If combining data in a manner that leads to more discrimination in the health market is undesirable, then why use merger review to prevent such combinations from Google only? Regulation would be far superior in that it would at least preserve a level playing field."
[61] Cristina Caffarra, Gregory Crawford, Johnny Ryan, 'The antitrust orthodoxy is blind to real data harms (*Voxeu*, 22 April 2022) <https://voxeu.org/content/antitrust-orthodoxy-blind-real-data-harms> accessed 13 June 2022
[62] Allen P. Grunes and Maurice E. Stucke, *Big Data and Competition Policy* (OUP 2016) 82.
[63] Ginger Zhe Jin and Liad Wagman, 'Big data at the crossroads of antitrust and consumer protection' (2020) 54 Information Economics and Policy 20.
[64] Orla Lynskey, 'Non-price Effects of Mergers' (OECD Note, 1 June 2018), 70.

joint statement of the UK's Information Commissioner's Office (ICO) and the CMA setting out their shared views on the relationship between competition and data protection in the digital economy.[65] Moreover, sectoral supervisors should be called to take part at the legislative table. For instance, the definition of the global data governance framework has important consequences for the financial sector, and its regulators. Finance, more than other sectors, is a data-centric business. Financial regulators should therefore be called to take active part in national and international discussions surrounding the right balance between data protection and competition in regulated markets.

Coordination is needed as frameworks regulating third party data collection, access, use and retention have a direct impact on the competitive landscape. Lack of data governance frameworks during the early days of the digital economy – when user metadata was considered an industrial byproduct – enabled and fostered digital disruption. Fast forwarding to present days, the same data governance frameworks, recognizing unbridled exploitation rights to data custodians, cement oligopolistic positions in the digital economy.

While it has been argued for decades that data protection, albeit important, shall not enter the competition policy reasoning, this is no longer the case. Data-enabled services and the economics of "frees" prove that the antitrust analysis need to expand its umbrella from prices to a holistic understanding of product quality. Such a challenging evolution can only be carried out by looking at the data governance framework of each jurisdiction by fully appreciating the mingling of competition and privacy considerations.

3.2 National Security and Data Protection

As data protection regulations set forth the conditions and safeguards under which personal information can be processed, they inevitably interact with countries' national security structures. Data protection regulation allow the creation of large data pools which are often exploited by national or foreign security services, or by malicious actors. Excessive, unjustified or malicious exploitation of personal data often sparks conflicts between individual rights and national security prerogative, both within and between jurisdictions.

The conflict between the national security and the individual rights is particularly evident between the US and the EU. Such tensions is epitomised in the recent Schrems II decision, whereby the Court of Justice of the EU (CJEU) struck down the European

[65] UK Competition and Market Authority, 'ICO and CMA set out blueprint for cooperation in digital markets' (Press Release, 19 May 2021).

Commission's EU-US data protection equivalence decision which served as legal basis for most of the transatlantic data transfers.

Since the September 2001 attack on the Twin Towers, the world experienced a marked increase in security screening, particularly with respect to digital communication. In this context, data protection regulation shifted, on both sides of the Atlantic, from economic, to security actors – from DG Internal Markets to security structures and interior ministries in the EU and from the Department of Commerce to Homeland Security and Treasury in the US – resulting in vast increase in cross-border security related arrangements,[66] such as the SWIFT agreements. [67]

As the Snowden revelations shed light on US mass surveillance operations, however, the pendulum started swinging back. According to Edward Snowden, under section 702 of the Foreign Intelligence Surveillance Act (FISA), US security agencies gained warrantless access to private data from Facebook, Google, Apple, Microsoft, and five other major platforms under a secrete programme called PRISM.[68] Private lawsuits, led by privacy activist Max Schrems, contested the US Government unbridled access to Facebook data as in violation of GDPR rights. The judicial process that followed led the CJEU to invalidate two EU-US data protection equivalence decisions known as *safe harbour* (struck down in 2015)[69] and *privacy shied* (struck down in 2020) [70].

In its ruling, the CJEU held that the US does not provide for an *essentially equivalent*, and therefore sufficient, level of protection as guaranteed by the European data protection legislation. Notably, the judges pointed out that the legal bases of US surveillance programmes such as PRISM and UPSTREAM[71] amount to a disproportionate interference with the rights to protection of data and privacy enshrined in article

[66] Monika Zalnieriute, 'Transfers after Schrems II: the EU-US Disagreements over data Privacy and national Security' (2022) 55 Vand. J. Transnat'l L. 35.
[67] In July 2010, the European Parliament approved a five-year agreement with the U.S. for the transfer of financial and other information collected by the Society for Worldwide Interbank Financial Telecommunication (SWIFT) to the U.S. the SWIFT information exchange. Such systems have been used for national security purposes more regularly and significantly since 9/11. For instance, in 2006, US authorities including the CIA attempted to gain access to SWIFT for terrorist finance tracing. In 2013, it was reported that the NSA intercepted and retained data transmitted via SWIFT.
[68] PRISM is a code name for a program under which the United States National Security Agency (NSA) collects internet communications from various U.S. internet companies.
[69] Case C-362/14 *Maximillian Schrems v. Data Protection Commissioner of Ireland* [2015] CJEU, 6 October 2015.
[70] Case C-311/18, *Data Protection Commissioner of Ireland v. Maximillian Schrems* [2020] CJEU, 16 July 2020. The second case arose as US surveillance law was not significantly changed following the invalidation of the Safe Harbour in *Schrems I*.
[71] UPSTREAM collection is a term used by the National Security Agency (NSA) of the United States for intercepting telephone and Internet traffic from the Internet backbone, i.e. major Internet cables and switches, both domestic and foreign.

not limit in a sufficient manner the powers conferred upon US authorities and lack actionable rights for EU subjects against US authorities.

These landmark judgments are at the cross road of data protection and national security. In the shifting balance between conflicting policy objectives, the CJEU asserted the primacy of fundamental principles of human dignity and freedom over (foreign) national security prerogatives. The ruling also came in the context of increasing scrutiny of security-related transfers.[72] In the US the ruling was harshly criticised as an EU legislative overreach into US security interests. Officials were reportedly mesmerised at the thought that citizens of one country should have the right to review their intelligence files from other countries. The ruling was also deemed unjust as the CJEU has examined the national security practice of the US while it is precluded from doing so in EU member states.[73]

The two Schrems rulings might have lasting impact on the global data governance framework. While transatlantic data transfers are still permitted, their legal basis has become substantially less certain. The issue appears compounded by the implementation of the US Clarifying Lawful Overseas Use of Data (CLOUD) Act, which amends the US Stored Communications Act to give US courts access to data held by US subjects outside of US territories. While the October 2021 G7 Digital Trade Principles spell a political wish to overcome the differences across the two sides of the Atlantic, achieving actual convergence might not be so straightforward. Finally, the rulings will most likely impact data transfers between the EU and other jurisdictions, such as China, where government access to privately held data sanctioned by the 2017 cybersecurity law appears in equal, if not starker, conflict with EU principles. Scrutiny in this sense might stem from a recent complaint against Huawei's data transfers in a German court.

While much of the discussion in this paragraph has focused on the degree of legally sanctioned access that national or foreign security services might have to personal data, it is important to point out that malicious operations also take place outside, or at the limits of national and international norms. The 2016 Cambridge Analytica scandal, whereby lax security standards on part of Facebook led to the leak of detailed

[72] On 27 July 2017 the CJEU declared that the agreement envisaged between the European Union and Canada on the transfer of Passenger Name Record data could not be concluded in its current form. The provisions would have allowed systematic and continuous transfer of PNR data of all air passengers to a Canadian authority with a view to that data being used and retained, and possibly transferred subsequently to other authorities and to other non-member countries, for the purpose of combating terrorism and forms of serious transnational crime. The Court established that the envisaged agreement interfered with the fundamental right to respect for private life as well as the fundamental right to the protection of personal data. CJEU, Grand Chamber, Opinion 1/15 of the Court, OJ C 138 (2017).

[73] Peter Swire, 'Schrems II' backs the European legal regime into a corner — How can it get out?' (IAPP, 2020) <https://iapp.org/news/a/schrems-ii-backs-the-european-legal-regime-into-a-corner-how-can-it-get-out/> accessed 13 June 2022.

psychometric user profiles, constitutes an eminent example of the risks of subversion that derive from malicious access to personal data.[74]

In light of the above, it is getting clearer that the interplay between national security concerns and data protection goals across different jurisdictions is a major hurdle for transnational data governance frameworks. If it true that also within every jurisdictions policy makers need to strike a balance between state control and individual autonomy when it comes to privacy, the same issue is much trickier at the transnational level. As such, the inherent cross-border character of the digital economy exacerbates the problem. Is should not come as a surprise that the international dialogue is currently focusing on finding middle-ground solutions to enable free-flows of data between different jurisdictions.[75] While international negotiations on the matter are far from being successful, this paragraph highlighted that the trade-off between national security and privacy is a key headache for policy makers dealing with data governance.

3.3 Competition and National Security

Given the rich information content intermediated, and their role as critical infrastructures, digital platforms have increasingly acquired relevance in the national security sphere, much like the financial sector and other forms of physical infrastructures.

Since antitrust action pursues the objective to preserve innovation and contestability within digital markets, sometimes it might clash with the overarching interest of national states to preserve their security apparatus as well as their means of international power projection. While conflicts of this sort can and do emerge in other sectors of the economy, the size and pervasiveness of the digital economy, coupled with the increasing weaponization of cyberspace make this trade-off particularly thorny.

Against this backdrop, it comes as no surprise that antitrust discussions involving the digital economy will increasingly have to weigh the national security consequences of limiting platforms' business freedom against the risk of shielding them from antitrust scrutiny.

Over the last decade, digital platforms have been targeted by antitrust investigations for killer acquisitions, self-preferencing and other forms of abuse of dominance. For such violations, competition law contemplates fairly extreme remedies, including break-ups. Indeed, proposals of structural interventions have gained momentum in the

[74] Jill Kastner and William C. Wohlforth, 'A Measure Short of War', (Foreign Affairs, August 2021) <https://www.foreignaffairs.com/articles/world/2021-06-22/measure-short-war> accessed 13 June 2022.
[75] United Nations Conference on Trade and Development - UNCTAD, Digital Economy Report – Cross-border data flows and development: For whom the data flow (Report, 2021) 32-35, <https://unctad.org/system/files/official-document/der2021_en.pdf> accessed 15 June 2022.

US over the last five years among policy makers and scholars. The recent appointment of Lia Khan as Chairperson of the Federal Trade Commission and of Tim Wu as special assistant to the US president for technology and competition policy at the National Security Council – both vocal critics of Big Tech's market power – is a clear sign that the Biden administration is open to radical options.

Antitrust ambitions, however, are set to clash with national security considerations. In the United States, both the intelligence and the military rely on private tech companies – for hardware, information and talent alike. From a security perspective, these firms' market power and scale constitute irreplaceable strategic assets.

Two examples might put the issue in the right perspective. First, as pointed out in paragraph 2.2, the Foreign Intelligence Surveillance Act (FISA) compels American firms to hand over data on suspected foreign agents. US intelligence agencies rely extensively on this legal tool to gather information. FISA court orders constituted the basis the PRISM dragnet. Second, as the US Defense Department needed to build an enormous cloud project (under the name of Joint Enterprise Defence Infrastructure Cloud), aimed at supporting its operations, it was only able to identify two viable bidders: Microsoft and Amazon. Only these two massive companies could provide the resources needed to establish the needed hardened data centres with the right analytical skills. Although the contract – awarded to Microsoft – has recently been recalled,[76] it is unlikely that firms outside the limited US Big Tech circle might have the capabilities and the US government's trust to deliver on similar projects.

According to this line of argument, dominant firms should be shielded from antitrust enforcement. Market dominance can finance the innovation that guarantees the US military and intelligence cutting edge capabilities. Further, should antitrust action curtail platforms' innovative prowess, foreign competitors such as Baidu or Alibaba, would stand to benefit, to the advantage of US strategic adversaries.

The Qualcomm antitrust case serves a material example of this antitrust conundrum. In 2019 the Department of Justice (DoJ) intervened in appeal, asking the Ninth Circuit to stay the Federal Trade Commission's injunction against Qualcomm for abusing its dominant position as a supplier of semiconductor devices to the detriment of cell phone manufacturers and direct competitors, claiming that it "would significantly impact U.S. national security".[77] According to the DoJ, such action would have hampered Qualcomm's ability to invest in R&D, ultimately reducing America's potential to lead the global race in 5G. In 2020, the Ninth Circuit overturned the District Court's decision,

[76] US Department of Defense, Future of the Joint Enterprise Defense Infrastructure Cloud Contract (Press Release, 6 July 2021).
[77] US Department of Justice, Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal (Statement, 16 July 2019), 1.

implicitly recognizing also the national security argument against Chinese competitive pressure.[78]

The influence of wider public interests other than consumer welfare on antitrust enforcement however is far from uncontroversial.[79] It has been argued that national security may actually benefit from a more vigorous antitrust enforcement in the digital economy.[80] First, as private sector agents, platforms work in foreign markets and are therefore subject to incentives and blackmail that could backfire against their own country national security policy. Second, their anticompetitive behaviour might ultimately crush innovation, thereby eroding rather than sustaining the US' strategic advantage.

Setting aside the debate on whether an effective competition law enforcement can benefit or not national security strategies, it is undisputable that the digital economy is exacerbating such relationship. The need to deliver contestability and lively competition dynamics in data-enabled markets is increasingly exposing the overall national security framework to new vulnerabilities. As showed in this paragraph with multiple examples, the third interplay characterizing data governance is a major one for policy makers.

4 Conclusion

The rise of digitalization, and the opportunities and risks that it engenders has sparked an increasingly lively debate on the rules that should govern the digital sphere. However, over the last ten years, data governance has remained an esoteric concept, whose discussion is limited to selected policy circles. The reasons behind this phenomenon lie both in the complexity of the phenomenon and in its political load. For starters, no individual regulation disciplines the subject in a comprehensive fashion, while several regulatory actions try to tackle adjacent (but interrelated) problems. At the same time, a limited number of extremely large and heterogeneous firms – digital platforms – has managed to hold critical roles within the digital space. Recent legislative initiatives are proving that the regulation of digital platforms goes well beyond economic technicalities, as it is a highly political endeavor, both domestically and internationally.

[78] *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).
[79] Noah Joshua Phillips, 'The Role of National Security in Antitrust Enforcement' (Prepared Remarks of Commissioner, 8 December 2020).
[80] Ganesh Sitaraman, 'The National Security Case for Breaking Up Big Tech' (2020) Vanderbilt Law Research Paper No. 20-18; Centre for the Governance of AI at the University of Oxford, 'How Will National Security Considerations Affect Antitrust Decisions in AI? An Examination of Historical Precedents' (Technical Report, 2020).

Against this framework, the article demonstrated that three major regulatory fields are critical in shaping a country's data governance framework: data control, national security and competition policy. We discussed the role that each of these regulatory levers play, and the complex web of overlaps and trade-offs that exist when they apply to the digital sphere with the aim of supporting policy makers and regulators in understanding the key levers under the comprehensive hood of data governance.

The analysis in this paper leads to two main conclusions. First, regulation of the digital space suffers from an extreme degree of complexity. Multiple and diverse regulatory domains intersect the digital space, with overlapping and sometimes unpredictable consequences. As regulators strive to "put order" in their digital corner, it appears particularly important that this complexity is factored in.

Second, given the trans-national nature of digital activity, coordination and dialogue can hardly be confined to a set of national regulators. For instance, the frictions between personal data control and national security recently emerged between the US and the EU showed that international cooperation and dialogue are called to tackle an extremely tricky issue in order to deliver common principles underpinning trans-national data governance. Having said that, the potential gains generated from a consistent international legal framework reducing economic frictions are significant and justify the regulatory effort.

While a set of internationally agreed principles for the regulation of the digital sector would appear necessary, this seems a complex task for very broad-based the G20 and WTO negotiations. Convergence might instead be found within smaller groups of like-minded countries. At the end of October 2021, Trade Ministers of G7 countries issued a set of commonly agreed Digital Trade Principles, pledging to work towards a common framework for cross-border data transfers, and limiting the use of data-localization measures for protectionist purposes.[81] These principles constitute a first step towards overcoming structural differences within the block of advanced economies.

Given the pervasive nature of digitalization, the approach presented in this article could be considered as a blueprint to expand the analysis to additional policy levers, such as digital taxation and content liability rules.

[81] G7 Trade Ministers, 'G7 Trade Ministers' Digital Trade Principles' (Statement, 22 October 2021).

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THE *UBER* CASE AND GIG-INDIVIDUALS AGAINST THE BACKDROP OF THE GIG-ECONOMY: DILEMMAS BETWEEN LABOUR LAW AND TECHNO-LAW

Abstract

The "Uber workers" and, more in general, individuals deployed in the platforms, overall considered the "gig economy", have already been the subject matter of multifarious *dicta* in Italy. However, not only are these court decisions contradictory with each other, but also they are quite nebulous in their underpinning reasoning. Furthermore, there are a few inconsistencies with entrenched principles of the Italian legal system, particularly in the area of labour law. By contract, across the "Channel", the Uber workers have been "dissected", from a legal perspective, in a very recent decision of the UK Supreme Court. On such a background, it is becoming vital to ascertain the legal characterisation of "gig individuals", also in the light of a prospective EU legal framework where this new category could be legislated. Bearing this in mind, seemingly the imminent EU regulation will engender a challenging, yet stimulating, comparative analysis with the common law (and its traditional "tests" of the contract of employment), where it still arduous to envisage any legislation in this micro-area of labour law.

JEL CLASSIFICATION: K12; K14

SUMMARY

1 Introduction – 2 The UK legislative background and the amendments to the 2019 Employment Rights Act – 3 "Uber vs. Aslam and others" before the UK Supreme Court – 4 The Spill-overs of *Aslam* – 5 The segmentation of gig-individuals: further (Italian) dilemmas – 6 The EU Proposal of Regulation for gig-individuals – 7 The prospective Labour Law and the human element: when "Hamlet" becomes fashionable (once again).

1 Introduction

"To be or not to be, that is the question" is the well-known opening phrase of Prince Hamlet's monologue in the so-called "nunnery scene" of William Shakespeare's Hamlet.[1]

Within the context of labour law, this sentence could translate into the "workers or self-employed dilemma," which has been puzzling common law and the pertinent

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[1] Act no. 3, scene no. 1.

British statute for some time. However, in approaching the Italian legal system, the dilemma becomes more complex, as a further "phantom" loiters around the beleaguered mind of the Shakespearean character. In fact, Italian scholars, alongside their Supreme Court,[2] are reminiscent of "Hamletic" figures asking themselves whether "gig-workers"[3] should be characterised as self-employed people, employees or *"tertium genus."*[4]

Bearing this in mind, the goal of this paper is to discuss and analyse from a legal point of view the "war" as well as the pertinent "battles" between the two highest Courts in two countries, more precisely the United Kingdom Supreme Court and the Italian Supreme Court. However, while Courts fiddle, Rome is already burning. Beyond the metaphor, through the lens of a debate which may be already old-fashioned and anachronistic, more urgent matters are already appearing on the horizon. From this perspective, the EU Commission has recently adopted a legal framework the purpose of which is to legislate on this new category of individuals, i.e. gig-workers. Ultimately, technological innovation exposes the backward and awkward nature of a legislation which is vaguely reminiscent of an "ancient regime" possibly close to a fatal demise.

Once again, it seems that both the European Union and the Italian legislation, like the Hamlet of a Shakespearean spark, are still trying to tackle their psychological issues, in dissecting the too numerous and abstract micro-categories of an ostensive legal nature, whereas in the UK the socio-technological context is taken in due account in order to put forward a more balanced categorisation of "gig workers."

2 The UK legislative background and the amendments to the 2019 Employment Rights act

With the entry into force in the UK of the 2019 amendments to the Employment Rights Act 1996, which took place on 1 January 2021, a number of legal provisions have been subject to a radical alteration to ensure strengthening of the legal basis for the protection of workers' rights.

[2] The *Corte Suprema di Cassazione* o, in this work, "Italian Supreme Court" or "ISC".

[3] The term gig-worker already implies a possible qualification of gig-individuals as belonging to a specific legal category, the "British" workers. However, the most neutral way to refer to people involved with the gig economy, before one can come to a clear unequivocal conclusion about their legal *status*, would be gig-individuals. Therefore, to refer to gig-individual, before a clear analysis is carried out, seems to comply with a more rigorous scientific approach, although admittedly the expressions, gig-workers and gig-individuals, are somehow used, in this paper, as synonyms.

[4] See David Cabrelli, '*Employment Law in Context. Text and Materials*' (Oxford University Press 2014) 59,134. More recently, David Cabrelli, '*Employment Law in Context. Text and Materials*' (4th ed Oxford University Press 2020) passim.

In the version of the Employment Rights Act 1996 prior to the 2021 novelty, that is to say the one in force since 2012, the definition of employee, employer, and employment relationship was fundamentally based, under the British statute, on the mere existence of an employment contract, although the case law flourished in this area gave rise to significant deviations from this concept.[5] On the contrary, as a result of the recent changes, the criterion for identifying the essential elements that characterise the work performance is the management and supervision from a party.

In the light of this, the concept of employee, employer, and employment contract are shaped on the basis of two elements: the first concerns the existence of a contractual relationship between the two parties; the second relates to the fact that one party, given the very existence of that contract, is paid, managed, and controlled by the other party. Finally, a contract of employment should be recognised as such not only based on formal aspects (the name given to it by the contracting parties), but also by virtue of its content.[6]

From this it follows that a bilateral agreement on given content may be defined as a contract of employment even if the *nomen juris* of that agreement, the "label," does not, *de iure,* relate to employment, although *de facto* such a contract turns out to be "overwhelmed" by these elements. Consequently, it is implied that all agreements which have as their content an employment relationship of this kind become employment contracts. Should this reasoning be correct, it is expected that any individual offered a job under the management and supervision from a counterparty should be treated as an employee.

From this perspective, it may be worth recalling the case of *Ferguson vs. John Dawson & Partners*,[7] in which the contractor, Dawson & Partners, hired Mr. Ferguson for the latter to carry out work on behalf of the company. During the working hours Mr. Ferguson had a work accident and subsequently asked the company to take on full responsibility for the relevant consequences. The Court, in focusing on whether it was possible to define Mr. Ferguson an employee, came to the conclusion that, although the social security contribution share had not been withheld from Ferguson's salary , the company was entitled to decide the place of work, including the working time, and dismiss him, therefore he was in fact an employee, since the factual elements were consistent with a contract of service rather than a contract for services.

Bearing this precedent in mind, it is worth recalling that the legislative amendments entered into force as from 2021 make it possible, on the one hand, to identify

[5] In this paper an exhaustive account of these different Court decisions is given.
[6] An agreement may be regarded as a contract of employment if "when two parties have an agreement on work to be done, wage, management and supervision of one party, such agreement shall be considered as employment contract regardless of its name" (1, Art. 13.1).
[7] Case [1976] EWCA Civ 7 Taken by Royal Courts of Justice on 22/7/1976.

employment contracts which could be defined as "concealed" or hidden yet giving rise to rights and obligations for both parties as if they pertained to a contract of service. On the other hand, they raise burning questions about the real scope of the agreement that is concluded between two parties. As to the latter, the dilemma is when two parties choose, explicitly and genuinely, not to enter into an employment relationship (a contract of service), because they are totally uninterested in it, despite the fact that the actual relationship does meet all the characteristics of a contract of service (the one existing between an employer and employee).[8]

From a closer perspective, an absolute and rigorous implementation of the – new – approach propounded by the British statute – substance over form – may bear a risk, namely being against the contractual principle of autonomy of the parties, which is the quintessence of an agreement governed by common law. This tension could reach its pinnacle in circumstances where a person performs their work based on a contract which relates to an employment relationship but at the same time is devoid of an employment contract flavour. The reasons for this may be different: for example, such person already has a contract of employment that fully protects their rights. The definition and determination of an employment contract consequently appears to be very complex if the parties agree not to conclude an employment contract or if the worker themselves does not recognise their legal status as an employee.[9]

According to what has been reported so far, the 2019 amendments may appear as a significant deviation from the common law principles of contract law in England and Wales, because workers are more aware of their rights. Ultimately, they should be able to choose more consciously how to shape the employment relationship,[10] but with a legislation that, as a fall-back option, is in a position to protect them.

[8] From an English law perspective, a holistic examination of the area of the employment relationship, including the "*quasi-dependent*", may be found in Zoe Adams, Catherine Barnard, Simon Deakin and Sarah Fraser Butlin, '*Deakin and Morris Labour Law*' (7th edn Hart Publishing 2021) 106,136.

[9] The reference goes to the case *Massey vs. Crown Life Assurance* 1978. Mr. Massey was an employee of the Crown Life Assurance from 1971 to 1973 and then, by mutual agreement, he became a self-employed, although his employment, including rights and obligations, remained the same, the only change being that the Company did not pay the pension insurance. The question, therefore, was whether Mr. Massey could continue being defined an employee also after the novation of the original agreement between him and the Company. The Court held that it could no longer be defined as an employee at the time of the dispute, because the nature of the contract, albeit still relating to an employment relationship, had changed. Both parties, in fact, had agreed to change the legal status of employee. This case may corroborate the view that an agreement between the parties shall be complied with and that the employment contract makes no exception to the rule of contract law. Ultimately, the parties are given the right to determine their own legal relationships. Case [1978] 1 WLR 676.

[10] Nguyen Le Thu, 'Legal Considerations for Determination of Employment Relation and Employment Contract' [2021]37 VNU Journal of Science: Legal Studies 42,48.

3 "Uber vS. Aslam and others" before the uk supreme court

In this case, two drivers working for the Uber online platform, previously qualified as self-employed gig workers, claimed that they were entitled to the national minimum wage under the National Minimum Wage Act 1998, as well as the annual paid leave under the Working Time Regulations 1998. Rights under these two pieces of legislation are granted to employees and workers alike. More in detail, the controversy was prompted by the claims lodged by five Uber drivers before the Court. In order for these two rights to be acknowledged, the conundrum for the Employment Tribunal was the qualification of Uber's drivers as workers, a characterisation which Uber had always unceremoniously objected until then. In other words, the crucial aspect was the solution of the conundrum relating to the qualification of the relationship between Uber and its drivers, that is if the latter were "working under contracts with Uber."

The Employment Tribunal held that the applicants did meet the criteria set out in Section 230(3)(b) of the Employment Rights Act 1996. This decision was based on three different lines of reasoning.

First and foremost, Uber exercised substantial control over drivers, since the company complied with a behaviour that was significantly reminiscent of an employer's modus operandi: the platform, in fact, used to deduct a percentage from the drivers' weekly pay, and this occurred without any notice given to the drivers. In that regard, the Employment Tribunal pointed out that the explanations encompassed in an American judgement (namely the North California District Court case of Uber Technologies Inc. vs. Berwick) were convincing enough to infer that not only did Uber sell a software package, but it also substantially operated a taxi service.

Second, in the contracts that Uber concluded with its drivers, called "Partner Terms," it was explicitly pencilled that a driver is an employee or business partner of an entity referred to as "Partner of Uber;" however, diabolically, such Partner of Uber is the driver themselves in almost all cases, which means that the connection between Uber and the driver was far from being "loose" and remote. Although Uber sought to deny any closeness between its own organisation and the drivers, given the intermediation of such – indeed evanescent – partner, the Employment Tribunal held that drivers should characterised as Uber workers. Indirectly, this engendered the further question of whether they could possibly be identified as employees as well, given the actual circumstances of the *Aslam* case.

This second argument is supported by the fact that, according to the Employment Tribunal itself, the same drivers were subject to continuous monitoring and control. Although drivers were left with a small margin of autonomy, the monitoring activity carried out was very penetrating and invasive to the point that they were subject to penalties, should they miss a certain number of trips.

A further aspect that should be added is that Uber drivers were not able to negotiate with their customers the rates to be applied for the service, since they needed to accept the terms and conditions arranged by Uber.

4 The spill-overs of *Aslam*

The decision by the Employment Tribunal, subsequently confirmed by the Court of Appeal,[11] has significant consequences.

First and foremost, the attention of the public has turned to the existence of the structure of the gig economy. Secondly, the Government have announced a review, to be carried out every six months, regarding modern working methods, with particular attention to new forms of self-employment that do not fall within standard forms of work.[12] Finally, there are undeniable repercussions on other pending cases such as, for example, the *Dewhurst vs. Citysprint* case.[13] In this controversy, a delivery man, previously characterised as an online platform worker, was given worker protection.[14]

Despite this, it must be pointed out that the approach of the British Courts to the gig economy has not always "unleashed" a uniform extension of worker rights to all platform workers. The reference goes, still in the UK, to the Central Arbitration Committee decision, relating to the work conditions reported by Deliveroo workers. The conclusion of the Committee was that the applicants were self-employed platform workers rather than workers, for the reason that the riders only theoretically could be replaced with other people, for their work-performance through the platform,[15]

[11] The Appeal Question remained the same, that is, limited to the definition of the status of the worker who claimed the minimum wage and the salary paid. Also, Judge Eady pointed out (*UNISON v Lord Chancellor* [2017] UKSC 51, at [6]) the need for the correct application of Workers' Rights: "Relations between employers and workers are generally characterised by an imbalance of economic power. Recognising the vulnerability of workers to exploitation, discrimination and other undesirable practices and the social problems which may arise from them, Parliament has intervened at length in these reports in order to confer legal rights on workers, rather than letting their rights be determined by contractual freedom. More recently, further measures have been taken in the framework of legislation implementing EU law. To ensure the effectiveness of the rights conferred on workers and to obtain the social benefits provided by Parliament, they must be concretely enforceable".

[12] Matthew Taylor, Greg Marsh, Diane Nicol and Paul Broadbent 'Good Work: The Taylor Review of Modern Working Practices' Department for Business, Energy & Industrial Strategy (London) 2017 online accessed 17 June 2022: https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices.

[13] ET/220512/2016 of 5 January 2017.

[14] In this case, the General Court found that the procedure for hiring drivers involved a two-day training period in which guidance was given on how to carry out the work. In addition, uniforms and other equipment had to be made available. These factors are not likely to qualify a worker as self-employed.

[15] Remarkably, the recognition by the Courts of the status of worker is not always beneficial to the subject at stake. In *"Pimlico"* (*Pimlico Plumbers Ltd and Another (Appellants) vs. Smith (Respondent)* [2018] UKSC 29), the applicant, previously qualified as a self-employed person, was subsequently qualified as a worker could not claim the large amount of leave arrears that he believed to be due.

whereas *de facto* they were under an obligation to perform their obligations personally.[16]

More in general, it becomes apparent that the Courts, including the British ones, are not the ideal places for the formulation of elements of social policy and labour:[17] when a certain individual is qualified as a worker in the contract, other elements about the work agreement such as working hours and remuneration may as well fade away.[18]

The *Aslam vs. Uber BV case,* as decided by the Employment Appeal Tribunal, showcases a peculiarity: as the Court decision is deemed to be effective exclusively *inter partes,*[19] the theory of the precedent would turn out to be partly contradicted. To further elaborate, the function that is carried out by decisions[20] is to provide guidance for the solution of future cases that may arise before the Courts: "a decision in a case with no value to anyone other than the litigants, the lawyers and judges involved in the case would be absurd."[21]

Another peculiar aspect entailed in *Aslam* is the principle of the predominance of the reality test over the ostensive will crystallised by the parties in the contractual documents. In the present case, the EAT held that, although it is very uncommon for a Court to give precedence to the factual elements in relation to the elements of a contractual relationship,[22] in the present case the Court was empowered to disregard written agreements between the parties where possible. Consequently, it was necessary to assess and ascertain the unspecified terms of the contractual relationship itself that may have reflected such a reality.

The dominance of factual elements over contractual ones derives, in the specific case, from the further consideration that the subject matter of the judgment not only is a commercial, ordinary relationship, but it is also an employment one, which implies a different contractual power between the parties, where legal and sociological gaps between the two must be filled in.[23]

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[16] At common law, the personal nature of services is one of the quintessential features of the contract of service. See below footnote 49.

[17] In this sense Lord Sumption, The Limits of Law, The 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, https://www.supremecourt.uk/docs/speech-131120.pdf. Accessed 10 July 2020

[18] Philip Larkin, 'Relationship between Employment Status and Scope of Social Security Protection: The United Kingdom Example' in Ulrich Becker and Olga Chesalina (eds), *Social Law 4.0. New Approaches for Ensuring and Financing Social Security in the Digital Age*, [Nomos 2021].

[19] The *Aslam* Tribunal decision "*only applies to the two drivers who brought the case*", pursuant to the same Court.

[20] In this sense Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

[21] *R(UNISON) v Lord Chancellor* [2017] UKSC 51, [67]–[69].

[22] This principle is more often than not applied to the Italian legal system. See ISC, 14 May 2009, no. 11207; ISC, 18 February 2009, no. 3894; ISC 17 June 2009, no. 14054.

[23] Gemma Pacella, 'Drivers di Uber: Confermato che si Tratta di Workers e non di Self-employed' (2017)2 Labour & Law Issues 3, 50-62; Vincenzo Pietrogiovanni, 'L'Importanza di chiamarsi Lavoratori, ossia delle

Uber complained against the decision of EAT to the UK Supreme Court,[24] which, in turn, unanimously rejected the appeal lodged.[25] The UK Supreme Court held that, given the dearth of a written contract between the drivers and Uber, the nature of the legal relationship had to be reconstructed starting from the behaviour of the parties.[26] Hence, it was impossible to consider the platform as an intermediary between drivers and customers, given that it was Uber which concluded the contracts with the passengers and hired the drivers to perform the services covered by the contract. In the light of this factual background, the Court came to the conclusion that it was impossible to classify the employment relationship of drivers as "autonomous" in view of the unilateral determination by the tariff platform and the contractual terms of performance of the service, the possibility for Uber to condition the ability of the driver to agree to perform

Corti del Regno Unito alle (p)rese con il Lavoro a Chiamata sulle Piattaforme' [2019] Labour & Law Issues 45-67.

[24] Robert Upex, 'Workers and the Gig Economy: an Appraisal of the Supreme Court's Decision in the Uber Case' [2021] Coventry Law Journal, 25,38; Adam Lambert and Peter Summerfield, '*UK Supreme Court Delivers Verdict in Uber case*' [2021] Compliance and Risk 8,10; Alan L Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' [2021]137 Law Quarterly Review 392,399; Zoe Adams, 'One Step Forwards for Employment Status, still Some Way to Go: the Supreme Court's Decision in Uber v Aslam under Scrutiny' [2021]80 Cambridge Law Journal 221,225; Douglas Brodie, 'Confronting the Gig Economy' [2021] Judicial Review 103,108.

[25] Supreme Court of the United Kingdom, 19 February 2021, *Uber BV and others v Aslam and others*, UKSC no. 5.

[26] As far as the brief but already extensive literature about *Aslam* is concerned, see Julian Fulbrook, 'Reverberations from Uber v Aslam in Personal Injury Claims?' [2021] Journal of Personal Injury Law 59-67; Sheryn Omeri, 'Uber-careful: Implications of Modern "Gig Economy" Litigation for the Employer's Common Law Duty of Care' [2019] Journal of Personal Injury Law 59,65; Stewart Healey, 'Uber BV v Aslam [2021] UKSC 5' (2021) Employment Law Bulletin 163, 2-4; Douglas Brodie, *'Confronting the Gig Economy'* (n 22); Snigdha Nag, '*Uber and the "Gig" Economy*' (2016)160 Solicitor Journal (43), 34-35; Sarah-Jane Van Den Bergh and Carl Richards, 'Uber Taxi Drivers are "Workers", not Self-employed Contractors' [2017] Corporate Briefing 7-8; David Morgan, 'Uber: more Journeys to Come', [2021]66 Journal of the Law Society of Scotland 4, 12-14 ; Carolyn Brown, Susan Ball and Sarah Halstead, 'The Supreme Court's Ruling in Uber: Employment Status is Uber Tricky?' [2021] Tax Journal 6; Alessio Bertolini and Ruth Dukes, 'Trade Unions and Platform Workers in the UK: Worker Representation in the Shadow of the Law' [2021]50 Industrial Law Journal 662-688; IDS Employment Law Brief (case comment), Employment status: Uber drivers are workers, (2016) IDS Employment Law Brief 1058, 3-5; IDS Employment Law Brief (case comment), 'Employment Status: Court of Appeal Majority Holds that Uber Drivers are "Workers" [2019] IDS Employment Law Brief 1109, 3-7; IDS Employment Law Brief (case comment), 'Employment Status: EAT Confirms Uber Drivers are Workers', [2017] IDS Employment Law Brief 1083, 3-5; Alan Bogg and Michael Ford, 'Between Statute and Contract: Who is a Worker?' [2019]135 Law Quarterly Review 347,353; Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (n 22) 392,399; K. Brearley, 'Uber BV and Others v Aslam and Others' [2021]44 Company Secretary Review 170-172; P. Botsford (case comment), 'UK Supreme Court Finding against Uber Answers Questions Posed by Gig Economy' [2021] IBA Global Insight Internet; D. Morgan, 'Employment Status: Flexibility or Security - What's the Best Gig?' [2017] Employment Law Bulletin 5,7; Compliance & Risk (case comment), 'Supreme Court Rules that Uber Drivers are Workers' [2021] Compliance & Risk 1,17; Farm Law (case comment), 'Uber BV and Others v Aslam and Others' [2021] Farm Law 14-16; A. Prendergast (case comment), 'Uber's "Labels" Rejected again "Worker" Status Confirmed by UK EAT' [2017] Industrial Relations News 42, 22,23.

a certain ride, the power of control exercised by the driver evaluation system as well as the measures put in place by Uber in order to limit the communication between passenger and driver to the strict minimum.

Since then, there have been other rulings which have stepped into the shoes of the ET with regard to the qualification of the gig-workers.[27] A peculiar case concerns the qualification of a courier of the Yodel Delivery Network platform that has reached the point of involving the EU Court of Justice. In the latter case, the claimant asked for the application of the working time safeguards laid down for workers, despite the *ex ante* self-qualification of the individual, within the contract, as self-employed. The Employment Tribunal of Watford, in assessing the contract, particularly the substitution clauses therein, remitted the question to the Court of Justice. In this respect, the query related to the European Directive no. 2003/88, a piece of legislation governing some aspects of the working time. This legislative instrument prevented the application of the national laws of the Member State, pursuant to which the worker must personally perform the work in order to fall within the scope of the Directive. In other words, the national court asked whether the mere presence, in the employment contract, of replacement clauses was incompatible with the qualification of worker. The Court of Justice, with an extremely concise order, held that the Working Time Directive does not apply to workers who may be covered by substitution clauses without, however, going into the issue of the right of the worker to be replaced.[28]

[27] See, for instance, *Dewhurst vs. Citysprint UK Ltd*, EW No. 2202512/2016; *Independent Workers' Union of Great Britain (IWGB) vs. Roofoods,* England and Wales High Court, 5 December 2018; *Independent Workers' Union of Great Britain (IWGB) v Roofoods* ('Deliveroo'), EWHC No. 3342, Case No. CO/810/2018; 14 November 2017.

[28] CJEU, 22 April 2020, C-692/19, *B. vs. Yodel Delivery Network*. The decision of the Court of Justice has been highly criticised by scholars, because the concept of worker used by the Court of Luxembourg does not bear the same meaning as the homonymous one before British Courts. Ultimately, it is argued that "not only is the Community law concept of "worker" not the same of that of "employee" such as it is understood in the domestic law of the different Member States, but that also the Community law concept of "worker" is not consistent even within the different Community law texts". (Georges Cavalier and Robert Upex, 'The Concept of Employment Contract in European Union Private Law' [2006] ICLQ 589). In a nutshell, the peculiar characteristics of the European notion of worker would be essentially three: the submission to the hetero direction, the receipt of a salary, the exercise of real and effective activities. From this it derives that the category of worker in the law of the European Union possesses an extremely wide scope in how much it comprises various typologies of job without resort to intermediate figures (intermittent job, partial job, formative activity of internship) between subordination and autonomy. (Gemma Pacella, 'The Euro-Unitary Notion of Employee to the Test of the Gig-Economy: the European Court of Justice' [2020] Labour & Law and Issues 6,18).

5 The segmentation of gig-workers: further (Italian) dilemmas

In turning the attention to the Italian legal system, a question has been raised as to whether a Uber driver[29] or a Foodora rider[30] should be regarded as an employed person

[29] With regard to the services offered by Uber, two more legal aspects have arisen, especially in Italy, compared with the one being analysed here. The former is closely connected with the investigations carried out by the Milanese Public Prosecutor's Office, which requested, and subsequently obtained, the application of the preventive measure of the judicial administration on the basis of a well-founded fear of the existence of the crime of illicit intermediation and exploitation of labour pursuant to Art. 603-bis, Italian Criminal Code, perpetrated by the companies affiliated to Uber Italy srl against the messengers. See Milan Tribunal, decree no. 9 of 27 May 2020. On this specific matter, see Alessandro Quattrocchi, 'Le Nuove Manifestazioni della Prevenzione Patrimoniale: Amministrazione Giudiziarie e Contrasto al "Caporalato" nel caso Uber' [2020] Giur. Pen. Web no. 6; Andreana Esposito, 'I Riders di Uber Italy Srl' [2020] RIDL 558; William Chiaromonte, 'Rider senza Tutele. Sfruttamento su Due Ruote' [2021] Nigrizia 2; Cristina Inversi, 'Caporalato Digitale: il Caso Uber Italy Srl' [2021] Lavoro e Diritto 335. The second problem relates to unfair competition between taxi drivers and Uber drivers, both of which are designed to meet the same requirement, namely customer transport. For further information, see Stefania Serafini, 'La Concorrenza Sleale per la Violazione della Normativa Pubblicistica del Trasporto Urbano non di Linea: Il Caso Uber' [2016] Corriere Giuridico 368; Cristina E Papadimitriu and Marco Percoco, 'Le Piattaforme Digitali tra Opportunità e Incertezze Normative: il Caso Uber' [2019] Rivista Giuridica del Mezzogiorno 451 ff.; Luca Belviso, 'Il Caso Uber negli Stati Uniti e in Europa fra Mercato, Tecnologia e Diritto. Obsolescenza Regolatoria e Ruolo delle Corti' [2018] MediaLaws 156; Diletta Tega, 'Uber in Piazza del Quirinale n. 41: la «Gig Economy» arriva alla Corte Costituzionale' [2017] Le Regioni 580-590; Valerio Cosimo Romano, 'Nuove Tecnologie per il Mitridatismo Regolamentare: il Caso Uber Pop' [2015] Mercato Concorrenza Regole 133; Paolo Tullio, 'In tema di Concorrenza Sleale sui Rapporti tra Uber e le Cooperative di Radiotaxi' [2017] Diritto dei Trasporti 917. As to the case law, see, see Milan Tribunal, ordinance 25 May 2015; Rome Tribunal, ordinance 7 April 2017. For the sake of completeness of analysis, see the Court of Justice of the European Union decision, which follows up on a reference for a preliminary ruling made by a Spanish judge, where the question was whether Uber was a transport service: *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (2017) C-434/15. The decision made by the Grand Chamber is of a particular importance, because it highlights the adverse implications of the "Uber system": "from information before the Court ... the brokering service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to which the undertaking provides a demand without which (i) such drivers would not be induced to provide transport services and (ii) persons wishing to make an urban journey would not use the services provided by such drivers. In addition, Uber has a decisive influence on the conditions under which this service is provided by such drivers. On the latter point, it seems, inter alia, that Uber determines at least the maximum tariff by means of the application of the same name, that the company receives that amount from the customer before paying a part of it to the non-professional driver of the vehicle, and which has some control over the quality of vehicles, drivers and their behaviour, which may, in certain circumstances, lead to their exclusion". [2017] C-434/15, [39]. See Ewan Mcgaughey, 'Uber, the Taylor Review, Mutuality and the Duty not to Misrepresent Employment Status' [2019]48 Industrial Law Journal 2, 194-195. The problem has also been addressed with the case *HKSAR* vs. *Yuong Ho Cheung* ([2020] 23 HKCFAR 311). See Samuel Yee and Ching Leung, 'How Do Statutes "Speak" in Recent Technology Advancement Cases?' [2021]XX Statute Law Review 1 ff.

[30] Mario Midiri, 'Nuove Tecnologie e Regolazione: il «Caso Uber»' [2018] Riv. Trim. Dir. Pub. 1017.

under a type of coordinated and continuous collaboration[31] suitable to take the contours of a hetero-organisation.[32]

With particular attention to the so-called "Uber phenomenon," some scholars are of the opinion that, "if the digital platform, far from being a mere place of encounters between service providers and users, acts as a true employer, exercising its powers, in regulatory and protective terms the response is found in the law."[33] At the same time, it has been pointed out that very often, however, in the work carried out through platforms there are not enough traces either of hetero-direction or of hetero-organisation,"[34] since the notion of subordination cannot be extended beyond measures in order to extend the status of protection granted to employees even to employment relationships that cannot be traced back under the umbrella of Art. 2094, ICC.[35]

The problem of subordination by the platform or platforms arises when the actual provider of the service is charged not only for the consideration given to their work (because they retain a part of it), which is imposed unilaterally, but also for the performance of services according to specific modalities the ultimate purpose of which is to guarantee certain quantitative standards of the service to be rendered to the end user. For example, Uber adopted – certainly at the time of the controversy – an activity

[31] It is recalled that the European Commission itself has specified that the emergence of these new forms of work leads to a structural change in the employment relationship affecting, inter alia, even the same boundaries between self-employed and subordinated workers to the point that this line of demarcation becomes increasingly blurred. To this he added that "in order to meet the requirement of subordination the service provider must act under the direction of the collaboration platform, which determines the choice of activity, remuneration and working conditions". European Commission (2016), A European agenda for collaborative economy, COM 2016, 356. More specifically, the Commission called on the Member States to "fair working conditions and adequate and sustainable social protection", by also assessing "the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative business models".

[32] The same problem had arisen in relation to the qualification of the pony-express employment relationship. See Marco Biasi, 'Dai Pony Express ai Riders di Foodora. L'attualità del Binomio Subordinazione-Autonomia (e del Relativo Metodo di Indagine) quale Alternativa all'Affannosa Ricerca di Inedite Categorie' [2017] Adapt University Press.

[33] Roberto Voza, *'Il Lavoro reso mediante Piattaforme Digitali. Il Lavoro Nelle Piattaforme Digitali'* [2017] QRGL 70.

[34] Enrico Raimondi, 'Il Lavoro nelle Piattaforme Digitali e il Problema della Qualificazione della Fattispecie' [2019]5 Labour & Law and Issues 2,67.

[35] Remarkably, the platform cannot be qualified as an employer, for the reason that it would only cater for the function of building a digital labour market by facilitating the match between the supply and demand of goods and services. According to the same line of reasoning, Scholars have pointed out that, in the case just described, "the trumpets of labour law remain silent as long as the platform is limited to promoting the mere commercial exchange of a good or a service through the Internet or apps, without any emphasis on the work required". (Our translation, albeit not literally, from Italian) (Roberto Voza, 'Il Lavoro Reso mediante Piattaforme Digitali' (n 30), 72).

of evaluation of the service provided through user feedback or other technological tools installed in the equipment or working tools to provide the service.[36]

In the light of the above, at least in Italy, there would be a knack for framing the collaboration within the digital platform pursuant to Art. 2094, Italian Civil Code ("ICC"): the unilateral dismissal from the platform has therefore been connected to the subsistence of a disciplinary power. The control carried out on the workers is the main "symptom" of subordination.[37]

Most scholars[38] have maintained that the condition of objective economic dependence on a platform cannot be considered a technical-functional subordination to an employer. The same outcome can be achieved when certain factual elements exist. These can be interpreted as indicators of a subordination, albeit under the *caveat* that

[36] Should the assessment be negative, including the circumstance where the driver does not agree to answer 80% of the calls, the platform disconnects the individual in such a way as to deprive him/her of the possibility of profit.

[37] Alessia Consiglio, 'Il Lavoro nella Digital Economy: Prospettive su una Subordinazione Inedita?' [2018]4 Labour & Law and Issues 78,116.
The above conclusion has been criticised. First, it was pointed out that the unilateral disconnection from the platform and the related monitoring carried out by the employer cannot be considered as symptomatic indicators of subordination. In this direction, disconnection can be qualified as withdrawal from a relationship of duration compatible, of course, with the autonomous nature of collaboration in the digital enterprise. A dismissal may be classified as such only on condition that there is an employment relationship upstream, contrary to withdrawal, being a power, it can be conventional and can find its specific discipline in special rules in the light of the type of contract chosen by the parties or ascertained by the judge. From this it follows that the only limit applies to the obligation of notice pursuant to Art. 3 Law no. 81/2017. With regard to the supervision exercised by the platform, it is necessary to distinguish between the way in which it is carried out or the result of the work which is carried out by the worker. The subordinate nature of the employment relationship made through digital platform, in the last measure, was preached on the basis of the thesis of the double extraneousness (*alienità*) supported by the Italian Constitutional Court with the Court decision no. 30/1996: In that judgment, the Court held that "in the strict sense" subordination is a concept which is both more meaningful and qualitatively different from the subordination found in other contracts, such as those involving the working capacity of one of the parties. The difference is determined, according to the Italian constitutional judges, by the combination of two conditions that are never found in other cases: the first is constituted by the extraneousness (*alienita*) - in the sense of exclusive destination to others - of the result for the attainment of which the performance of job is used; while the second is represented by the extraneousness (*alienità*) of the productive organization in which the performance is inserted (so called hetero-organization). The text-based conclusion of the Consultation is as follows: "when supplemented by these two conditions, subordination is not simply a way of being of the performance inferred in the contract, but is a qualification of the performance resulting from the type of settlement of interest chosen by the parties with the conclusion of an employment contract, involving the incorporation of work in a production organisation over which the worker has no control, being established for a purpose in respect of which he has no legally protected (individual) interest". Enrico Raimondi, 'Il Lavoro nelle Piattaforme Digitali e il Problema della Qualificazione della Fattispecie", (n 34).

[38] Also supported by a constant jurisprudential orientation according to which "as such an indefectible element of the employment relationship, and a discretionary criterion, at the same time, compared to that of self-employment, is the personal subjection of the employment provider to the power of management, disciplinary action and supervision of the employer, which is inherent in the way in which the work is carried out". ISC, 10 September 2019, no. 22632

they are pieces of evidence of the existence of a governing power. By adopting this hermeneutical perspective, therefore, the unilateral power to dictate contractual conditions, such as remuneration of the benefit or checks on the performance of work, are symptoms of a mere difference in contractual power which may also be present in an independent employment relationship.[39]

Ultimately, the conclusion inferable from the foregoing is that, in order to assess an employment relationship, it will be necessary to distinguish on a case-by-case basis the actual manner in which the contractual relationship is conducted, with the ultimate aim to view and therefore characterise the individual providing the service either as an employee or a self-employed or occasional worker.[40]

The status of riders has potentially come to a conclusion, hopefully, with judgment no. 1663/2020 of the Italian Supreme Court. This Court decision does not depart from the Court of Appeal of Turin with regard to the application of Art. 2(1), Legislative Decree no. 81/2015. More in detail, the Italian Supreme Court pointed out that Art. 2(1) of the 2015 piece of legislation needed be interpreted as a law principle.[41] In the light of Decree Law no. 1/2019 as amended by Law no. 128/2019, this piece of legislation may be applied to work performance managed by a platform.[42]

The objection to the decision of the Court of Appeal is concerned with the classification of the contentious case within a *tertium genus*, a third further category, at a crossroad between autonomous and subordinate employment contract,[43] therefore, pursuant to the common law jargon, between and independent contractor and an employee.

With regard to the perimeter of the protections of paid employment applicable to hetero-organised collaborations, the Italian Court allows for a selective application of the protections of paid employment to hetero-collaborators organised by excluding those closely related to the essence of subordination or the exercise of the employer's

[39] Guido Smorto, 'La Tutela del Contraente Debole nella Platform Economy' [2018] GDLRI 423 ff.
[40] Silvia Ciucciovino, 'Analisi e Proposte sul Diritto del Lavoro al Tempo di Industria 4.0 Le Nuove Questioni di Regolazione del Lavoro nell'Industria 4.0 e nella Gig Economy: un Problem Framework per la Riflessione', [2018] Dir. Rel. Ind. 1. See Legislative Decree no. 81/2015 and Law no. 128/2019, conversion law of Decree Law no. 101/2019.
[41] In that regard, it is argued that, by that provision, the legislator would only have valued "certain factual indices deemed significant (personality, continuity, hetero-organisational) and sufficient to justify the application of the rules laid down for the employment relationship, exempting from any further investigation the judge who recognizes the competition of such elements in the specific case and who cannot, in the appreciation of them, draw a different conviction in the qualifying summary judgment".
[42]The Italian Supreme Court has delayed its final decision pending the promulgation of the law of conversion despite the object of the decision held previous facts.
[43] Carlo Spinelli, 'Le Nuove Tutele dei Riders al Vaglio della Giurisprudenza: Prime Indicazioni Applicative', [2020]6 Labour & Law and Issues 89.

hierarchical-disciplinary power in view of the fact that these collaborations remain autonomous.[44]

Despite the qualifying question relating to services rendered via digital platform seems to be resolved, the Palermo Court has stepped up to the place[45] with a recent judgment in which the work relationship of riders is characterised as a contract of service, therefore "dependent," to use a "Continental" jargon.[46] In that ruling, the Tribunal (which is the first instance Court in Italian labour law controversies) held that the employment relationship was subordinate in nature, since there was no freedom, among others, as regards the choice of working time. Furthermore, the service appeared to be organised through a digital platform whereby the employer was in a position to control the "working energies" of the individual providing the work. Additionally, the employer was endowed with managerial and supervisory powers, of a disciplinary nature too.[47]

[44] Umberto Carabelli, '*Introduzione*' in Umberto Carabelli and Lorenzo Fassina (eds), '*La Nuova Legge sui Riders e sulle Collaborazioni Etero-Organizzate*' [Ediesse 2020]22,23; Marco Barbieri, 'Contraddizioni Sistematiche e Possibili Effetti Positivi di una Legge di Buone Intenzioni e Cattiva Fattura' in Umberto Carabelli and Lorenzo Fassina (eds), *La Nuova Legge sui Riders e sulle Collaborazioni Etero-organizzate* [Ediesse 2020]100. Some scholars have spelled out that the *decisum* of the Italian Supreme Court may suggest that it is not a matter of independent job to which to apply the protections of the subordinate job, rather a matter of job that, just in its ordinary course, develops some peculiar characteristics. These characteristics can be viewed and justified by the same legal system (the Italian one in this case) as equivalent, from a functional point of view, to those of the dependent employment. This equivalence is as such as to justify the full application of the body of law of the dependent employee (*lavoratore dipendente*), with the exclusion of the protections that will turn out to be ontologically incompatible. Orsola Razzolini, 'I confini tra Subordinazione, Collaborazioni Etero-Organizzate e Lavoro Autonomo Coordinato: una Rilettura' [2020]30 Dir. Rel. Ind. 345. On the Italian issue of the "subordination", see Adalberto Perulli, 'Il Diritto del Lavoro e il "Problema" della Subordinazione' [2020]6 Labour & Law Issues 2, 92,132.

[45] Palermo Tribunal, judgment no. 3570/2020. In the present case, a rider from the Glovo platform appealed to the Court of Palermo on the grounds that he had worked as a cyclist continuously until 3.3.2020, when he was disconnected from the platform and never reconnected. In the light of this the rider challenged the conduct of that platform as oral dismissal, discriminatory and retaliatory adding the claim of the subordinate nature of the employment relationship in the light of the concrete modalities of performance of the job in relation to the phase of execution of the orders received.

[46] Giuseppe Santoro-Passarelli, '*Il Lavoro mediante Piattaforme Digitali e la Vicenda Processuale dei Riders*' [2021] Dir. Rel. Ind. 111.

[47] The Palermo Tribunal states that "in essence, therefore, beyond the ostensive and self-declared (in contract) freedom of the rider, and of the applicant in particular, to choose the working time and whether or not to render the service, the organisation of the work carried out exclusively by the party agreed on the digital platform in its own availability is reflected in the integration of the hetero-organisational premise, also in making available to the employer by the worker his working energy for substantial periods of time (and unpaid) and in the exercise by the defendant of management and control powers, as well as of a strictly disciplinary nature, which are constituent elements of the case of employment under Art. 2094 Italian Civil Code" (our translation from Italian). Vincenzo Ferrante, 'Ancora in tema di qualificazione dei lavoratori che operano grazie ad una piattaforma digitale' [2021] Dir. Rel. Ind 215; Gabriele Fava, 'Nota alla Sentenza del Tribunale di Palermo n. 3570/2020 pubb. il 24/11/2020 – Il rapporto di Lavoro dei Riders' [2021] Lavoro Diritti Europa.

In a symmetric way, the Turin Tribunal held that Art. 2094, ICC, shall be interpreted in an evolutionary way. The judicial goal is to make the discipline encompassed within the ICC applicable to "the new ways of working made possible by technological evolution that has allowed for disintegration of the workplace and its physical places, and which makes a process of "modernization" of the notion of subordination inevitable."[48]

6 The EU Proposal of Regulation for gig-individuals

In the paragraphs above, reference has been made to the way platform workers have been characterised by the judiciary, mainly in the UK, but also in Italy. Now the attention will briefly turn to EU legislation.

At the end of 2021, the European Commission adopted a Proposal "on improving working conditions in platform work."[49]

This document kickstarts with the underpinning philosophy of its objectives: 1) "promotion of the well-being of its peoples and sustainable development of Europe based on a highly competitive social market economy, aiming at full employment and social progress;" 2) "The right of every worker to working conditions which respect their health, safety and dignity."

Admittedly, a close neighbour of the right of workers is digital transformation: in the light of this, not only is the platform economy an innovative business model, but it is also a new opportunity for consumers as well as businesses. In this way, this prospective piece of European Union legislation states that the algorithmic management "also conceals the existence of subordination and control by the digital labour platform on the persons performing the work. The potential for gender bias and discrimination in algorithmic management could also amplify gender inequalities." It constantly stresses that the correct understanding of how algorithms influence or determine certain decisions (such as access to future task opportunities or bonuses, imposition of sanctions or the possible suspension or restriction of accounts) "is paramount, given the implications for the income and working conditions of people working through digital labour platforms."[50] Finally, it is concluded by the EU prospective statute that, given these shortcomings, establishing a legal presumption "that an employment relationship exists between the digital labour platform and a person performing

[48] Our translation, albeit not literal, from Italian.
[49] Brussels, 9.12.2021 COM(2021) 762 final 2021/0414 (COD) Proposal for a Directive Of The European Parliament and of the Council on improving working conditions in platform work.
[50] Brussels, 9.12.2021 COM(2021) 762, 2.

platform work, if the digital labour platform controls certain elements of the performance of work"[51] is essential.

In this system of presumptions, a way to rebut one of them – the legal one – is "to prove that the contractual relationship at stake is in fact not an 'employment relationship' in line with the definition in force in the Member State concerned. The burden of proof that there is no employment relationship will be on the digital labour platform."[52] The duty of Member States is "to have in place appropriate procedures to verify and ensure the correct determination of the employment status of persons performing platform work, so as to allow persons that are possibly misclassified as self-employed (or any other status) to ascertain whether they should be considered to be in an employment relationship – in line with national definitions – and, if so, to be reclassified as workers."[53] *Quod erat demonstrandum*: this has already happened in one

[51] Art. 4. This legal provision goes on by stipulating as follows: "The article defines criteria that indicate that the digital labour platform controls the performance of work. The fulfillment of at least two indicators should trigger the application of the presumption. Member States are also required to ensure effective implementation of the legal presumption through supporting measures, such as disseminating information to the public, developing guidance and strengthening controls and field inspections, which are essential to ensure legal certainty and transparency for all parties involved".

[52] Art. 5.

[53] Art. 3. In the UK, the control test has soon become a myth, because of the evolution of the industry. In fact, it was held soon that it should be interpreted less literally. After the WWII, the case *Stagecraft v Minister of Pension* ([1952] S.C. 288) held an artiste working for a company engaging circus and theatrical personnel should have been regarded as employee. Although it was impossible to decide how to perform, given the high technicality, the control was nonetheless inferable, because there was the possibility to direct the end to which the artist's individual skills are put. Similarly, in *Cassidy v Minister of Health* [1951] 2 K.B. 343, the control was replaced by the "*organisation test/integration test*", pursuant to the statements of Lord Denning, hence the Lord Denning Test. This was confirmed by *Stevenson, Jordan & Harrison Limited v MacDonald & Evans Ltd.* [1952] 1 T. L.R. 101, where it was affirmed, among the other things: "Under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business". The organisation test is echoes in *Whittaker v Minister of Pensions* ([1967] 1 Q.B. 156) which is another example to demonstrate the existence of a contract of service based on the "organisation test: "The worker is an employee if he is part of the organisation he belongs to". It is with *Ready Mixed Concrete Ltd v Minister of Pension* ([1968] 2 QB 497) which showcases the first example of application at judicial level of the "economic reality" test. The economic reality test, which is still the current one, *Market Investigations v Minister of Social Security* ([1968] 3 All ER 732), researchers were in charge of carrying out market research for MI. A controversy arose between the company and the Minister as to the payment of social security. It was held that a contract of service did exist because there was control, provision of tools & equipment, hiring of helpers, the financial risk (on the company itself), opportunity to profit from good work. Historically, as far as casual workers are concerned, the mutuality test, as part of the economic test, has been used. In some Court decisions (*O'Kelly v Trusthouse Forte plc* [1983] I.C.R. 728; *Carmichael v National Power plc* [2000] I.R.L.R. 43; *Montgomery v Johnson Underwood ltd* [2001] IRLR 269; *Nethermere (St Neots (Ltd) v Taverna* [1984] I.C.R. 612; *Montgomery v Johnson Underwood ltd* [2001] EWCA Civ 318), the mutuality test has been used to solve some dilemmas. Montgomery was registered as agency worker for the defendant and was allocated to work for the client. A dispute arose as to whether the employer was the agency or the client. He was not employee of either of them. Irreducible element of the employment the "control" and the "mutuality". Finally, a quintessential element entailed in a contract of service is the personal nature of the service. In *MacFarlane v Glasgow City Council* [2001] IRLR 7, EAT, a gym instructor

legal system, namely in the UK legislation, albeit quite paradoxically. In fact, Great Britain is a country that has already left the EU.

7 The prospective labour law and the human element: when "hamlet" becomes fashionable (once again)

The positive aspect of the legislative intervention which has recently unfolded in the European legal landscape is the tentative protection afforded to what is traditionally defined in labour law as the vulnerable party. There is no doubt that the proposal recognises the platform as the presumptive employer. This contribution has shown that, based on the British judicial stances in this area (the Uber case before the London Courts), the identification of a party as the employer does not imply the characterisation of the relevant counterparty as an employee. The employing party as the "employer" is only crucial for purposes of ruling out the subsistence of a contract for services, therefore, in the English common law, the one existing between a self-employed, therefore a sole trader, versus a client. Nevertheless, at least another two options are available to any Court: the pure contract of service (the "dependent", to use the "Continental" terminology); the worker's contract between a worker and an employer, a relationship devoid of a fundamental right, *i.e.* the entitlement to challenge a potential unfair dismissal. In this scenario, it is likely that any prospective legislation in the European Union will leave room for an automatic characterisation of platform individuals as "workers," rather than "employees," yet with a counterparty to be defined as "employer."

Although this is an aspect already highlighted by scholars, the legalisation of this leads to further reflections.

First and foremost, the underpinning philosophy of the law – labour law in particular – is that it is conceived not only for humans but also robotic systems. In this sense, it is therefore anachronistic to reflect on the status to be accorded to the gig-worker, while the new challenge is to preserve human uniqueness.

used to work for the Council, however, if he was not in a position to take a class, he could arrange the replacement by collecting him by a list of instructors approved by the Council. The replacement instructor would have been paid by the Council. In this case it was held that a contract of service did exist as the delegation to MacFarlane was occasional. There was personal nature of the service. In *Express and Echo Publications Limited v Tanton* [1999] ICR 693, no contract of employment because of a clause specifying that, if Mr Tanton could not or did not want to drive (he was a driver), he would have arranged "at his own expense entirely for another suitable person (provided he was trained and suitable) to perform the services".

business.[54] Technological and digital innovation creates waste and pollution. In terms of physical waste, we refer to the disposal of obsolescent devices, the replacement of smartphones, computers, and the scrapping of household appliances whose methods cannot be qualified as sustainable. As regards the second aspect, it should be pointed out that the spread of new technology sparks off environmental pollution, because the servers that manage the traffic of communications through apps require a lot of energy to process the amount of data that they exchange on a daily basis. The ultimate consequence is a significant emission of carbon dioxide.[55]

Ultimately, it is possible to envisage that in a near future things might radically change. Whereas the crucial aspect is currently the qualification of the labour position of gig-individuals,[56] the new challenge may firstly become the urgency to preserve human jobs, and secondly the effective protection of privacy and data protection of consumer. The reference here is to automated vehicles: they could become the "new" gig-workers. In this scenario, scholars now face new challenges: the development of technology requires the legislation to prevent possible damage to the privacy of customers. However, for this further conundrum there will be a further dilemma, and a further Hamlet.

[54] Tania Novitz, 'Gig Work as a Manifestation of Short-termism: Crafting a Sustainable Regulatory Agenda', [2021]50 Industrial Law Journal 636, 661.
[55] AM Al-Khouri, 'Environment Sustainability in the Age of Digital Revolution: A Review of the Field' [2013] American Journal of Humanities and Social Sciences 101, 122; Brett H Robinson, 'E-waste: An assessment of global production and environmental impacts' [2009] Science of the Total Environment 183, 191; Adele Bianco, 'Rifiuti Informatici, Inquinamento Digitale. Il Lato Insostenibile della 4ª Rivoluzione Industriale' [2021] Società Mutamento Politica 183,192.
[56] Again, at least in the UK, the stances that they can be even "employees" are very limited, the dilemma being whether they are workers or not. And the relevant response to this burning question is that they are workers, although they are not self-employed.

Alba Ribera Martínez[*]

THE FACEBOOK/GIPHY DIVESTITURE: THE (NEW) FIRST OF MANY?

Abstract

The decision of the Competition and Markets Authority ordering Facebook's divestiture of GIPHY stands as a landmark to expedite on-going worldwide merger control reform, namely through the imposition of structural remedies upon Big Tech. The theories of harm considered in Facebook/GIPHY are not particularly novel: the competition authority puts forward the loss of competition, as well as the loss of innovation theories of harm, on the basis of the dynamic characteristics of digital markets. However, the low threshold placed by the authority to find a substantial lessening of competition has been decisive towards the order's final outcome.

The decision has made its comeback on the past experience with Big Tech by placing the spotlight on small-scale but significant takeovers, in the same light of the Guidance issued by the European Commission on the interpretation of article 22 of Merger Regulation 139/2004. Meanwhile, Facebook's acquisitions over WhatsApp and Instagram are being contested by the Federal Trade Commission before the United States' District Court for the District of Columbia. As opposed to legal certainty, time and scope have not been an obstacle to revert the deal. The acquisition was signed off in May 2020 for $400 million, and the CMA's merger control proceedings did not start until June 2020.

Although there was no overlap in relevant commercial activity within the UK, the competition authority's decision is called to have universal repercussions, notwithstanding the foregoing Australian Competition and Consumer Commission's investigation on the same acquisition as well as the outcome of the Austrian Federal Competition Authority's proceedings. The steadiness of the Facebook/GIPHY operation is at stake and a conflicting decision can still jeopardise the CMA's ruling on a global scale, deeming it a symbolic decision.

The order to revert the acquisition came as a consequence of the fact that the CMA considered Facebook's proposed behavioural remedies as insufficient, notwithstanding some of them were close to the interoperability mandates set out under the DMA, namely, to maintain an open access to GIPHY's library and database to existing API partners. Similar commitments were offered by the merging parties on the Google/Fitbit merger scrutinised by the European Commission and were accepted. The ambivalence on the results to prevent Google from degrading interoperability with Android via API is still in liege, and the CMA has chosen to reject behavioural remedies almost by default.

The paper will address the aftermath of the CMA's Facebook/GIPHY decision in the light of the economic analysis performed around dynamic digital markets. To this aim, we will analyse: i) the existing overlaps on both undertakings' activities as opposed to the CMA's opinion that they are close substitutes at the horizontal level; ii) the strength of the 'killing' component of the merger, considering the differences between digital and pharma markets in relation to innovation; iii) the effectiveness of interoperability mandates within the Facebook/GIPHY merger as well as the general advantages and drawbacks associated to them in relation to the dynamic competition paradigm.

JEL CLASSIFICATION: K21; K42; L44

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SUMMARY

1 Introduction - 2 Account of Giphy's worldwide position - 2.1 A GIF explained - 2.2 Giphy's business model vis-à-vis digital platforms - 2.3 The Paid Alignment Business Model in the United States - 3 The dynamic component of the merger - 3.1 The jurisdictional challenges posed by the merger - 3.2 Horizontal overlaps between Facebook and GIPHY on the display advertising market - 3.3 The applicable test for a dynamic market by using static parameters of competition - 3.4 The resulting theories of harm applied: loss of innovation (and!) of future competition - 3.5 Vertical effects GIFs as an input to foreclose - 4 Interoperability solutions as opposed to structural remedies - 4.1 An overview on interoperability - 4.2 What's next? - 5. Conclusions

1 Introduction

On 30 November 2021, the Competition and Markets authority (CMA onwards) blocked the $400 million completed acquisition by Facebook, Inc. (now Meta Platforms, Inc) of GIPHY, Inc[1]. The UK competition authority deemed the commitments offered by Meta were not acceptable in connection with the risks posed by the merger in the immediate future within the UK display advertising market. On 9 June 2020, the CMA served an initial enforcement order to place a standstill on the operation until it rendered a decision on the market outcomes produced by the merger[2].

The infamous US based digital social network is integrated by three additional user-facing platforms, i.e., Instagram, WhatsApp, and Messenger. Facebook was incorporated in July 2004, and its family of apps are mainly monetised through the neighbouring market of display advertising. By the end of 2021, it produced 117 billion in revenue, mainly belonging to its results in advertising[3]. Its presence in the digital arena is unquestionable for competitors operating online, although the Federal Trade Commission (FTC) is currently putting forward an action to account for the abuse and consolidation of its dominant position[4].

[1] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Competition & Markets Authority Final report of 30 November 2021.

[2] *Acquisition by Facebook, Inc. through its subsidiary Tabby Acquisition Sub, Inc. of GIPHY, Inc* Competition & Markets Authority Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002 (the Act) of 9 June 2020.

[3] 'Meta Reports Fourth Quarter and Full Year 2021 Results' (*Meta*, 2 February 2022) <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx> accessed 2 June 2022.

[4] 'FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate' (*Federal Trade Commission*, 19 August 2021) <https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed> accessed 2 June 2022.

has been the first opportunity open to the CMA to endorse the conclusions that it developed around Facebook's strategic position as a gatekeeper in the UK economy[6].

As opposed to Facebook's super dominance on social media and messaging services, GIPHY is the world's leading provider of GIFs and GIF stickers through its online database and search engine, although it has no financial or economical presence in the UK[7]. Although the start-up was founded and launched in 2013 by Alex Chung and Jace Cooke in New York, it immediately picked up its own pace[8]. In fact, it attracted around a million users during its first week, and it quickly integrated with Twitter and Facebook[9]. Pre-merger, its prospects were unpromising in terms of their capacity to produce enough revenue to cover hosting costs as a result of increasing traffic produced by the Coronavirus (COVID-19) pandemic.

This is the first time the CMA imposes a divestiture remedy of this type against a digital player after the starting gun was fired on its on-going reform on digital markets (and after Brexit, too), and the Competition Appeal Tribunal dismissed the substantial arguments presented by Meta in appeal[10]. The European Commission (EC onwards) has

Markets Authority, 'Online platforms and digital advertising (Digital Markets Unit)' 1 July 2020; Will Hayter, 'Digital markets and the new pro-competition regime' (*Competition and Markets Authority Blog*, 10 May 2022) <https://competitionandmarkets.blog.gov.uk/2022/05/10/digital-markets-and-the-new-pro-competition-regime/> accessed 4 June 2022.

[6] Tom Smith, 'CMA blocks the Facebook/GIPHY merger: you can't say they didn't warn us' (*The Platform Law Blog,* 7 December 2021) <https://theplatformlaw.blog/2021/12/07/cma-blocks-the-facebook-GIPHY-merger-you-cant-say-they-didnt-warn-us/> accessed 26 January 2022; Tom Smith and Simay Erciyas, 'The Competition and Markets Authority blocks the Meta/Giphy merger: you can't say they didn't warn us' (2022), <https://doi.org/10.4337/clj.2022.01.04> accessed 1 June 2022.

[7] As per the CMA's definition: *A GIF* -that stands for Graphic Interchange Format- *(or video GIF) is a digital file that displays a short, looping, soundless video, while a GIF sticker displays an animated image comprised of a transparent (or semi-transparent) background which is placed over images or text (such as a Story on Instagram or Snapchat).*

[8] Riley Winn, 'The man, the GIF, the legend: An interview with Giphy founder Alex Chung' (*digitaltrends*, 28 April 2019) <https://www.digitaltrends.com/web/giphy-founder-alex-chung-interview/> accessed 2 June 2022.

[9] Jacob Kastrenakes, 'Giphy brings animated GIFs to Facebook' (*The Verge*, 29 August 2013) <https://www.theverge.com/2013/8/29/4671718/giphy-brings-animated-gifs-to-facebook> accessed 2 June 2022; Ken Yeung, 'This could get messy: Giphy brings animated GIFs to your Twitter timeline' (*The Next Web*, 14 November 2013) <https://thenextweb.com/news/get-messy-giphy-brings-animated-gifs-twitter-timeline> accessed 2 June 2022.

[10] *Meta Platforms, Inc. v. Competition and Markets Authority* [2022] CAT 26; Josh White, 'Facebook appeals CMA's blocking of Giphy acquisition' (*ShareCast*, 6 March 2022) <https://www.sharecast.com/news/news-and-announcements/facebook-appeals-cmas-blocking-of-giphy-acquisition--8977920.html> accessed 4 June 2022; Katharine Gemmell, 'Meta Calls U.K. Tech Watchdog's Giphy Decision 'Irrational'' (*Bloomberg*, 25 April 2022) <https://www.bloomberg.com/news/articles/2022-04-25/meta-set-for-court-showdown-over-giphy-with-u-k-s-tech-watchdog> accessed 4 June 2022; August Graham, 'Tribunal backs competition watchdog over Facebook's Giphy takeover' (*Evening Standard*, 14 June 2022) <https://www.standard.co.uk/news/uk/competition-and-markets-authority-facebook-meta-innovation-giphy-b1006154.html> accessed 15 July 2022; Kate Beioley, 'Meta fails to overturn Giphy sale order

rarely imposed divestiture remedies within merger control that have resulted to be successful, although the Remedies Notice contains a general preference to go structural on those mergers where horizontal overlaps tend to eliminate competition[11]. Even EU Commissioner Margrethe Vestager has expressed her preference for behavioural remedies in digital mergers[12]. This same position is also new to the antitrust enforcement performed overseas, where structural remedies have become scarcer over time. Since the AT&T divestiture, the FTC has not sought or achieved divestiture in merger control effectively, notwithstanding the current debate on the breakup of Facebook from Instagram and WhatsApp[13]. However, the FTC's renewed enforcement priorities are moving towards an approach favouring the imposition of structural remedies[14].

On top of this, the events following the initial merger have been characterised by the subsequent fining of Facebook by the CMA due to non-compliance of the initial enforcement order issued by the CMA at the start of the review in June 2020 (fines amounting to £50.5 million and £1.5 million were imposed on October 2021 and February 2022)[15].

order by UK competition regulator' (*Financial Times*, 14 June 2022) <https://www.ft.com/content/8add1876-7674-4f21-bea4-fb1b82e6285d> accessed 15 July 2022.

[11] Thomas Wilson, 'Merger remedies – is it time to go more behavioural?' (*Kluwer Competition Law Blog*, 21 February 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/> accessed 10 February 2022; Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267, paras 17 and 61. For instance, accounting for a recent 'completed' divestiture failure: Case M. 8974 *NIDEC/Whirlpool (Embraco Business)* [2020] C(2020) 3118 final.

[12] Margrethe Vestager, 'Defending competition in a digital age' (Florence Competition Summer Conference, Florence, June 2021).

[13] Hiba Hafiz, 'Rethinking Breakups' (2021) Boston College Law School Legal Studies Research Paper No. 566 <https://dx.doi.org/10.2139/ssrn.3892326> accessed 10 February 2022; Andrew Beattie, 'A History of U.S. Monopolies' (*Investopedia*, 7 October 2021) <https://www.investopedia.com/insights/history-of-us-monopolies/> accessed 10 February 2022.

[14] Alex Wilts, 'Khan lists potential updates to merger guidance, draft expected in "coming months"' (*Global Competition Review*, 9 May 2022) <https://globalcompetitionreview.com/gcr-usa/article/khan-lists-potential-updates-merger-guidance-draft-expected-in-coming-months> accessed 4 June 2022. For instance, 'FTC sues to block two hospital mergers' (*American Hospital Association*, 3 June 2022) <https://www.aha.org/news/headline/2022-06-03-ftc-sues-block-two-hospital-mergers> accessed 4 June 2022.

[15] *Acquisition by Facebook, Inc. through its subsidiary Tabby acquisition sub, Inc. of GIPHY Inc.* Competition and Markets Authority Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002; Competition and Markets Authority, 'CMA fines Facebook over enforcement order breach' <https://www.gov.uk/government/news/cma-fines-facebook-over-enforcement-order-breach> accessed 7 February 2022; Competition and Markets Authority, 'CMA fines Meta a second time for breaching enforcement order' <https://www.gov.uk/government/news/cma-fines-meta-a-second-time-for-breaching-enforcement-order> accessed 7 February 2022.

Pre-acquisition, GIPHY's investors were paid dividends lowering the value of the company's assets[16]. Therefore, when the merger was completed, it did not meet the $18.8 million size-of-person test required under the FTC's regulations and was counted as non-reportable[17]. A reaction from any of the top-leading competition authorities was to be expected. The UK, Austrian and Australian competition authorities took it onto their own hands to assess the potential implications of the merger given that thousands of UK -Australian and Austrian- users daily access GIPHY's library and database through the Internet[18].

Contrary to the EU principle of one-stop merger control, the merger's clearance faces great jurisdictional extraterritorial challenges. The CMA has ordered divestiture, whereas the Australian Competition and Consumer Commission (ACCC) initiated proceedings on 8 June 2020 and has not yet rendered its decision, which could result conflicting with the divestiture package ordered by the CMA[19]. On top of that, by 23 June 2022, the Austrian Supreme Cartel Court confirmed the merger's clearance, pursuant to Phase II proceedings initiated by the Federal Competition Authority and followed by the Higher Regional Court Vienna acting as the Federal Cartel Court[20]. The Austrian Federal Competition Authority had already imposed a fine of 9.6 million euro due to the acquisition's violation of the standstill obligation, insofar as the merger had not been notified in Austria[21].

One of the main questions stemming from the CMA's decision is whether interoperability remedies, like those to be mandated by virtue of the Digital Markets Act

[16] David McLaughlin, 'Facebook's Stealth M&A Puts Focus on Deals Under Antitrust Radar' (*Bloomberg*, 23 August 2021) <https://www.bloomberg.com/news/articles/2021-08-23/facebook-s-stealth-m-a-puts-focus-on-deals-under-antitrust-radar?sref=P6Q0mxvj> accessed 10 February 2022.

[17] Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 U.S.C. § 18a; Katie Canales, 'The sneaky way Facebook reportedly got its $400 million GIPHY acquisition under regulatory radar is completely legal, experts say' (*Insider*, 26 August 2021) <https://www.businessinsider.com/GIPHY-facebook-dividends-payment-deal-antitrust-2021-8> accessed 8 February 2022.

[18] Rod Sims, 'The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses' (Australia-Israel Chamber of Commerce, Western Australia, August 2020); 'Facebook/GIPHY merger: AFCA files request for examination with Cartel Court' (*Federal Competition Authority*, 18 June 2021) <https://www.bwb.gv.at/en/news/detail/facebook-giphy-merger-afca-files-request-for-examination-with-cartel-court> accessed 15 July 2022.

[19] Email from Australian Competition and Consumer Commission to author (2 February 2022).

[20] 'Meta(Facebook)/Giphy merger: AFCA appealing against conditional clearance' (*Federal Competition Authority*, 4 March 2022) <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance> accessed 15 July 2022; 'Meta(Facebook/Giphy merger: Supreme Cartel Court confirms Cartel Court's conditional clearance' (*Federal Competition Authority*, 24 June 2022) <https://www.bwb.gv.at/en/news/detail/submetering-cartel-decision-relating-to-ista-oesterreich-gmbh-final-1> accessed 15 July 2022.

[21] 'Austrian Federal Competition Authority files application to fine Facebook for failing to notify GIPHY acquisition' (*Federal Competition Authority*, 7 June 2021) <https://www.bwb.gv.at/en/news/detail/austrian-federal-competition-authority-files-application-to-fine-facebook-for-failing-to-notify-giph> accessed 15 July 2022.

(DMA onwards) are enough to halt the disruptive advance of digital platforms in neighbouring markets, such as those of online display advertising[22].

We will analyse the reasons given by the CMA to block the Facebook/GIPHY merger. First, we will consider the special impact of GIPHY's recent developments on monetising its content through advertising and sponsoring (Paragraph 2). Then, we will overview the merger's implications from the vertical and horizontal viewpoint, with an attention to the economic analysis performed by the competition authority (Paragraph 3). Finally, we will make an overview on interoperability remedies applied to the Facebook/GIPHY merger and considering the ruling's consequences overseas and on antitrust/regulatory intervention (Paragraph 4).

2 Account of GIPHY's worldwide position

Facebook's business model and dominance has been scrutinised from an antitrust perspective throughout the Globe. In the case of the UK, the CMA issued in July 2020 its final report on online platforms and digital advertising, where it warned against the firm's super dominance. However, the target of the merger, GIPHY, Inc., has received little attention up until this day. We will look at the characteristics that make a GIF distinctive from other digital services and features, and then we will analyse the singularity of the Paid Alignment Business Model, which is the prime instrument devised by GIPHY to monetise its activity.

2.1 A GIF explained

GIFs are an extremely popular form of content used on social media and messaging apps[23]. They have turned to be ubiquitous online as a form of social expression. Traffic on GIPHY has increased dramatically to 700 million users accessing more than 10 billion GIFs per day as of May 2020.

GIFs are displayed in a completely different environment as opposed to that of advertising within a social network. The intentions of users are also different: whereas social media platforms account for their actual feelings and thoughts through images, texts, or interactions shared between users, a GIF is used to express a particular idea or

[22] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM (2020) 842 final; and 'leaked' text in 'The leaked (almost final) DMA text' (*Chillin' Competition*, 20 April 2022) <https://chillingcompetition.com/2022/04/20/the-leaked-almost-final-dma-text/> accessed 4 June 2022; Council of the EU, 'Digital Markets Act (DMA): agreement between the Council and the European Parliament' (25 March 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/> accessed 18 June 2022

[23] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 4.8 and 4.43.

texts, or interactions shared between users, a GIF is used to express a particular idea or emotion to the recipient (given that both the recipient and the sender share the same knowledge on the GIF's meaning)[24].

They are mainly based on the personal and communal common grounds of the relationship between them both: they must manage and interpret the impressions portrayed through the GIF and the context in which it is rendered[25]. GIFs are a form of polysemic non-verbal communication to express complex emotions and feelings and can contain multiple layers of meaning, beyond the expressions words and photographs can depict. They are particularly helpful when users cannot adequately express their nuanced emotions or gestures through these forms of expression[26].

Since the GIF is context-dependent on the conversation taking place or the content that accompanies it, it is malleable regardless of its actual content and can be easily decontextualised. For instance, the Michael Jackson eating popcorn within the 1982 Thriller videoclip GIF is more prone to illustrate a sensation of expectation, and not be used in reference to Jackson's track record[27]. Different to emojis, that are developed top-down into devices, GIFs are displayed in a community-oriented format and operate within their context (as little as two persons through instant messaging or as big as Twitter when a GIF is displayed through a tweet)[28].

The effect of GIFs, caused by their content and time span, is different to other digital services: they operate on a loop (so they have a high 're-review rate') and in a short time span -two to five seconds-[29]. The animation's speed of movement and length can be tailored to carve out user engagement[30]. In fact, shorter, higher quality GIFs with more frames per second are the most attractive[31]. User engagement performed by GIFs can be drawn out directly from their virality, as a measure to their capacity to travel across

[24] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 40.
[25] Aaron Jiang, Casey Fiesler, Jed R. Brubaker, '" The Perfect One": Understanding Communication Practices and Challenges with Animated GIFs' (2018) 2(CSCW) Proceedings of the ACM on Human-Computer Interaction, 1; Jackson Tolins and Patrawat Samermit, 'GIFs as Embodied Enactments in Text-Mediated Conversation' (2016) 49(2) Research on Language and Social Interaction 75.
[26] Saeideh Bakhsi, David A. Shamma, Lydon Kennedy, Yale Song, Paloma de Juan and Joseph Kaye, 'Fast, Cheap, and Good: Why Animated GIFs Engage Us' (2016 CHI Conference on Human Factors in Computing Systems, San Jose, May 2016); Eli Bourlai and Susan Herring, 'Multimodal communication on tumblr: "I have so many feels!"' (WebSci' 2014, Indiana, June 2014); Kate M. Miltner and Tim Highfield, 'Never Gonna GIF You Up: Analyzing the Cultural Significance of the Animated GIF' (2017) July-September Social Media + Society 1.
[27] Miltner and Highfield (n 26).
[28] Miltner and Highfield (n 26).
[29] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Summary of third-party calls para 19.e.
[30] James Ash, 'Sensation, Networks and the GIF: Toward an Allotropic Account of Affect' in Ken Hillis, Susanna Paasonen and Michael Petit (eds.), *Networked Affect* (MIT Press, 2015).
[31] Bakhsi, Shamma, Kennedy, Song, de Juan, and Kaye (n 26).

time and space to a large audience based on cultural and pop trends[32]. For instance, the most popular GIFs of 2021 account for the most viewed TV show during the COVID-19 quarantine: the 2005-rebooted *The Office* and one of the most popular shows viewed worldwide, The Weeknd's NFL Halftime Performance[33]. The most popular GIFs have entered the common lexicon since they are regularly posted and used across online messaging and communities[34].

Against this framework, GIPHY has enhanced the design of its services so that its search engine is adjusted to render quick and targeted responses to the queries posed by users, so keywords are efficiently matched to a GIF or a GIF sticker within a few seconds.

2.2 GIPHY's business model vis-à-vis digital platforms

GIFs and GIF stickers are available via GIPHY's own website and app, and through the interface of apps that integrate GIPHY's database. Apps such as Facebook, Instagram, WhatsApp, or Snapchat incorporate the GIPHY database through Application Programming Interfaces (APIs)[35] and Software Development Kits (SDKs)[36]. These social networks embed GIPHY's and Google Tenor's libraries within their GIF search engines.

As customary on online services, GIPHY provides its services for free[37]. On most digital platforms, the gratuity of services is explained through their multi-sided nature[38]. The possible combinations on the monetisation business models across platforms are unlimited. For example, Facebook feeds off from both direct and indirect network effects[39]. On one hand, Facebook's popularity attracts more users to join the digital platform. Taking the paradox of the invention of the telephone, if friends or family do not

[32] Ash (n 31).
[33] Afprelaxnews, 'The 10 most popular GIFs in 2021: From Stanley Hudson in 'The Office' to Baby Yoda's joy and excitement' (*Forbes India*, 18 December 2021) <https://www.forbesindia.com/article/lifes/the-10-most-popular-gifs-in-2021-from-stanley-hudson-in-the-office-to-baby-yodas-joy-and-excitement/72293/1> accessed 11 February 2022.
[34] Bakhsi, Shamma, Kennedy, Song, de Juan, and Kaye (n 26).
[35] An API is the software interface that allows users to use and navigate mobile apps and an SDK provides tools for third-party host apps such as TikTok or Snapchat to program GIPHY¡s library so that its style and functionality is aligned with the app's own interface and design.
[36] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Competition & Markets Authority para 10.
[37] Anja Lambrecht, Alessandro Bonatti, Avi Goldfarb, Anindya Ghose, Daniel G. Goldstein, Randall Lewis, Anita Rao, Navdeep Shani and Song Yao 'How Do Firms Make Money Selling Digital Goods Online?' (9th Triennial Choice Symposium, Noordwijk, 2014).
[38] David S. Evans and Richard Schmanlensee, 'The Antitrust Analysis of Multi-sided Platform Businesses' (2013) National Bureau of Economic Research 18783 <https://www.nber.org/papers/w18783> accessed 11 February 2022.
[39] Hal Varian, 'Use and abuse of network effects' (2017) <https://ssrn.com/abstract=3215488> accessed 11 February 2022.

family do not own a telephone, how are you supposed to extract any value from owning it yourself? The direct network effects applicable to digital platforms play on the same rule: insofar as more friends and members of your family join the platform, its value increases personally for you, when you can interact with a higher number of acquaintances.

On the other hand, users on Facebook are not only those consumers who wish to share their experiences online, but also advertisers who wish to display their offerings to them. The digital platform's role is to intertwine the demands of these customer groups[40]. Facebook facilitates their interaction and charges advertisers for displaying their ads on their webpage, at a marginal cost of production near zero[41]. Therefore, advertisers subsidise user experience in exchange for the space that has been rendered for them through the social network[42].

Facebook uses aggregators that place cookies on their devices to track their preferences and behaviour both on the social network and online to tailor and personalise advertising, so ads yield as effective as possible and remain to be attractive for advertisers and not excessively intrusive for users[43].

The 'non-commercial' user can access Facebook's services for free, experiencing low marginal costs on consumer search and transaction costs[44]. However, users do 'pay' for Facebook's service through the tasks of data accumulation and processing that the social network can perform by virtue of the personal and non-personal data they produce whilst navigating online[45]. Facebook's monetisation business model is mainstream for most digital players.

[40] Evans and Schmalensee (n 38).
[41] Lambrecht, Bonatti, Goldfarb, Ghose, Goldstein, Lewis, Rao, Shani and Yao (n 37); Simon P. Anderson, Øystein Foros, Hans Jarle Kind and Martin Peitz, 'Media market concentration, advertising levels, and ad prices' (2012) 30(3) International Journal of Industrial Organization 321.
[42] Wilko Bolt and Alexander F. Tieman, 'Heavily skewed pricing in two-sided markets' (2008) 26 International Journal of Industrial Organization 1251; Jörg Claussen, Tobias Kretschmer and Philip Mayrhofer, 'Incentives for Quality over Time – The Case of Facebook Application' (2012) CEP Discussion Papers, <https://ideas.repec.org/p/cep/cepdps/dp1133.html> accessed 1 June 2022.
[43] Tami Kim, Kate Barasz and Leslie K. John, 'Why Am I Seeing This Ad? The Effect of Ad Transparency on Ad Effectiveness' (2019) 45 Journal of Consumer Research 907; Jordan L. Fischer, 'Web Cookies and Shadow Data Collection: The Legal Implications' (*ABA*, 6 May 2020) <https://www.americanbar.org/groups/business_law/publications/committee_newsletters/cyberspace/2020/202005/fa_2/> accessed 11 February 2022; Susan Athey and Joshua S. Gans, 'The Impact of Targeting Technology on Advertising Markets and Media Competition' (2010) 100(2) The American Economic Review 608; Ramon Casadesus-Masanell and Hanna W. Halaburda, 'When Does a Platform Create Value by Limiting Choice?' (2010) Harvard Business School Working Paper, No. 11-030, <http://www.hbs.edu/research/pdf/11-030.pdf> accessed 1 June 2022.
[44] Lambrecht, Bonatti, Goldfarb, Ghose, Goldstein, Lewis, Rao, Shani, and Yao (n 37); David S. Evans, 'The Antitrust Economics of Free' 7(1) Competition Policy International 71.
[45] Howard Beales and Jeffrey A. Eisenach, 'An Empirical Analysis of the Value of Information Sharing in the Market for Online Content' (2014) <https://ssrn.com/abstract=2421405> accessed 11 February 2022.

However, GIPHY's model does not adjust to this same pattern. GIFs are offered for free to consumers and to business users or API/SDK partners[46]. Not only that, but the tool is especially relevant for API partners since it improves their user engagement and brand awareness. Therefore, if GIFs are not available in a particular platform such as Facebook, users may be dissatisfied with their general experience in relation to the service provided by the social network, given that GIFs and GIF stickers are a novel form of expression.

Most of GIPHY's traffic depends on the services rendered to API partners, and Facebook accounts for a large percentage of its global traffic[47]. GIPHY does not receive key data on user performance since they perform actions on apps and websites of API partners. Therefore, the GIF provider does not process or collect first-party data that is core for most digital platforms. Instead, it can only capture essential and raw data from the agreements it enters into with its API partners, similar to other digital products and services. In spite of that, GIPHY will only obtain raw data on the aggregated popular keywords of the moment and search terms. This data is not valuable for the purpose of advertising when it cannot account for the insights and impact of particular changes and actions performed by the search engine in a granular and substantial way.

Up until 2017, GIPHY chose not to monetise its services through the revenue it obtained from advertisers to subsidise the experience and services catered to final consumers. As shown above, GIPHY is not comparable to mainstream online platforms, as it does not feed off from indirect network effects and feedback loops resulting from the collection and processing of data[48]. The GIF library cannot mimic the business model that leverages data to enhance user experience and personalised advertising, since it cannot offer adequate data on attribution and audience metrics to advertisers[49]. This is exactly why GIPHY has relied on venture capital for its financing up until now. Since 2018 it operated off $20 million, with a subsequential funding round amounting to $72 million on 2020[50]. Although counterintuitive, this business strategy led GIPHY to

[46] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP Initial Phase 2 Submission EU-DOCS\32123250.23 para 2.6.

[47] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP paras 3.1 and 5.8; Vishal Shah, 'Facebook Welcomes GIPHY as Part of Instagram Team' (*Meta*, 15 May 2020) <https://about.fb.com/news/2020/05/welcome-giphy/> accessed 23 February 2022.

[48] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 5.11.c); Nico Neumann, Catherine E. Tucker and Timothy Whitfield, 'Frontiers: How Effective Is Third-Party Consumer Profiling and Audience Delivery? Evidence from Field Studies' (2019) 38(6) Marketing Science 918.

[49] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 39.

[50] Richard Best, 'GIPHY: How it Works and Makes Money' (*Investopedia*, 13 September 2021) <https://www.investopedia.com/articles/investing/022216/GIPHY-how-it-works-and-makes-money.asp> accessed 7 January 2022; Viktor, 'The GIPHY Business Model-How Does GIPHY Make Money?' (*Productmint*, 27 October 2021) <https://productmint.com/GIPHY-business-model-how-does-GIPHY-

its latest feat: the Paid Alignment Business Model, which was intended to exploit the base of captive users generated through its API Partners[51].

2.3 The paid alignment business model in the United States

From 2017 until May 2020 GIPHY offered its 'Paid Alignment' service to brands and advertisers[52]. In exchange for a fee, advertisers were offered a prevalent place within the GIF search engine so they would be displayed alongside the most popular GIFs according to daily and monthly trends or be aligned with one or multiple popular search terms or events[53]. For instance, Dunkin' Donuts purchased the reaction GIFs tied to the 3rd of June (the National Doughnut Day)[54]. At first, these agreements were only concluded through GIPHY's website and app, but they rapidly expanded onto its API distribution network[55].

This business model did not incorporate tangible and adequate direct response mechanisms that could measure attribution. In other words, advertisers and brands could only expect to generate brand awareness and user engagement but could not account and track any tangible economic value to the promoted content. According to third parties to the merger, advertisers could only monitor metrics such as the number of impressions of the content (CPM[56]) but could not provide data on return on investment (ROI[57])[58]. For instance, Dunkin' Donuts could account for the number of times that the GIFs generated from the National Doughnut Day were shared, but it could not tie that engagement on the side of the user to a particular action, i.e., purchasing a doughnut online or offline.

However, this did not seem to be a problem for GIPHY. Instead, it was its business model's main accomplishment. The advertised content was inserted in such a subtle

money/#:~:text=GIPHY%20Make%20Money%3F-,GIPHY%20makes%20money%20by%20helping%20to%20create%20as%20well%20as,on%20a%20per%2Dcampaign%20basis> accessed 7 February 2022.

[51] GIPHY, 'GIPHY Create' <https://GIPHY.com/create/gifmaker> accessed 11 February 2022; *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 5.6.

[52] Mark Bergen & Selina Wang, 'Google Buys Tenor, a GIF Search Tool That Advertisers Love' *Bloomberg* (New York, 27 March 2018).

[53] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 7.13.

[54] Christine Lagorio-Chafkin, 'How This Massive Search Engine with $150 Million in VC Funding Is Finally Going to Make Money' (*Inc*, 8 June 2018) <https://www.inc.com/christine-lagorio/inside-GIPHYs-plan-to-make-money.html> accessed 7 February 2022.

[55] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 2.8-2.9.

[56] CPM stands for cost-per-mille and refers to the cost of the advertisers per thousand impressions of its offering.

[57] ROI is a performance measure used for attributing profit and revenue growth to the impact of marketing initiatives.

[58] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Summary of third-party calls para 22; *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Appendix F – GIPHY's Paid Alignment model para 2.

and intrinsic manner that it did not interrupt user experience. For example, one of the main results retrieved from the search of the acronym 'OMG' displayed on GIPHY is a loop of a Lyft ad. Although the GIF passes on a particular impression when shared between the receiver and the sender, it has the capacity to convey an advertised content. Not many advertisers are able to display their content on the messaging context, if any. Against this background, ads come with a certain air of credibility as opposed to tailored ads to their preferences on social networks that can be perceived as intrusive by users[59].

3 The dynamic component of the merger

The merger between Facebook and GIPHY was analysed through the lens of the dynamics of the digital arena. Prior to this analysis, the CMA had to determine if there was a relevant merger situation, in the light of the application of its national merger control regime and rules.

3.1 The jurisdictional challenges posed by the merger

Although both the acquirer and the target of the transaction are based in the United States, both the CMA and the Australian competition authority have applied their share of supply test which confers them with the jurisdictional powers to decide on the concentration's market outcomes, desirable or otherwise. Although the Austrian Federal Competition Authority applies a turnover threshold, on its Facebook/GIPHY case the value of both the acquirer and target were determined on the basis of their data-based significance by looking at GIPHY's unique visits in Austria in May 2020[60].

In the case of the UK competition authority, it applied its traditional two-step process to find that the merger was cognisable under the UK regime. First, it analysed whether the merger could be interpreted as triggering the disappearance of a relevant undertaking within the UK market. Later, due to the fact that the GBP70 million turnover threshold was not satisfied by GIPHY, the CMA analysed the plausibility of applying its share of supply test over the merger[61].

[59] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Summary of third-party calls, para 19.a.
[60] Evelin Hlina, 'Merger Control: Adjustment of the local nexus under the transaction value threshold in Austria' (*Schonherr*, 12 January 2022) <https://www.schoenherr.eu/content/merger-control-new-developments-concerning-the-local-nexus-under-the-transaction-value-threshold/#:~:text=Pursuant%20to%20Austrian%20law%2C%20a,target%20company%20has%20significant%20domestic> accessed 16 July 2022.
[61] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.1 and 3.20.

As expected, Facebook was found and quickly categorised as an undertaking in terms of the application of the UK merger regime[62]. However, the CMA had to make more of an effort to justify that GIPHY was an undertaking on these same terms, too.

To this end, the UK competition authority did not address the current state of things regarding GIPHY, but rather the set of steps that it had taken towards its ambition of being a profitable business[63]. For instance, the fact that GIPHY successfully completed a number of investment rounds in order to expand its commercial operations and further develop its services and goods, was highlighted throughout the CMA's analysis to prove that GIPHY was promoting itself to investors as a business[64]. Although the company was certainly not profitable, it raised $150.95 million in four rounds of funding. The competition authority could not go as far as saying that GIPHY, pre-merger, was a successful undertaking, at least from the UK perspective. Instead, it placed its main arguments on the plans the business had to generate revenue in the future, i.e., through the Paid Alignment Business Model. In fact, since 2019, GIPHY had endured losses insofar as its revenue levels were not sufficiently high to cover its operational costs, due to an increase in traffic, general uncertainty in the venture capital market and a slowdown in the advertising market.

Pursuant to the share of supply test provided in the UK merger control regime, the authority had a wide discretion to assess whether the merged enterprises either supply or acquire goods or services of a particular description in the UK, and would, post-merger, supply or acquire at least 25% or more of those goods or services in the UK[65]. By this token, the CMA captured the GIPHY phenomenon within digital communications as a whole and considered the supply of apps and websites that allow UK users to search for and share GIFs for the purpose of this analysis. Moreover, it calculated the shares of supply by reference to the average monthly searches performed by users on GIFs in general, be that through an app or directly through a website. The combined share of supply amounted to a 50-60 per cent: the searches run on Facebook accounted to this same percentage, whereas GIPHY only produced a 0-5% per cent of the estimate[66].

Notwithstanding the reduced impact of the supply of services from the perspective of the target, the UK competition authority established that the jurisdictional nexus to the UK was sufficiently justified due to the results produced by the share of supply test itself[67].

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[62] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.7.
[63] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.8-3.12.
[64] Michelle Castillo, 'Investors have bet more than $150 million that short animations are the future of communication' (*CNBC*, 17 March 2017) <https://www.cnbc.com/2017/03/17/giphy-why-investors-bet-150-million-on-gifs.html> accessed 4 June 2022.
[65] Enterprise Act 2002, s 23.
[66] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 3.43 and 3.44.
[67] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 3.47.

3.2 Horizontal overlaps between Facebook and Giphy on the display advertising market

From the horizontal perspective, the CMA's theory of harm revolved around Facebook's 'killing' of GIPHY's Paid Alignment Business Model. In this context, the main concern was that the target had started to monetise its GIF library through the Paid Alignment Business model on the U.S. and Facebook discontinued this service once it acquired full control over GIPHY[68].

The competition authority considered GIPHY and Facebook have an important presence within the same level of the supply chain of the display advertising market[69]. To this end, the OECD has acknowledged that the identification of overlapping products and geographical areas for dynamic markets might come in as a difficult task. It has settled that a sensible solution to this problem is to establish horizontal and vertical overlaps between the undertakings on the basis of close substitutes within the market[70]. Correspondingly, the CMA points out that Facebook and GIPHY come in as close substitutes within the same market. This finding is instrumental to its final decision to order the divestiture, even though it recognises that their activities do not perfectly intersect at the horizontal level[71].

As pointed out before, Facebook offers the space of its social network to advertisers alongside with the data gathered about consumers to make behavioural and targeted advertising possible. Digital advertising is tailored to trigger an action. If the action that is intended to happen is performed by the user, the ad will be deemed effective and therefore will be more valuable for the advertiser. Against this background, as per the CMA's market study on online digital advertising, Facebook is the largest supplier of online display advertising expenditure with a share of 50-60 per cent, and therefore, it has significant market power in social media[72]. Stemming from Facebook's already established dominance on display advertising, the competition authority's decision is already prejudiced towards the outcome of a substantive lessening of competition[73]. As far as GIFs are concerned, Facebook does not host its proprietary GIF library on the wide range of platforms it owns. Rather, it integrates both of Google Tenor's and GIPHY's search engines and libraries for this purpose[74].

[68] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 7.30-7.40.
[69] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 36.
[70] OECD, 'Merger control in dynamic markets' (*OECD*, 2020) <https://www.oecd.org/competition/merger-control-in-dynamic-markets-2020.pdf> accessed 9 March 2022.
[71] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 5.182.
[72] *Online platforms and digital advertising*, Competition & Markets Authority para 5.131 and 5.136.
[73] Smith (n 6).
[74] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Latham & Watkins LLP paras 4.3 and 4.19.

In contrast with Facebook, GIPHY started to monetise its activity on a different market, and with a different purpose, as pointed out by the parties throughout the proceedings[75]. GIPHY's Paid Alignment Business Model was not meant to trigger actions on users but was only directed at raising brand awareness for advertisers and brands[76]. As illustrated, the purpose of advertising for Facebook and GIPHY is not the same and, in our view, they cannot amount to an overlap at the same level of the value chain of the display advertising market[77].

Bearing in mind that Facebook's acquisition of GIPHY can lessen competition within the advertising market, even in insignificant terms, the merger is pre-empted anticompetitive due to the unpredictable and dynamic characteristics of digital markets. Surprisingly, the CMA established that the merger would not raise anticompetitive concerns if GIPHY was to be acquired by a third party other than Facebook[78]. Therefore, the 'substantiveness' of the prospective risks associated to competition within the display advertising market does not stem from the merger on itself or the decisions made by Facebook once it was completed, but rather on the initial position held by the competition authority in its market study against the social network conglomerate.

3.3 The applicable test for a dynamic market by using static parameters of competition

The definitions and tests that have been applicable up until to this moment within the competition law community in relation to dynamic markets have been conflated. The difference between static and dynamic competition strives upon the nature of the rents firms compete for: in the case of static, they compete for existing rents, whereas for dynamic they do the same for future rents -produced through innovation in the long term-.

As a matter of fact, the dynamic competition paradigm only means the parameters of competition and innovation must be considered within the antitrust analysis as co-determinant of the changes produced within the market structure and the undertaking's performance within it. This paradigm enables competition authorities to observe market outcomes alternatively and cumulatively in terms of concentration and of the progress on innovation at the industrial level, and not only considering the former

[75] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* Latham & Watkins LLP para 4.1.
[76] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 7.13.
[77] OLG Vienna 10.11.2021, 28kt 6/21y and OGH 23.06.2022, 16Ok3/22k. Both the Higher Regional Court of Vienna acting as the Federal Cartel Court as well as the Supreme Cartel Court, held the position that no significant horizontal overlap was produced, from the Austrian competition regime point of view.
[78] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 11.312.

in detriment of the latter as conflicting values[79]. Plain and simple, the shift from one approach to the other lies upon the assessment rendered to the same set of facts; whereas the static analysis considers each industry and firm as a black box where technology and innovation are predominantly irrelevant, dynamic analysis aims to set out the differences within managerial strategies and business capabilities[80].

It follows then that static competition analysis will consider the same set of assumptions repeatedly: if undertakings cannot be distinguished one from another from the inside, higher levels of concentration will always lead to undesirable market outcomes. When authorities act on 'blind' assumptions pursuant to the static structure-conduct-performance framework, competition policy may, as a result, also become the source of unreasonable conclusions[81].

On the contrary, through dynamic assessment, competition authorities can observe market outcomes depending on the 'mix' of competition and innovation that can be welfare-enhancing within each industry and firm: it follows that the same combination will not be optimal for digital markets as opposed to traditional markets. This approach is tailored to avoid overenforcement that can cause a diminishment of innovation as well as a decline on positive market outcomes. However, most competition authorities tend to fall in the trap that a monopolist (or a highly concentrated market, for that matter) may have low incentives to innovate. This may not be true for digital markets where venture capitalists are available, and the larger part of the main digital platforms are multiproduct firms[82].

As opposed to this, the CMA considers that Facebook aims to create an architectural advantage or bottleneck within the GIF sector. In the same spirit, Facebook would favour the extraction of naked monopoly rents once the merger was completed[83]. How-

[79] Nicolas Petit and David Teece, 'Innovating Big Tech Firms and Competition Policy: Favoring Dynamic Over Static Competition' (2021) 30(5) Industrial and Corporate Change 1170-1171; Frederic Jenny, 'Competition law and digital ecosystems: Learning to walk before we run' 30(5) Industrial and Corporate Change 1143-1167.

[80] Petit and Teece (n 80) 1992. This same understanding is not followed by the Competition Appeal Tribunal in *Meta Platforms, Inc. v. Competition and Markets Authority* [2022] CAT 26. Instead, in paras 99-102, the CAT sets out that static and dynamic competition are coexistent within the same spectrum and cannot be too rigidly demarcated. All in all, the CAT upholds the CMA's decision in substance, whereas it mildly touches upon the information subject to confidentiality and its unfolding to the parties.

[81] Joseph A. Schumpeter, *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (fist published 1934, Harvard Economic Studies 2008); OECD (n 71).

[82] Petit and Teece (n 79) 1175-1176; Gary Dushnitsky and D. Daniel Sokol, 'Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments that Fund It' (2021) No. CLASS 21-35 USC CLASS Research Paper <https://dx.doi.org/10.2139/ssrn.3863580> accessed 4 April 2022.

[83] Michael G. Jacobides, Thorbjørn Knudsen and Mie Augier, 'Benefiting from innovation: Value creation, value appropriation and the role of industry architectures' (2006) 35(8) Research Policy 1210; Petit and

However, the competition authority fails to identify the heterogeneity and dynamic capabilities between both undertakings in terms of the differences between their business models. Although in the short-term Facebook's incentives may be driven towards a profit-maximising strategy within the range of platforms and services it owns, in the long-term digital platforms tend to prioritise their strategies on growth, expansion and scale[84].

3.4 The resulting theories of harm applied: loss of innovation (and!) of future competition

On top of that, the theory of harm applied by the CMA does not consider the 'killing' of a nascent competitor, but rather that of a monetisation strategy: the Paid Alignment Business Model. As opposed to the test applicable to the dynamic competition paradigm, the incentives of the existing competitors within the market are not analysed on the long-run but rather on the short-run.

The British competition authority pulls together the two main -and mutually exclusive- theories of harm that have been used in nascent competitor acquisition cases: the loss of future competition (for example, the *Facebook/Instagram* acquisition) and the loss of innovation between the acquirer and the target (for instance, following the *Ilumina/Grail* merger[85]). The competition authority's scrutiny from both perspectives puts forward GIPHY's monetisation strategy as the source for potential competition and as a key differentiator in terms of innovation before Facebook's superdominance on the display advertising market[86].

However, the CMA's reasoning leads us to an antitrust cul-de-sac. Either Facebook and GIPHY are so close within the market of display advertising so the loss of future competition is so imminent that the likelihood of significant future competition outweighs the benefits and synergies caused by the merger, or the undertaking's overlap within display advertising is so remote that competition would not take place until the distant future and therefore the key parameter of competition to be analysed is innovation. Anyhow, the CMA cannot have it both ways: if the loss of competition

[84] Petit and Teece (n 79) 1184.
[85] Case C-T-227/21 *Ilumina v. Commission* (General Court -Third Chamber, Extended Composition, 13 July 2022). At the jurisdictional level, the General Court confirmed the extensive interpretation of the European Commission's powers under article 22 EMUR, and established the principle of the protection of legitimate expectations would be applicable only when well-founded expectations were given as a consequence of precise assurances from an EU institution, body or agency (paras 254).
[86] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 7.254.

theory of harm is applicable due to the temporal proximity of competition between one and another, then the legal test required by this analysis must follow, and vice versa[87].

Either way, the CMA fails to ground its pre-emptive finding on solid arguments, since it considers a static approach to the merger: the current *status quo* of the market (or counterfactual)[88]. Although the decision is sustained on the grounds of the 'nascent' rationale, the competition authority does not factor into its analysis the uncertainty about future competition that is characteristic to dynamic markets[89]. The CMA highlighted GIPHY's revenue model was primarily flawed so that in the near future it would not have generated enough revenue to secure sufficient external investment and there was no realistic prospect of an alternative purchaser[90].

In the case of the loss of future competition theory that would have required to predict the evolution of the market of display advertising over time, with and without the merger. To this end, for instance, it did not consider GIPHY will be a significantly weaker competitor within the market of the provision of GIFs if the merger is blocked and divestiture is ordered. From the economic analysis perspective, the CMA is right to point out that expansion within the multi-sided market of advertising can be magnified by network effects, but it does not account, for instance, for the marginal cost efficiencies that would arise from the merger[91].

In the case of the loss of innovation theory, the analysis is based on the incentives and ability of the merging parties to engage in innovation which, in turn, must be corroborated by the economic analysis of innovation effects -lacking on the CMA's decision-. The application of these economic models can be presumptive to the specific assumption in which they are formulated and have posed problems for competition authorities throughout the world. Traditionally, the most suitable economic analysis has been to balance out the social costs of lost competition caused by the merger against the reduced incentives to innovation as a result of the operation, according to the EC's Guidelines on the assessment of horizontal mergers[92]. In this same spirit, some acquisitions may be more problematic than others.

[87] Jay Ezrielev, 'Uncertainty and Two Theories of Harm in Nascent Competitor Acquisitions' (2022) Competition Policy International <https://www.competitionpolicyinternational.com/uncertainty-and-two-theories-of-harm-in-nascent-competitor-acquisitions/?utm_source=CPI+Sub%E2%80%A6> accessed 23 February 2022.
[88] Salomé Cisnal de Ugarte, Mélanie Perez and Ivan Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' 6(1) European Competition and Regulatory Law Review 18.
[89] OECD (n 71).
[90] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 11.154.
[91] Ezrielev (n 87).
[92] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5.

As a matter of fact, innovation in the form of the Paid Alignment Business Model has already manifested itself on GIPHY's uprising monetisation strategy. In the same vein, GIPHY cannot be classified within the potential competition category since its monetisation business model has already realised in the market. In addition, we are a long way from the traditional pharma scenario where innovation as such must be protected so that a technological advancement is not discontinued in order to avoid a replacement effect, similar to the recent *Ilumina/Grail*[93] merger[94]. Moreover, digital markets do not follow a standardised innovation process pursuant to a regulatory approval process as opposed to the pharma industry. Thus, the quantitative evidence supporting the theory of harm of 'killing' a monetisation strategy cannot follow through on the basis of accurate prospective predictions[95].

As counterintuitive as it can sound, when there is a higher degree of alignment between the undertakings, there will be a greater scope for efficiencies to be redeemed from the merger[96]. In the terms of the General Court's ruling on *CK Telecoms UK*, any concentration can lead to efficiencies, stemming particularly from the rationalisation and integration of the undertakings following the merger[97]. However, the EC's implementation of this theory of harm has, *de facto*, reversed the burden of proof so that the undertaking is the one responsible to show these effects outweigh the potential risks of the merger. In fact, in those cases the EC would have accepted efficiency claims, it did not verify them because the parties did not achieve to bring them forward successfully. On top of that, even in those mergers where efficiency claims were considered, they were not decisive or indicative of the EC's final decision[98].

[93] European Commission, 'Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Ilumina' (*Press Corner*, 22 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844> accessed 9 March 2022.

[94] Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2018) 129(3) Journal of Political Economy 649-702.

[95] Norbert Maier and Kalle Kantanen, 'Economics of Potential Competition' (*CPI Competition Policy*, 10 February 2022) <https://www.competitionpolicyinternational.com/economics-of-potential-competition/?utm_source=CPI+Subscribers&utm_campaign=c6c858cf3e-%E2%80%A61/11> accessed 15 March 2022; Christopher P. Adams and Van V. Brantner, 'Estimating The Cost of New Drug Development: Is It Really $802 Million?' (2006) 25(2) Global Health Priorities; Pierre Dubois, Olivier de Mouzon, Fiona Scott-Morton, and Paul Seabright, 'Market size and pharmaceutical innovation' 46(4) The RAND Journal of Economics.

[96] Petit and Teece (n 79) 1187; Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, 'Platform mergers and antitrust' (2021) 30(5) Industrial and Corporate Change 1308; Jan Bena and Kai Li, 'Corporate Innovations and Mergers and Acquisitions' (2013) 69(5) The Journal of Finance 1923; Kevin Bryan and Erik Hovenkamp, 'Antitrust Limits on Startup Acquisitions' (2020) 56 Review of Industrial Organization 615; Yasser Alhenawi and Sudha Krishnaswami, 'Long-term impact of merger synergies on performance and value' (2015) 58 The Quarterly Review of Economics and Finance 93.

[97] Case T- 399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] paras 276-279.

[98] Reinhilde Veugelers, 'Innovation in EU merger control: walking the talk' (2012) Bruegel Policy Contribution Issue 2012/04, <https://www.bruegel.org/wp-content/uploads/imported/publications/pc_2012_04__FINAL.pdf> accessed 4 April 2022.

Considering the case of the Facebook/GIPHY merger, the social costs of lost competition might be lower than the reduced incentives to innovation. However, stemming from the conclusions of its market study, the CMA already deemed that Facebook's dominance was inadmissible and potentially harmful for competition on its own, through the abuse of a dominant position lens under article 102 of the Treaty of the Functioning of the European Union. The structural remedy ordered by the decision has been the device picked out from the toolbox by the authority to confront Meta's dominance within the UK.

3.5 Vertical effects: GIFs as an input to foreclose

Following its position from the horizontal viewpoint, the CMA also established that GIFs are an input in the downstream market of the provision of GIFs. All in all, it stated that Facebook will foreclose the access to the input or downgrade the conditions in which it is rendered to GIPHY's API existing partners.

By this token, the competition authority believes Facebook would be incentivised to disadvantage its competitors on the upstream market of social media by limiting the access to GIPHY's features, similar to the effects caused by mergers involving pipeline firms[99]. These concerns are similar to those voiced out by EC on the *Google/Fitbit* merger, although the conclusions derived from it are striking by comparison[100]. As we have shown before when analysing Facebook's main sources of revenue, a major part of its value is not derived from within the social network, but instead depends on the value created by third parties through display advertising[101]. However, the competition authority's main argument to uphold Facebook's incentives to foreclose is addressed through the balance of the direct benefits and the costs associated to this strategy. The fact that users tend to multi-home across platforms is not an obstacle to this finding[102].

Against the backdrop of dynamic digital markets, the competition authority acknowledges that the vertical effects of the merger take place within an evolving innovation and experimentation-prone environment, where the static economic analysis is not applicable[103]. On the basis of the foregoing, if the CMA's rationale was to be consistent, if the economic analysis performed for the horizontal overlaps is static,

[99] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 8.165; Parker, Petropoulos, and Van Alstyne (n 97) 1308; at the EU level, in cases such as Case. M. 8955 *Takeda/Shire* [2018], Case. M. 8084 *Bayer/Monsanto* [2018] and Case M. 7932 *Dow/DuPont* [2017].
[100] Malte Frank and Sabrine Frank, 'Google/Fitbit: the starting point for a revolution in merger remedies in digital markets?' (2021) 42(6) European Competition Law Review 297-298.
[101] Geoffrey Parker, Marshall Van Alstyne and Xiaoyue Jiang, 'Platform Ecosystems: How Developers Invert the Firm' (2017) 41(1) MIS Quarterly 255-266.
[102] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 8.120-8.126.
[103] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA para 8-146.c).

the same must be applicable for the vertical perspective. It does not follow that the dynamic competition paradigm justifies the competition authority's intervention if it works on the assumption that digital markets compete for rents and not for users[104]. Considering Facebook's large user base, the authority considers the direct benefits of foreclosure would be larger than its incentives to keep from restricting access to GIPHY as an input, although in a public statement it declared that it would maintain existing relations and conditions with API partners. Facebook even signed a 5-year agreement with Snap to ensure access on the same terms to the GIF library and database[105].

In the CMA's opinion, GIPHY is attributed the role of a 'complementor' within Meta's ecosystem, so that the merger is subservient to break the barrier on the provision of GIFs and then Facebook can follow through insulating the barrier to protect its own superdominant position within social media and digital display advertising[106]. Again, the authority's argument is completed through the pre-emptive conclusions obtained from the market study performed on digital platforms to establish a substantive lessening of competition due to input foreclosure. This conclusion is similar to the ACCC's conclusion on the *Google/Fitbit* merger[107].

All in all, the decision to order the divestiture is a clear example of a Type I error on competition enforcement, which deprives the market of attaining the efficiencies associated with the merger[108].

4 Interoperability solutions as opposed to structural remedies

In line with its opinion throughout the proceedings, the CMA required the full divestiture of GIPHY from Facebook[109]. On top of that, considering GIPHY's financial (questionable) viability, the competition authority deemed that a simple divestiture over the target was not enough: Facebook had to restore GIPHY's ability to generate revenue, so that the remedies comprised additional obligations in terms of time and

[104] Ezrielev (n 87); Petit and Teece (n 79) 1191; Marco Cappai and Giuseppe Colangelo, 'Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the US' (2020) TTLF Working Papers, No. 55, <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/cappai_colangelo_wp55.pdf> accessed 2 June 2022.

[105] Vishal Shah, 'Facebook Welcomes GIPHY as Part of Instagram Team' (*Meta*, 15 May 2020) <https://about.fb.com/news/2020/05/welcome-GIPHY/> accessed 8 February 2022; *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Latham & Watkins LLP para 8.2

[106] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 7.240 and 7.241; Petit and Teece (n 79) 1191.

[107] Frank and Frank (n 100) 299.

[108] Ariel Ezrachi, 'Under (and Over) Prescribing of Behavioural Remedies' (2006) Working Paper 13/05, The University of Oxford Centre for Competition Law and Policy, <https://dx.doi.org/10.2139/ssrn.913773> accessed 4 April 2022.

[109] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups para 11.

resources from Facebook. Within the divestiture rationale, given that Facebook has terminated the Paid Alignment Business Model, i.e., its revenue function, it should make up for it. The UK competition authority goes through with this process and imposes far-reaching obligations on Facebook as part of its divestiture package, such as imposing that a strong and experienced senior management team must be provided and cash to support its operating activities must be incorporated, amongst others. Not only the CMA looks to reverse the situation generated by the merger, but it looks to reinstate GIPHY as a viable and strong competitor within the market, although its pre-merger prospects were not positive[110].

Stemming from the ideas underlying the theories of harm on the lessening of competition and innovation caused by the merger, the CMA rules out the effectiveness of behavioural remedies due to their static nature. The competition authority establishes that behavioural remedies are only suitable when divestiture is not a feasible option, and the substantive lessening of competition will have its effect during a short period of time[111]. This would be a coherent approach if the competition authority would have followed the spirit as well as the legal and economic tests applicable to dynamic theories of harm from the horizontal and vertical viewpoint[112]. However, as shown above, it failed to do so.

Aside from this, it follows that if the concerns voiced out by the competition authority are dynamic in nature, the remedies brought out to address them must be the same, although they might be costly because of the resources required for monitoring compliance from a public enforcement perspective[113]. In this same vein, behavioural remedies are flexible and reversible tools that are suitable to address concerns in markets with changing realities, as opposed to the irreversible component of structural remedies[114].

In front of the competition authority's pre-emptive decision, Facebook put forward the whole set of interoperability remedies that have been used and proposed by competition authorities: i) protocol interoperability (the 'commingling' remedy); ii) data interoperability (the 'open access' remedy); and iii) full protocol interoperability (the

[110] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 11.14-11.21 and 11.49.
[111] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 11.251 and 11.253.
[112] Rory Van Loo, 'In Defense of Breakups: Administering a "Radical" Remedy' (2020) 105(7) Cornell Law Review 1955.
[113] *Completed acquisition by Facebook, Inc. of GIPHY, Inc.* Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups para 10.
[114] Ezrachi (n 109); Frank P Maier Rigaud, 'Behavioural versus Structural Remedies in EU Competition Law' in Philip Lowe, Mel marquis and Giorgio Monti (eds), *European Competition Law Annual 2013* (Hart Publishing 2014).

white label licensing remedy)[115]. All of them were ruled out due to their behavioural nature, regardless of the effects they could comprise for competition within the merger. Accordingly, we must question whether interoperability mandates are dynamic in nature and suitable to address competition concerns within digital markets.

4.1 An overview on interoperability

The break-up ordered by the CMA, especially when the operation was non-notifiable under the U.S. merger regime, calls for a closer look into alternative outcomes and remedies that could have been imposed, namely interoperability mandates. Interoperability refers to the ability of different services, i.e., Facebook and its competitor's services, to communicate and work with one another, given that the latter is complementary to the former's functionalities. This remedy can have both horizontal and vertical implications[116].

Bearing in mind the acquisition cannot be labelled under the 'killer acquisition' category, divestiture seems to be a burdensome solution[117]. Instead, when anti-competitive leveraging of market power into markets with complementary services is involved, data interoperability may be an efficient possibility to apply to the merger, so synergies resulting from the operation can be reflected immediately into the market and the risks posed by it can be addressed in an effective manner[118].

Not only that, but interoperability mandates are adequate instruments to face heterogeneous market realities[119]. Considering the Facebook/GIPHY merger, which the CMA claimed jurisdiction over -the Australian authority's decision is still pending and the Austrian Supreme Cartel Court has already cleared the merger with commitments- although both undertakings are established in the U.S., divestiture can cause unpredictable outcomes worldwide. We can agree that, once the divestiture is completed according to the CMA's conditions, its effects will not be confined to the UK market, but to a global scale, insofar as the requirements stated by the authority have a worldwide dimension to them. For instance, they are aimed at restoring GIPHY's necessary management, technical and creative personnel to enable it to compete effectively after the divestiture is completed.

[115] *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of GIPHY, Inc.* CMA paras 11.204-11.217; *Competition Policy for the digital era: Final report* Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 63.
[116] Chris Riley, 'Unpacking interoperability in competition' (2020) 5(1) Journal of Cyber Policy 95.
[117] Examples of non-divestiture remedies in the EU, i.e., Case M. 8330 *Maersk Line/Hamburg Süd* [2017] or Case M. 7268 *CSAV/HGV/Kühne/Hapag Lloyd* [2014].
[118] Crémer, de Montjoye and Schweitzer (n 115) 130.
[119] Ezrachi (n 108); for instance, Case. M.8314 *Broadcom/Brocade Regulation* [2017] or Case M. 8744 *Daimler/BMW/Car Sharing JV* [2018].

Even though the theories of harm designed by the CMA looked to address horizontal and vertical effects, one of the main risks associated to the merger manifests on Facebook's incentives to disadvantage its competitors in terms of the provision of GIFs on the vertical front as well as to aggregate GIPHY's data into its own datasets to generate more insights and unwarranted economic value for its behavioural and targeted advertising tasks performed on neighbouring markets[120]. The main risk at stake is that of asymmetry of information between competitors, not as a result of competition on the merits, but as the product of an acquisition of a close substitute.

In the face of this, interoperability mandates can address these concerns, and the technical means to manage them are public, transparent, third-party facing APIs, where users and third-party service providers can meet up so GIPHY's library and search engine is no longer non-exclusive and non-rivalrous to Facebook, and can be accessible to partners, but also to users that can generate content through GIFs[121]. In fact, at the Austrian level, this condition was imposed by the legal authorities to counteract the possible consequences caused by the merger[122]. This type of APIs, as opposed to private APIs, establish mechanisms so that remote services can require data or an operation to be performed by the platform, and it can get as basic or as complex as the remedy's scope of action[123]. Therefore, GIPHY's library could be made available for competitors and final consumers to generate content and value by unlocking downstream innovation. Nonetheless, if access is not rendered to real-time data streams, the remedy may render ineffective altogether[124].

The main drawback to these remedies follows the gatekeeper philosophy: if the API is embedded within Facebook's ecosystem, it can decide which requests (from its competitors) are to be accepted and denied based on its technical and usage policies. Therefore, the question of foreclosure becomes more of a circular conundrum in this context: Facebook is the only one holding the master keys to the APIs, and it is the only

[120] Parker, Petropoulos, and Van Alstyne (n 96) 1309; Bertin Martens, 'Data Access, Consumer Interests and Social Welfare: An Economic Perspective' (2020), <https://dx.doi.org/10.2139/ssrn.3605383> accessed 4 April 2022.
[121] Riley (n 116) 96.
[122] The Federal Court ordered, after all Austrian and international merger proceedings would be completed, that Meta would have to grant alternative GIF libraries, under certain conditions, access via APIs to Giphy's GIF Library to allow the establishment of an additional GIF provider other than Giphy and Tenor (Google) for a 7-year period of time; 'Meta(Facebook)/Giphy merger: AFCA appealing against conditional clearance' (*Federal Competition Authority*, 4 March 2022) <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance> accessed 15 July 2022.
[123] Michael Bock, 'WTF is an API? How the Internet Works Behind the Scenes' (*hackernoon*, 20 January 2015) <https://hackernoon.com/apis-how-the-internet-works-behind-the-scenes-690288634c32> accessed 14 March 2022.
[124] Amelia Fletcher, 'Digital competition policy: Are ecosystems different?' (2020) DAF/COMPT/WD (2020)96 Hearing on Competition Economics of Digital Ecosystems.

player capable of controlling and monitoring its actions in a successful and accurate manner[125]. This unlimited control over the API can trigger anticompetitive behaviour[126]. Additionally, Facebook will be able to closely monitor the activities of its competitors when access is rendered to them and easily replicate or answer to competitive threats[127].

All things considered, the CMA's position to rule out behavioural interoperability remedies does not seem to be proportionate, considering the impact of divestiture at a global scale, although these remedies, if not designed and closely monitored, can result to be problematic.

4.2 What's next?

Considering the drawbacks of interoperability mandates, one must question whether another course of action is possible: other than imposing obligations on the undertakings to secure the outcome of a particular merger, competition authorities can take an active role on ensuring that behavioural remedies are suited to meet the problems identified within its analysis. For instance, the faults of dynamic analysis within merger control could be addressed through merger analysis that does capture the real impact of acquisitions within digital markets.

On one hand, substitutability should be solved based on potential competition materialising within the markets concerned. Although merger control is prospective, it cannot go so far as establishing that close substitutes can account for a horizontal overlap when a dynamic markets' approach is not applied around substitutability[128]. It is possible that two close substitutes can rapidly compete and there is also a chance they never meet up on the market. Prospective analysis does not work on the assumption of the worst possible scenario, but it does function on the most probable one. For instance, online choice experiments can be performed by competition authorities in order to

[125] Joseph L. Bower and Clayton M. Christensen, 'Disruptive Technologies: Catching the Wave' (*Harvard Business Review*, January-February 1995) <https://hbr.org/1995/01/disruptive-technologies-catching-the-wave> accessed 14 March 2022.

[126] Annie Njanja, 'Meta faces prosecution in South Africa for alleged antitrust breach' (*techcrunch*, 15 March 2022) <https://techcrunch.com/2022/03/15/meta-faces-prosecution-in-south-africa-for-alleged-antitrust-breach/> accessed 15 March 2022; 'A552 – Italian Competition Authority, investigation opened against Google for abuse of dominant position in data portability' (Autorità Garante della Concorrenza e del Mercato, 14 July 2022) <https://en.agcm.it/en/media/press-releases/2022/7/A552> accessed 15 July 2022.

[127] Gabriel Nicholas and Michael Weinberg, 'Data Portability and Platform Competition: Is User Data Exported from Facebook Actually Useful to Competitors?' (2019) NYU School of Law, <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition> accessed 4 April 2022.

[128] Parker, Petropoulos and Van Alstyne (n 96) 1332.

capture user preferences to evaluate whether substitution is prone to manifest close in time[129].

On the other hand, dynamic efficiency gains and synergies resulting from the operation should be compared with increased concentration competition concerns, directly by the competition authority and not as a result of a reverse burden of proof in the hands of the undertakings. Therefore, network effects and data synergies of the merged entity should account for the unpredictable outcome of the merger. Competition authorities should remain open to rule that an acquisition will eliminate duplication on investment and trigger business capabilities, whereas the innovation efficiencies are factored into the 'mix' of the prospective merger market outcomes[130].

In addition, although ex ante evaluation is core to secure disruptive effects to take place within digital markets, ex post evaluation as a form of considering the effectiveness of the analysis performed and the remedies proposed is also key to ensure competition authorities can assess where they have gone wrong or, to the contrary, whether the analysis and remedies have brought the risks posed by the merger to an end[131].

Finally, the traditional approach to interoperability and data sharing has been to award it on the basis of exceptional circumstances and always referred to data of dominant firms' processes and structures, such as in the *Magill, IMS* and *Microsoft* mergers[132]. Nonetheless, competition authorities and entities must strive to ensure data interoperability is not ordered as a standalone measure but alongside data portability mandates that confer users control over their raw data. By this token, they can trigger the entrance of third parties to compete with the ecosystem holders managing the public APIs. As opposed to the risks posed by asymmetrical information in the hands of digital platforms and competitors as well as potential entrants to the market, in the sense of the Digital Act proposed in February 2022, the playing field will be progressively levelled so competitors get symmetric access to information leading to the creation of value both in the upstream and downstream market[133]. However, we must consider

[129] Erik Brynjolfsson, Avinash Collis, Walter Diewert, Felix Eggers and Kevin Fox, 'GDP-B: Accounting for the Value of New and Free Goods in the Digital Economy' (2019) 25695 NBER Working Paper Series, <https://www.nber.org/system/files/working_papers/w25695/w25695.pdf> accessed 4 April 2022.
[130] Parker, Petropoulos and Van Alstyne (n 96) 1332-1333; Veugelers (n 99).
[131] Parker, Petropoulos and Van Alstyne (n 96) 1333; Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (1st edn, OUP 2016).
[132] Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039; and Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601.
[133] Parker, Petropoulos and Van Alstyne (n 96) 1325; European Commission, 'Data Act: Commission proposes measures for a fair and innovative data economy' (*Press Corner,* 23 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1113> accessed 21 March 2022.

more data are not always better for competitors. Rather, differentiated data from the one integrated within its own datasets are the most valuable, so interoperability mandates can range on their impact depending on existing datasets which, in turn, rely on big investment and the requirements tailored to the firm's processes. Even if close substitutes for Facebook's provision of GIFs could benefit from interoperability, the data they can obtain from the remedy could be valuable for them or not[134].

All things considered, interoperability can trigger and foster innovation and competition, but it is not a magic bullet to address competition concerns in digital markets by default. Competition authorities must delve into the dynamic competition paradigm so that efficiencies and business capabilities are accounted for, as opposed to the prospective risks caused to competition. To this end, the prospective nature of the merger control regime must not be conflated with a worst-case scenario analysis.

5 Conclusions

The CMA ordered Facebook's divestiture of GIPHY, although the substantial lessening of competition from both the horizontal and vertical perspective is questionable, considering the arguments put forward by the authority, namely the dynamic component of the merger.

First, the horizontal overlap between Facebook and GIPHY is established on the basis of their close substitutability on the display advertising market. However, the CMA fails to account that both of them could intersect in this market, but they pursue different purposes through advertising: whereas branded GIFs and GIF stickers produce user engagement and brand awareness with the advertiser's offerings, the ads displayed on Facebook are aimed to trigger an action on the user. Against this same background, the authority completes its argument, and the risks associated to competition as a result of the merger at the horizontal level, by bringing about the decisive element of digital markets: the dynamic competition paradigm. Nonetheless, the authority's analysis does not follow through on its promise: it instrumentalises the counterfactual -a static dimension of competition- to establish the imminent loss of competition and innovation to be produced on the market. On top of that, the aforementioned theories of harm are cumulatively presented by the authority to reinforce the idea of the prospective risks linked to GIPHY's elimination from the market when they, in fact, present conflicting elements which cannot go hand in hand, such as the expected proximity and time in which competition will materialise within the market. All in all, the factors contributing to the finding of Facebook's discontinuing of GIPHY's Paid

[134] Thibault Schrepel, 'Alternatives to Data Sharing' (*The Regulatory Review*, 21 February 2022) <https://www.theregreview.org/2022/02/21/schrepel-alternatives-data-sharing/> accessed 15 March 2022.

Alignment Business Model does not unravel the 'killing' of a nascent and potential competitor, although the competition authority was inclined to hold that view.

Second, the vertical overlap between Facebook and GIPHY and the threat to competition of the merger was defined in the terms of a traditional pipeline vertical merger: there is an input, and the dominant firm will be incentivised to foreclose access to it or, at least, to downgrade the conditions in which access is rendered. The same rationale of dynamic digital markets was applied and, yet again, the CMA failed to establish possible prospective states of being that could have favoured business capabilities and efficiencies for the undertakings. Furthermore, the authority places the substantial lessening of competition meter too high stemming from Facebook's initial super dominance, and the potential implications of the merger constitute the straw that broke the camel's back.

As a consequence of its horizontal and vertical findings, the authority believes remedies behavioural in nature are to be ruled out altogether, insofar as they cannot successfully and effectively address the 'dynamic' concerns of the acquisition. Nonetheless, there are in fact all kinds of reasons to advise against this position: divestiture will cause an irreversible impact on a non-notifiable operation under the UK merger regime (and for the U.S. merger control regime) and cannot adjust to the heterogeneous and uncertain market outcomes resulting from it.

As opposed to this, interoperability mandates ordered through the access of public APIs seem to be a plausible solution so asymmetries of information between Facebook and its competitors on the upstream market of the provision of GIFs can be solved. Be that as it may, interoperability is not a magic bullet to fire antitrust problems away: data can be as useful or as useless to competitors only in the light of the scope and reach of their own datasets, and therefore may need to be ordered alongside with a data portability mechanism to ensure users to port their raw data into third-party provider services.

Out of the regulatory scope, we also propose competition analysis must be enhanced so dynamic and innovation efficiencies do not come as an exception, but rather as a rule. Compared to this position, although the EC acknowledges on its Guidelines on Horizontal Guidelines the possible impact on its analysis of these elements, it has failed to consider them as an element of their merger analysis. Instead, innovation efficiencies based on the dynamic competition paradigm only play a role on merger control where the parties' standard of proof is concerned, and it has never substantially impacted on the outcome of an EC decision. To this end, competition authorities must look back at the enforcement they have performed and account for Type I and Type II errors that were committed in the past. By this token, the dynamic competition

paradigm will be progressively applied with successful outcomes, even when interoperability mandates are applied.

Selcukhan Unekbas*

COMPETITION, PRIVACY, AND JUSTIFICATIONS: INVOKING PRIVACY TO JUSTIFY ABUSIVE CONDUCT UNDER ARTICLE 102 TFEU

Abstract

This article aims to delineate the extent to which potentially anticompetitive behaviour that simultaneously improve user privacy are cognizable as efficiencies or objective justifications within the context of unilateral conduct cases in European competition law. After mapping the existing literature, it moves on to discuss whether the decisional guidance of the European Commission, as well as the case-law of the Union Courts, allow the invocation of privacy as proper grounds to mount a defense against abusive practices. In order to concretise the theoretical discussions, the article focuses on two recent and highly relevant developments: Apple's App-Tracking Transparency initiative, and Google's unveiling of the Privacy Sandbox. It finds that the state of the law pertaining to the second stage of an abuse case is underdeveloped and needs clarification. Nevertheless, considering the recent developments surrounding European competition law in general, and the digital transformation in particular, both efficiencies and objective justifications are likely to find room for application in the digital economy. On the one hand, efficiencies must be evaluated within the context of substantive symmetry, legal coherence, and economic considerations in a manner that caters to consumer choice. On the other hand, one must approach objective justifications with nuance, lest they give rise to unintended consequences resulting from recent judicial and legislative developments. Overall, it is apparent that the case-law provides valuable insights as to the implementation of efficiency arguments and objective justifications in a privacy context. However, the concepts are nonetheless in need of further analysis, in the absence of which their successful invocation remains rather unlikely. In that regard, the article concludes by highlighting points of potential contention in the future.

JEL CLASSIFICATION : K21, L4, L5

SUMMARY

1 Introduction - 2 Privacy and competition: integration, separation, and the third-way – 2.1 Integrationists – 2.2 Separatists – 2.3 The emergence of the "third way" - 3 Privacy versus competition: invoking privacy to justify restrictions of competition? – 3.1 *Quo vadis, Europa?* European competition law and the privacy-competition debate – 3.2 Privacy as efficiencies – 3.3 Privacy as objective justification - 4 Conclusion

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1 Introduction

Antitrust has become cool again.[1] With digitalization insinuating itself into virtually all aspects of our lives, incumbents have started to adapt their *modus operandi* to the digital world, and brand-new undertakings the business models of which have been designed entirely in the light of the new economy have emerged. With such dramatic change naturally came a large body of high-level inquiries, governmental reports, examinations, and scholarly research, culminating in a number of reform proposals ranging from an overhaul of existing competition laws to standalone ex-ante regimes.[2] As digitalization became omnipresent, undertakings, the activities of which are based on collecting and analyzing consumer data with the aim to provide constantly improving products and services, begun dominating markets. A *corpus* of commentary highlights that the pervasive collection of consumer data may bring about phenomena such as data-driven feedback loops and extreme returns to scale; giving rise to potentially problematic situations such as entrenched market power and market tipping.[3] Relatedly, the amalgamation of consumer data – sometimes without regard for prior user consent – increased the importance accorded to data protection and privacy, leading to the adoption of the General Data Protection Regulation in the EU, with the e-Privacy Regulation in the legislative pipeline.[4] Subsequent to these developments, many concepts have entered the literature, including novel theories of harm[5] and innovative ways to define relevant product and geographical markets.[6] However, there has been a relative lack of analysis concerning arguments around which acts of undertakings capable of restricting competition are nevertheless justified.

Most of the existing work on justifications focuses on the long-term debate surrounding the application of Article 101 (3) TFEU, or efficiencies arising out of a business transaction, such as a merger.[7] By comparison, analyses under Article 102 are neglected. Such lack of interest may relate to the relative scarcity of abuse of dominance

[1] Michael Weiner, 'Antitrust Is Cool Again' (2018) New York Law Journal. Although competition law in the European Union represents a wider set of concepts than antitrust, for the purposes of this Article, both terms will be used interchangeably, unless explicitly specified otherwise.
[2] Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (2019) https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.
[3] Ben Holles de Peyer, 'EU Merger Control and Big Data' (2017) 13 (4) Journal of Competition Law & Economics 767.
[4] Magdalena Kedzior, 'GDPR and beyond – a year of changes in data protection landscape of the European Union' (2019) 19 ERA Forum 505.
[5] A few examples of which may be found in Daniele Condorelli & Jorge Padilla, 'Data-Driven Envelopment with Privacy-Policy Tying' (2021) https://www.condorelli.science/PEPPT.pdf.
[6] Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 World Competition 473.
[7] See, e.g., Lars-Hendrik Röller, 'Efficiencies in EU Merger Control' in Philip Lowe & Mel Marquis (eds), *European Competition Law Annual 2010* (Hart 2013).

cases, whose conclusion hinged on justifications of otherwise anticompetitive conduct. However, the issue is rather likely to occupy the center stage in antitrust discussions soon. Platforms, the main actors of the digital economy, exercise power on their ecosystems that go beyond mere dominance, acting as regulators of a private origin.[8] Such extent of power over complementors and users may represent a competition problem.[9] At the same time, some undertakings may rely on countervailing arguments, such as user privacy and security, to justify behaviour that may be established as anticompetitive. In fact, the harbingers of this phenomenon can already be seen. Recently, Apple successfully argued against Epic Games that a prohibition on payments concluded outside of its App Store is justified to secure user privacy.[10] The issue is not only confined to the US either. For instance, the UK's Competition and Markets Authority, in its recently released final report on mobile ecosystems, sought to repudiate similar claims made by Apple and Google.[11]

Within this scope, the present article aims to determine whether potentially anticompetitive practices that concomitantly increase user privacy are suitable of being asserted as justifications in European Union competition law. To construct a robust response to that question, three further sub-questions are examined. Firstly, the Article examines the state-of-play regarding the relationship between privacy and competition in Europe in general, seeking for clues on emerging trends to note in this space. Secondly, the focus turns to instances where undertakings under scrutiny put forward arguments to escape liability, such as efficiency defenses and objective justifications. The outcomes of this doctrinal analysis feed into two normative inquiries, whereby privacy considerations are evaluated regarding their capability to act as grounds for justifying otherwise abusive conduct, either as efficiencies or objective justifications. To concretise the arguments, the Article makes references to two ongoing, high-level investigations in Europe: Apple's App-Tracking Transparency Initiative, and Google's Privacy Sandbox project. These developments are briefly investigated after theoretical examinations to shed light into their practicalities, from the viewpoint of privacy, competition, and justifications. As a result, the Article aspires to delineate the legal contours applicable to this underexplored and underutilised area

[8] Cremer, de Montjoye and Schweitzer (n 2).
[9] Stefan Larsson, 'Putting trust into antitrust? Competition policy and data-driven platforms' (2021) 36 (4) European Journal of Communication 391.
[10] Mike Swift, 'For Apple and everyone else, worlds of antitrust and privacy are converging, lawyers say' (*MLex Regulatory Insight*, 7 April 2022) <https://content.mlex.com/#/content/1370675?referrer=search_linkclick>.
[11] Dimitrios Katsifis, 'The CMA Final Report on the Mobile Ecosystems market study: a repudiation of Apple's narrative over privacy and safety as justifications for the status quo' (*The Platform Law Blog*, 14 June 2022) <https://theplatformlaw.blog/2022/06/14/the-cma-final-report-on-the-mobile-ecosystems-market-study-a-repudiation-of-apples-narrative-over-privacy-and-safety-as-justifications-for-the-status-quo/> accessed 26 July 2022.

of European competition law. Lastly, by virtue of the aforementioned analyses, the Article provides informed insights on whether the primary goals of competition law, namely the protection of competition and consumer welfare, can be reconciled with privacy concerns.

The proposed inquiry contributes to an ongoing and lively debate. By highlighting the emerging tensions between the two realms, the Article contributes to a developing area of research in transatlantic studies of competition law. The analysis is also timely and necessary. As the Commission actively pursues a number of data-related competition inquiries, it is likely that discussions of privacy-related justifications will surface.[12] Moreover, as the upcoming Digital Markets Act is rather stingy with regard to countervailing defenses, it is all the more crucial to carefully demarcate the boundaries of justifications, such as efficiency arguments, in order to provide businesses with the opportunity to continue engaging in ambivalent (or even beneficial) conduct – a prime necessity to prevent the chilling of innovative activities.[13]

The remainder of the Article adopts the following structure. Paragraph 2 engages in a literature review that analyses a large body of studies conducted on both sides of the Atlantic. This paragraph constructs an overview of the prevailing scholarship on privacy and competition by building upon the findings of similar categorization work conducted by several scholars.[14] Amid divisions in the literature, we recognise that a nuanced school of thought is in development. The identifying attribute of this "third way" of understanding the relationship between privacy and competition is the focus on the complexity surrounding such interactions. In contribution to this emerging literature, Paragraph 3 sets out to diagnose whether the protection of user privacy constitutes cognizable efficiencies or qualifies as a factor capable of justifying otherwise anticompetitive conduct in EU competition law. We tackle the question through the lens of the decisional practice of the European Commission, as well as the case-law of Union Courts that deal with efficiency defenses and objective justifications.[15] Throughout the

[12] 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (European Commission Press Release, 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 29 December 2021.

[13] Aurelien Portuese, 'The DMA and the EU's French Presidency: The Road to Precaution and Tensions' (2021) 29 Competition Forum.

[14] For instance, see Erika Douglas, 'Monopolization Remedies and Data Privacy' (2020) 24 (2) Virginia Journal of Law and Technology 1; Marija Stojanovic, 'Can competition law protect consumers in cases of a dominant company breach of data protection rules?' (2020) 16 (2-3) European Competition Journal 531.

[15] While distinct concepts, the Article refers to insights from Article 101 TFEU as well as merger control where appropriate, as these areas form a coherent whole in European competition enforcement. See Ginevra Bruzzone, 'The effect-based approach after *Intel*: A law and economics perspective' in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *Economic Analysis in EU Competition Policy* (Elgar 2021).

surrounding Google's Privacy Sandbox and Apple's App Tracking Transparency initiatives to concretise the problem. In Paragraph 4, a brief conclusion outlines the findings of the Article and summarises the main points discussed.

2 Privacy and competition: integration, separation, and the third way

This paragraph explores previous work on the interaction between privacy and competition law. We compartmentalise scholarly views into three groups: integrationists, separatists, and a new, third group that adopts a view of privacy and competition as concepts potentially in conflict. After the literature is mapped, several gaps are exposed that relate to tensions between privacy and competition, which we scrutinise in the subsequent paragraph.

2.1 Integrationists

As understood by most authorities worldwide, competition law serves the protection of consumer welfare via ensuring a competitive process in a market economy.[16] Accordingly, the precise delineation of the term "consumer welfare" is capable of determining the metrics on which competition law may legitimately exert control on undertakings. The integrationist strand of the literature may be best summarised as adopting a broad definition of consumer welfare. This definition encompasses privacy considerations as a component of consumer welfare, often as an extension of competition on product/service quality. Thus, integrationist scholars view antitrust as a tool to also achieve privacy-oriented goals. Borrowing from international investment law, their approach can be likened to umbrella clauses, whereby business conduct compromising user privacy may be elevated to also constitute competition law breaches, not by virtue of privacy requiring a special treatment per se, but because reductions in privacy are capable of resulting in deteriorations in quality, and ultimately, consumer harm.[17]

The integrationists arguably constitute the most diverse section of the literature, incorporating scholars from either side of the Atlantic, as well as a few enforcers, such as Germany's Bundeskartellamt. It is possible to categorise the scholars subscribing to the integrationist school of thought into three sub-groups. The first sub-group often underlines the intersections between privacy and competition, without venturing further into a deeper analysis of such an interaction. For instance, Gorecka argues that

[16] Case C-377/20, *Servizio Elettrico Nazionale and Others* [2021], Opinion of AG Rantos, para 44; Frederic Marty, 'Is Consumer Welfare Obsolete? A European Union Competition Perspective' (2021) 24 (47) Prolegomenos 55.

[17] This analogy does not purport to set out a sort of hierarchy between norms protecting privacy and competition, although it is worthy of note to consider that the rules protecting competition enjoy the status of primary law in the European Union.

further into a deeper analysis of such an interaction. For instance, Gorecka argues that privacy, data protection, and competition could "...possibly intersect with each other and keep balanced during an assessment of anticompetitive misconducts".[18] Witt highlights the developing trend on both the US and in Europe to consider privacy considerations in antitrust analyses, but leaves the conclusion somewhat indeterminate.[19] While Mehra maps three possible scenarios arising as a result of the increasing relevance of privacy for competition, the analysis does not delve into a substantive examination of how exactly privacy is to be incorporated in competition assessments.[20]

Going a step further, some authors suggest that European competition law can even aid the weaknesses inherent in regulations designed to further privacy.[21] In this second group of (mostly European) integrationist scholars, the argument frequently used is that, upon a holistic reading of the Treaties, an understanding of European competition law as a "lonely portfolio" becomes inappropriate.[22] In other words, privacy, data protection, consumer protection, and competition law regimes of the EU exist in a relationship akin to "family ties", with data protection measures capable of acting as an internal yardstick to guide the application of competition rules to non-price elements of suspicious conduct.[23] Adherents defend that cooperation between policies relating to privacy and competition may minimise consumer harm and orient the market towards privacy-enhancing products and services.[24] However, it is notable that an unstructured enforcement practice with insufficient cooperation between authorities, arguably denoting the prevailing situation in Europe, is liable to create a "regulatory dilemma"

[18] Arletta Gorecka, 'Defining Privacy in the Competition Law Sphere' (2021), available at <https://spark.stir.ac.uk/wp-content/uploads/2021/10/A-Gorecka-final.pdf> accessed 26 July 2022.
[19] Anne Witt, 'Data, Privacy and Competition Law' (2021) Graz Law Working Paper No. 24-2021 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3989241> accessed 26 July 2022.
[20] Salil K. Mehra, 'Data Privacy and Antitrust in Comparative Perspective' (2020) 53 Cornell Int'l L.J. 133.
[21] Bert-Jaap Koops, 'The trouble with European data protection law' (2014) 4 (4) International Data Privacy Law 250. This group of integrationists can be likened to what Dunne labels "competition law functioning as means of course-correction for another regulatory regime"; see Paragraph 3.2. below.
[22] Louise O'Callaghan, 'The Intersection Between Data Protection and Competition Law: How to Incorporate Data Protection, as a Non-Economic Objective, into EU Competition Analysis' (2018) 21 Trinity College Law Review 109.
[23] Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition in EU Law' (2017) 54 Common Market Law Review 11; Anuradha Bhattacharya, 'Do Privacy and Competition Concerns Go Hand in Hand?' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792169> accessed 6 July 2022.
[24] 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (EDPS Preliminary Opinion, 2014) <https://edps.europa.eu/sites/default/files/publication/14-03-26_competitition_law_big_data_en.pdf> accessed 26 July 2022.

privacy and competition.[25] Such "unity in diversity" on the part of Member State authorities unavoidably triggers legal uncertainty.[26]

A third and last group within the broader integrationist school represents a somewhat inverted relationship between privacy and competition. In particular, these commentators argue that there is a feedback loop between competition and privacy in digital markets, whereby the lack of competition is directly responsible for the prevalence of privacy-invasive practices, which in turn perpetuate market power. As a potential solution, they propose concrete interventions where competition enforcement can act as a tool to remedy market circumstances presenting "infracompetitive privacy".[27] In other words, these scholars assert that pervasive data collection leads to consumer harm, economic inequality, and market failures, and call for the introduction of competition enforcement to directly alleviate such concerns.[28] Whereas some authors delineate specific theories of harm within this context[29], others focus on a particular firm (such as Facebook) to outline how undertakings can both utilise and undermine privacy competition.[30] Overall, these scholars belong under the overarching umbrella of integrationists, as they acknowledge the potential of competition enforcement in tackling privacy-related harms, but nevertheless constitute their own sub-group since they advocate for a more concrete, upfront, almost micro-level engagement between privacy and competition.

2.2 Separatists

As opposed to integrationists, separatists adhere to a strict delineation between the boundaries of privacy and competition law. These scholars often subscribe to the price-centric analysis of competition that has long dominated antitrust enforcement.[31] As is the case with integrationists, the separatist school of thought can also be divided into

[25] Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64 (3) The Antitrust Bulletin 428.
[26] European competition enforcers adhere to the "unity in diversity" motto throughout the digital economy. For an example within the context of software application stores, see Friso Bostoen, 'The French judgment on Google's Play Store: a shift towards platform exploitation?' (*CoRe Blog*, 1 April 2022) https://www.lexxion.eu/en/coreblogpost/french-judgment-google-play-store/.
[27] Gregory Day & Abbey Stemler, 'Infracompetitive Privacy' (2019) 105 Iowa L. Rev. 61.
[28] Nathan Newman, 'The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google' (2014) 40 (2) William Mitchell Law Review 849.
[29] Katharine Kemp, 'Concealed data practices and competition law: why privacy matters' (2020) 16 European Competition Journal 628.
[30] Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 Berkeley Business Law Journal 39.
[31] Joseph Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 N.Y.U. L. Rev. 1020.

further sub-groups: those viewing the privacy-competition relationship as indeterminate due to equivocal perceptions of privacy among consumers, and those pointing towards institutional constraints. An aura of pessimism pervades both sub-groups as the scholars see the introduction of privacy into competition law as a rather negative development.[32]

Even though most separatist commentators acknowledge the role of privacy as a potential arm of competition on product/service quality, such scenarios are often accompanied by reservations, describing the incorporation of privacy into competition assessments as being either largely theoretical[33], or difficult to operationalise and administer due to inherent difficulties in quantification.[34] This is primarily the result of a lack of systematic correlations between diminished privacy and market power.[35] Indeed, separatist commentators highlight the mismatch between stated and demonstrated consumer behaviour ("privacy paradox") as well as the heterogeneous, subjective, and multidimensional nature of quality competition. In short, unlike lower prices, it is unclear whether consumers uniformly prefer products that keep their online activity discreet.[36]

Moreover, according to separatists, the protection of privacy should remain within the remit of other laws and institutions, such as data protection regulations (e.g. GDPR) in the EU.[37] For instance, Colangelo and Maggiolino observe that concerns relating to invasive data accumulation practices by large technology companies are best addressed not through antitrust laws, but via regulatory intervention.[38] In a similar vein, Lypalo criticises attempts by the Bundeskartellamt to widen the scope of antitrust law in its controversial Facebook investigation and argues that privacy and data collection matters should be left to the upcoming Digital Markets Act, where the legislature can ensure higher levels of legal certainty.[39] Others equate using abuse of dominance rules

[32] Geoffrey Manne and Dirk Auer, 'Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins' (2021) 28 Geo. Mason L. Rev. 1281.
[33] Darren Tucker, 'The Proper Role of Privacy in Merger Review' (2015) 2 CPI Antitrust Chronicle.
[34] Geoffrey Manne and Ben Sperry, 'The Problems and Perils of Bootstrapping Privacy and Data Protection into an Antitrust Framework' (2015) 2 CPI Antitrust Chronicle.
[35] James Cooper and John Yun, 'Antitrust & Privacy: It's Complicated' (2022) George Mason Law & Economics Research Paper No. 21-14.
[36] Michael Katz, 'Multisided Platforms, Big Data, and a Little Antitrust Policy' (2019) 54 Review of Industrial Organization 695.
[37] Carl Shapiro, 'Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets' (2019) 33 (3) Journal of Economic Perspectives 69; Maureen Ohlhausen and Alexander Okuliar, 'Competition, Consumer Protection, and the Right [Approach] to Privacy' (2015) 80 Antitrust Law Journal 121.
[38] Giuseppe Colangelo and Mariateresa Maggiolino, 'Data accumulation and the privacy-antitrust interface: insights from the Facebook case' (2018) 8 International Data Privacy Law 224.
[39] Dzhuliia Lypalo, 'Can Competition Protect Privacy? An Analysis Based on the German Facebook Case' (2021) 44 World Competition 169.

as a vehicle to condemn data-related practices as an abuse of competition law itself.[40] Overall, most commentators in this group express that inserting privacy considerations into antitrust will open the Pandora's Box and transform competition authorities into auxiliary data protection authorities, a task they are ill-equipped to perform.[41] For these scholars, privacy constitutes too important an issue to be left at the hands of antitrust enforcers.[42]

2.3 The emergence of the "third way"

It is apparent that the literature on the relationship between privacy and competition is expansive, with conflicting views and heated debates still ongoing. As identified, the avenues of inquiry are often shaped by the question of whether it is necessary and feasible to incorporate privacy into competition law assessments. Whereas separatists are wary of institutional limits, subjectivity, and the ensuing legal uncertainty such an endeavor would bring, integrationists assert that the issue is broader and pervasive in a way that requires an all-hands-on-deck approach that also includes antitrust.

One aspect unifying the separatist and integrationist approaches is the endeavor to evade complex scenarios. In what may be dubbed a form of complexity denialism, separatists deliberately try to oust privacy considerations from the purview of competition law.[43] This simplified approach no longer seems acceptable.[44] On the other hand, scholars advocating for a more integrated treatment of privacy and competition often fall prey to tunnel-visioning. Typically, integrationist scholars focus on scenarios that present linear relationships between privacy and competition. In such inquiries, strengthening one dimension (e.g., competition) leads to commensurate improvements in the other (e.g., privacy). In other words, often, scholars prescribe more competition as a remedy for undesirably inferior levels of consumer privacy.[45] For instance, it is argued that tech giants such as Facebook and Google are able to denigrate

[40] Roger van den Bergh and Franziska Weber, 'The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?' (2021) 44 World Competition 29.
[41] Torsten Körber, 'Is Knowledge (Market) Power?' (2018) SSRN https://www.ssrn.com/abstract=3112232 accessed 2 April 2022.
[42] Alfonso Lamadrid, 'Big Data, Privacy and Competition Law: Do Competition Authorities Know How To Do It?' (*Competition Policy International*, 17 January 2017) <https://www.competitionpolicyinternational.com/big-data-privacy-and-competition-law-do-competition-authorities-know-how-to-do-it/> accessed 2 April 2022.
[43] Nicolas Petit & Thibault Schrepel, 'Complexity-Minded Antitrust' (2022), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050536> accessed 3 April 2022.
[44] Frank Pasquale, 'Privacy, Antitrust, and Power' (2013) 20 Geo. Mason L. Rev. 1009.
[45] For example, see Colangelo and Maggiolino (n 38); Day and Stemler (n 27).

injection of more competition into the market.[46] However, the dimensions of interaction between privacy and competition also materialise in conflicting terms. Competition and privacy can exist in tension, where an increase in one may result in a reduction of the other.[47] At this point, a more nuanced approach to the topic can be seen emerging in the scholarship. We classify the harbingers of such an approach as belonging to a "third way" of the debate on privacy and competition.

Third way scholars focus on the tensions between privacy and competition, embodied in taxonomies that highlight complex scenarios in which the concepts interact.[48] The hallmark of these analyses is the acknowledgement that striving to reach the objectives of privacy and competition in an uninformed, piecemeal fashion may lead to perverse outcomes.[49] For instance, Carugati develops an analytical framework to identify settings where privacy and competition present a dilemma, where they work against each other.[50] Similarly, Douglas paints diverging scenarios in which privacy and antitrust may work at cross-purposes, in the sense that trying to achieve the goals of one may jeopardise the attainment of those belonging to the other.[51] Kerber and Zolna opt for framing this problem in economic terms, as the issues of privacy and competition in digital markets mark the presence of not one, but two market failures, namely informational asymmetries and market power.[52] They argue that trying to remedy the former may produce counterintuitive outcomes with regards to the latter, or vice versa.[53] Elsewhere, Majcher and Robertson conduct an overarching analysis to delineate the contours, through which EU competition law can reconcile the occasionally divergent objectives sought by the two fields.[54] In a recent book, Stucke discusses the

[46] Jaron Lanier, *Ten Arguments for Deleting Your Social Media Accounts Right Now* (Henry Holt and Co. 2018).
[47] Similarities can be drawn with Buchanan's ideas on monopolies, competition, and externalities, where more competition may reduce overall welfare due to higher amounts of negative externalities. See, James Buchanan, 'External diseconomies, corrective taxes, and market structure' (1969) 59 American Economic Review 174.
[48] Some antitrust enforcers also fall under this category. See Australian Competition and Consumers Commission, 'Digital Platform Services Inquiry' (2022) Discussion Paper For Interim Report No. 5.
[49] Jan Kramer & Daniel Schnurr, 'Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies' (2021) Journal of Competition Law & Economics (advance article).
[50] Christophe Carugati, 'The Antitrust Privacy Dilemma' (2021) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3968829 accessed 4 April 2022.
[51] Barbara Douglas, 'The New Antitrust/Data Privacy Law Interface' (2021) 130 The Yale Law Journal Forum 647; Cooper and Yun (n 35).
[52] Wolfgang Kerber & Karsten Zolna, 'The German Facebook case: the law and economics of the relationship between competition and data protection law' (2022) European Journal of Law and Economics (advance article).
[53] Ibid 8.
[54] Klaudia Majcher and Viktoria Robertson, 'Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law' (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778107> accessed 26 July 2022.

discusses the sometimes inverse relationship between privacy and competition in the US.[55] Lastly, Kira, Sinha, and Srinivasan acknowledge and briefly address the potential tensions between privacy and competition, but without going into detail.[56]

Two contemporary examples should suffice to concretise the findings of these few studies. Even though the below explanations risk oversimplification, they should present the arguments undergirding the privacy-competition dilemma in a palpable manner.[57] The examples involve two of the largest companies the world has ever seen, Apple and Google, and they both broadly relate to online advertising services. In recent years, both Apple and Google have taken actions to reorient their services towards ensuring greater consumer privacy.[58] These efforts arguably culminated in the introduction of the App-Tracking Transparency ("ATT") with the iOS 14.5 update for Apple, and the Privacy Sandbox initiative for Google.

ATT essentially enables users to choose whether they want their online activity to be tracked by the apps they use. Simply put, whenever a user loads an application for the first time, they are presented with a one-time question, where they are requested to express whether they want the app to collect their data across other applications. This is not a new phenomenon, as Apple has been gradually limiting the collection of third-party data across websites and mobile applications. The true novelty brought about by ATT was Apple's decision to render the default consumer choice in cross-app data collection as "opted-out". In earlier versions of the iOS, consumers had to navigate through various steps in the settings section of their devices to find and turn off cross-app tracking, which was automatically opted-in for them by default. With ATT, iOS

[55] Maurice Stucke, *Breaking Away: How to Regain Control Over Our Data, Privacy, and Autonomy* (OUP 2022).
[56] Beatriz Kira, Vikram Sinha, & Sharmadha Srinivasan, 'Regulating digital ecosystems: bridging the gap between competition policy and data protection' (2021) 30 Industrial & Corporate Change 1337.
[57] Carugati (n 50). For a detailed, technical analysis of Apple's IOS 14.5 updates and its effects on competition, see Alba Ribera Martinez, 'Trading Off the Orchard for an Apple: the IOS 14.5 Privacy Update' (2022) 13 Journal of European Competition Law & Practice 200. For a detailed, technical analysis of Google's Privacy Sandbox initiatives, see Damien Geradin, Dimitrios Katsifis and Theano Karanikioti, 'Google as a *de facto* regulator: analysing the Privacy Sandbox from an antitrust perspective' (2021) 17 European Competition Journal 617.
[58] Antony Ha, 'Apple defends new ad-tracking prevention measures in Safari' (*TechCrunch*, 16 September 2017) <https://techcrunch.com/2017/09/15/apple-defends-new-ad-tracking-prevention-measures-in-safari/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAACJHEOUzBdbgOV96MDbycf1YZwUlAxpibSRBek4odBvKQh-LxcYDj77NF3LpeHFch9JvM-cJbagU6HEDj9FwVzQazq8ZWvOu0EnlkKRfzUQeL9F5vXBEYoGbdIgrbWr-CISsNMD67PX9PJAKtp9zkfqVAMGRkbcphVvYi8SO3V9OY> accessed 4 April 2022; 'What to Expect from Privacy Sandbox Testing' (*Chromium Blog*, 31 March 2022) <https://blog.chromium.org/2022/03/what-to-expect-from-ps-testing.html> accessed 4 April 2022.

asking whether they grant the app the authorization to track their activities.[59] In simple terms, Apple purports to give consumers greater control over their privacy by making it easier for them to choose whether they wish to opt-in to cross-app tracking. This move on behalf of Apple to remedy the market failure of information asymmetries seems to be working. Although numbers vary, approximately 85% of users ask apps not to track their activities across other apps.[60] While this is a welcome development in terms of privacy, it also comes with significant antitrust risks. Indeed, Apple's unilateral decision to switch the default from opt-out to opt-in for tracking resulted in an uproar in some EU member states. In Germany, a number of publishers filed a complaint with Bundeskartellamt, arguing that Apple's conduct equates to an abuse of dominance by excluding rivals in online advertising.[61] As a result, the German authority has recently initiated an inquiry against Apple on the basis of ATT.[62] In France, the Autorité de la Concurrence opened an investigation against Apple.[63] The authority was motivated also by allegations of self-preferencing, on the basis that ATT does not apply to Apple's own advertising business. Indeed, some commentators argued that Apple advantages its own ad network; after all, Apple's ad revenues started increasing after the introduction of ATT.[64] Conversely, undertakings that rely on personalised ads, and hence, cross-app tracking, have recently seen their financials plummet. A notable example is Facebook, which experienced the record daily loss in market capitalization for a US firm.[65] Further, the reduction in ad revenue may lead to a proliferation of paid apps, which have to go through Apple's in-app payments system, incurring a fee in the process.[66] More broadly,

[59] 'What Is App Tracking Transparency (ATT) and How Does It Affect Mobile Marketing?' (*Vungle Blog*, 26 May 2021) <https://vungle.com/blog/app-tracking-transparency-att/> accessed 26 July 2022.
[60] Alex Bauer, 'ATT opt-in rates: the picture so far and the ugly truth behind why the numbers vary so widely' (*AdExchanger*, 10 May 2021) <https://www.adexchanger.com/data-driven-thinking/att-opt-in-rates-the-picture-so-far-and-the-ugly-truth-behind-why-the-numbers-vary-so-widely/> accessed 26 July 2022.
[61] Sam Shead, 'Apple hit with German antitrust complaint as it prepares to roll out new iPhone software' (*CNBC News*, 26 April 2021) <https://www.cnbc.com/2021/04/26/ios-14point5-apple-iphone-software-leads-to-german-antitrust-complaint.html> accessed 26 July 2022.
[62] Bundeskartellamt, 'Bundeskartellamt reviews Apple's tracking rules for third-party apps' (14 June 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html?nn=3591568> accessed 26 July 2022.
[63] Alex Barker, 'Apple hit with antitrust complaint in France over privacy controls' (*Financial Times*, 28 October 2020).
[64] Benjamin Seufert, 'ATT advantages Apple's ad network. Here's how to fix that.' (*MobileDevMemo*, 1 November 2021) <https://mobiledevmemo.com/att-advantages-apples-ad-network-heres-how-to-fix-that/> accessed 26 July 2022.
[65] 'Facebook owner Meta sees biggest ever stock market loss' (*BBC*, 4 February 2022) <https://www.bbc.com/news/business-60255088#:~:text=Facebook's%20owner%20Meta%20Platforms%20saw,loss%20for%20a%20US%20firm> accessed 26 July 2022.
[66] Reinhold Kesler, 'The Impact of Apple's App-Tracking Transparency on App Monetization' (14 April 2022) <https://www.dropbox.com/s/miom2cdoub8241w/ATT_Paper_Kesler.pdf?dl=0> accessed 26 July 2022.

through Apple's in-app payments system, incurring a fee in the process.[66] More broadly, since ATT renders first-party data (data acquired via the business itself and not from other apps or websites via cookies) extremely valuable, there are concerns that it will transform the web into a series of "content fortresses" or "walled-gardens", with higher levels of concentration and consolidation.[67] Traces of this trend can already be seen, with established firms like Uber, Disney, and Walgreens striving to create their own, integrated, cross-platform ad businesses.[68] Hence, there seems to be plausible concerns that Apple is using privacy as a pretext to self-preference its own ad business.[69]

Google's conduct also met fierce opposition by regulators, not least the UK's CMA and the European Commission.[70] Essentially, the objectives sought by Google are largely in alignment with those of Apple. Google wishes to eliminate third-party cookies on its browser, Chrome. Cookies basically enable websites to track users (with their consent) across the web, aiding in the construction of detailed consumer profiles online. Accordingly, cookies form the backbone of the current online targeted advertising industry.[71] Such advances in ad technology to phase-out the cookie are welcome from a user privacy standpoint, since less cross-website tracking is viewed favorably from a privacy perspective.[72] However, eliminating cookies would also uproot the revenue streams of the vast majority of modern internet, with wide-reaching ramifications. Since most websites and apps are funded by ads (that render them "free"), obliterating the means to monetise may result in a subscription-dominated web, with consumers paying actual money to use the internet. Alternatively, third-party websites that do not already rely on Google may be forced to contract with it in order to maintain their ad-funded business models. This is because, similarly to Apple's ATT, Privacy Sandbox does

[66] Reinhold Kesler, 'The Impact of Apple's App-Tracking Transparency on App Monetization' (14 April 2022) <https://www.dropbox.com/s/miom2cdoub8241w/ATT_Paper_Kesler.pdf?dl=0> accessed 26 July 2022.

[67] Eric Benjamin Seufert, 'The profound, unintended consequence of ATT: content fortresses' (*MobileDevMemo*, 15 February 2021) <https://mobiledevmemo.com/the-profound-unintended-consequence-of-att-content-fortresses/> accessed 26 July 2022.

[68] Megan duBois, 'Disney+ Will Introduce an Ad-Supported Subscription In Late 2022' (*Forbes*, 4 March 2022) <https://www.forbes.com/sites/megandubois/2022/03/04/disney-will-introduce-an-ad-supported-subscription-in-late-2022/?sh=4837b23a5bf6> accessed 26 July 2022.

[69] Rory Van Loo, 'Privacy Pretexts' (2022) Cornell L. Rev. (forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4048919> accessed 26 July 2022.

[70] Dimitrios Katsifis, 'CMA opens investigation into Google's Privacy Sandbox browser changes' (*The Platform Law Blog*, 8 January 2021) https://theplatformlaw.blog/2021/01/08/cma-opens-investigation-into-googles-privacy-sandbox-browser-changes/ accessed 4 April 2022.

[71] The online ad industry totaled in USD 350 billion in 2020 and is set to surpass traditional advertising channels in terms of spending. Alex Barker, 'Digital ad market set to eclipse traditional media for first time' (*Financial Times*, 23 June 2020) <https://www.ft.com/content/d8aaf886-d1f0-40fb-abff-2945629b68c0> accessed 26 July 2022.

[72] Maryam Mehrnezhad, Kovila Coopamootoo and Ehsan Toreini, 'How Can and Would People Protect from Online Tracking?' (2022) 1 Proceedings on Privacy Enhancing Technologies 105.

funded business models. This is because, similarly to Apple's ATT, Privacy Sandbox does not ban the collection and use of first-party data for targeted advertising. Since Google has access to vast amounts of first-party data through various sources (e.g., YouTube, Gmail, Google Maps), it would become a lucrative source for ad personalization. Furthermore, Google may indeed have incentives to "close off" and reserve for itself completely the search advertising market, which arguably constitutes a superior form of online advertising.[73] The extension of the Privacy Sandbox to smartphones using the Android OS further exacerbates the problem.[74] Given these reasons as well as the fact that it already controls nearly half of advertising revenue in the United States, together with a not-so-spectacular track record in front of competition authorities, Google's decision to completely destroy the cookie raised more than a few eyebrows.[75] As a result, the UK's Competition and Markets Authority decided to investigate the initiative. In cooperation with the Information Commissioner's Office, the local data protection regulator, the CMA wishes to help consumers reap the benefits of enhanced privacy whilst protecting against undue restrictions of competition.[76] The European Commission is pursuing its own investigation as well.[77]

The aforementioned developments attracted little investigation in the scholarship. Of the few examples available, Sokol and Zhu confront the ATT updates in defending that Apple is abusing privacy arguments to restrict competition, from a US perspective.[78] On this side of the Atlantic, Geradin et al. focus on the technical nature of the Privacy Sandbox, whereas Hoppner & Westerhoff, as well as Martinez, analyse Apple's ATT initiative.[79]

[73] Ben Thompson, 'Digital Advertising in 2022' (*Stratechery*, 8 February 2022) <https://stratechery.com/2022/digital-advertising-in-2022/> accessed 27 July 2022.
[74] Dimitrios Katsifis, 'Google announces Privacy Sandbox on Android' (*The Platform Law Blog*, 16 February 2022) <https://theplatformlaw.blog/2022/02/16/google-announces-privacy-sandbox-on-android/> accessed 27 July 2022.
[75] Erin Thomson, 'Will the DMA trigger competition in the Digital Advertising Market?' (2022) 34 Competition Forum; Dimitrios Katsifis, 'How tech platforms act as private regulators of privacy' (*The Platform Law Blog*, 26 October 2020) <https://theplatformlaw.blog/2020/10/26/how-tech-platforms-act-as-private-regulators-of-privacy/> accessed 27 July 2022.
[76] 'CMA to investigate Google's Privacy Sandbox browser changes' (Competition and Markets Authority Press Release, 8 January 2021) <https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes> accessed 27 July 2022.
[77] 'Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector' (European Commission Press Release, 22 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143> accessed 27 July 2022.
[78] Daniel Sokol and Feng Zhu, 'Harming Competition and Consumers under the Guise of Protecting Privacy: An Analysis of Apple's iOS 14 Policy Updates' (2021) USC Law Legal Studies Paper No. 21-27.
[79] Thomas Hoppner and Philip Westerhoff, 'Privacy by Default, Abuse by Design: EU Competition Concerns About Apple's New App Tracking Policy' (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853981> accessed 27 July 2022; Geradin, Katsifis and Karanikioti (n 57); Martinez (n 57).

Thus becomes apparent an underexplored area. Whereas the presented issues largely relate to abuses of dominance, and in particular, the justification of abusive conduct, it is unfortunate that no academic study establishes the core insights of European decisional practice and case-law on efficiencies and objective justifications with a view of applying them to the debate. As will be highlighted further below, the few existing studies expressly focus on the first stage of an Article 102 analysis, namely the establishment of the theory of harm, but not the second stage where potential justifications are raised.[80] Building on the work of third way scholars briefly summarised above, the remaining paragraphs of the Article will discuss whether privacy arguments can be mobilised to justify allegedly anticompetitive conduct. In so doing, we wish to ascertain whether the recent developments initiated by large technology companies indeed correspond to "privacy-washing", or if they can actually be allowed to go through in European competition law.[81] At the end of our analysis, we will return to ATT and the Privacy Sandbox.

3 Privacy versus competition: invoking privacy to justify restrictions of competition?

As modern economies become increasingly complex, it becomes inevitable to try to simplify intricate phenomena into workable constructs. However, complexity of the economy should not serve as a pretext to advance reductionism in competition law. This holds true in the case of privacy as well. A qualified integration of privacy into competition assessments is required to dissect the intricacies of the digital economy.[82] One particular extension of this line of thought relates to justifications. It is well established that the application of Article 102 in EU competition law proceeds in a bifurcated manner, similar to that of Article 101, in the sense that the establishment of an abuse is distinct from potential justifications.[83] Accordingly, unilateral conduct that falls under the prohibition in Article 102 may nevertheless be objectively justified or deemed adequately efficient.[84] However, it is unclear whether privacy should play a role in this exercise.

[80] See generally Paragraph 3.
[81] Ulrich Aivodji et al., 'Privacy and AI Ethics – Understanding the convergences and tensions for the responsible development of machine learning' (2021), available at <https://sebastiengambs.openum.ca/files/sites/82/2021/11/OPC_final.pdf> accessed 27 July 2022.
[82] See Paragraph 2.3.
[83] Opinion of AG Rantos (n 16); Ben Smulders, 'The bifurcated approach and its practical impact on the establishment of harm to competition' in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition* (Bruylant 2017).
[84] Case C-549/10, *Tomra and others* [2012].

To provide an answer to that question, this paragraph will conduct a sequential, three-pronged analysis. The first part briefly sets out the general approach to privacy in European competition law from the viewpoints of the Commission and the Union Courts. The second and third parts respectively deal with privacy considerations as efficiencies and objective justifications. These initiate the discussion by a doctrinal analysis of the relevant case-law, followed by an examination of the findings within the context of the privacy-competition relationship.

3.1 *Quo vadis, Europa?* European competition law and the privacy-competition debate

The European approach to privacy within the context of competition represents an evolution from a strictly separatist attitude towards what may be dubbed qualified integration. In a similar vein to integrationist scholars, it is visible that the European Commission is gradually opening the doors to considering privacy in competition law assessments.[85] To date, the Commission have mostly dealt with privacy and competition within the context of merger control. Starting with *Google/DoubleClick*, the Commission adopted a separatist attitude, acknowledging that its decision exists within the confines of European competition law, and without prejudice to the rules concerning privacy and data protection.[86] Next, in *Facebook/WhatsApp*, the Commission implicitly recognised that privacy is a metric of competition, as developments in privacy and security technology were characterised as important factors for product improvement.[87] It also noted that after Facebook announced the acquisition, a considerable number of users switched to Telegram, which differentiated on privacy grounds.[88] To be fair, the Commission expressly stated that any privacy-related concerns belong under data protection rules, and not competition rules. However, in the face of explicit references to product differentiation and competition based on privacy, this acknowledgement should be interpreted as referring to standalone privacy concerns stemming from the transaction.[89] To the extent that privacy considerations come affixed to an overarching competitive concern, it seems that the Commission is willing to assess them. This position was further solidified in *Microsoft/LinkedIn*, where the Commission explicitly pronounced privacy as a cognizable metric of competition in digital markets.[90] The en-

[85] Giovanni Pitruzzella, 'Big Data and Antitrust Enforcement' (2017) 1 Italian Antitrust Review 77.
[86] Case COMP/M.4731, *Google/DoubleClick* [2008].
[87] Case COMP/M.7217, *Facebook/WhatsApp* [2014].
[88] ibid 24.
[89] ibid 31.
[90] Case COMP/M.8124, *Microsoft/LinkedIn* [2016].

marginalization of competitors with services offering better protection of user privacy, leading to reduced consumer choice.[91]

As can be observed, the Commission started its journey as a strict separatist, and slowly started to flirt with the idea that, under certain market circumstances, like those prevalent in consumer communication services, privacy may be regarded as a competitive metric. This places the Commission at the outer edge of separatists, closing in on an integrationist attitude. This position was confirmed in a rather controversial transaction that involved the acquisition of Fitbit, a supplier of wearables that had access to sensitive health data, by Google.[92] Several submissions by third parties denigrated the acquisition, urging the Commission to opt for a blocking decision. At the heart of these arguments was the concern that Google would get its hands on sensitive consumer data, to the detriment of user privacy. In response, the Commission started by acknowledging that the existence of dedicated regulations, such as the e-Privacy Directive and the GDPR, does not preclude the assessment of potential data-related competition concerns.[93] However, on substance, the Commission concluded that in the wearables market, privacy was not a dimension of competition. Other concerns that strictly related to consumer privacy, such as Google's ability to acquire data more easily compared to the counterfactual, were dismissed as being suitable for resolution via specific regulations. Part of the motivation behind this conclusion, as explained by the Commission's Chief Economist, was the remaining consumer choice in the market: if consumers would become unhappy with Fitbit's collection and use of their data after the transaction, they had options to switch to.[94]

Whereas the reluctance to further integrate privacy into competition assessments has been met with harsh criticism, with some commentators accusing the Commission of adhering to 'antitrust orthodoxy', the landscape may be changing.[95] Recent developments may generate challenges that eventually force the Commission to adopt a quasi-polycentric approach to competition enforcement, with privacy considerations being taken into account.[96] Three developments are worthy of highlight as of today. Firstly, the recently approved Digital Markets Act ("DMA") includes, under Article 5 (a), an obligation on gatekeepers not to combine and cross-use user data gathered across the gatekeeper's services. In concrete terms, the provision envisages a soft-structural relief in

[91] ibid 76.
[92] Case COMP/9660, *Google/FitBit* [2020].
[93] Ibid 93.
[94] Pierre Regibeau, 'Why I agree with the Google-Fitbit decision' (*VoxEU.org*, 13 March 2021) <https://voxeu.org/article/why-i-agree-google-fitbit-decision> accessed 27 July 2022.
[95] Cristina Caffarra, Gregory Crawford, & Johnny Ryan, 'The antitrust orthodoxy is blind to real data harms' (*VoxEU.org*, 22 April 2021) <https://voxeu.org/content/antitrust-orthodoxy-blind-real-data-harms> accessed 27 July 2022.
[96] Ioannis Lianos, 'Polycentric competition law' (2018) 71 Current Legal Problems 161.

relief in the form of data-silos. For instance, under such a rule, Google would be barred from combining data it gathered via YouTube with those from Google Search.[97] As highlighted by the corresponding Recital 36, this provision seeks to ensure that the contestability objective of the DMA is respected by preventing the erection of entry barriers. However, the prohibition is without prejudice to user consent. If a user gives consent, gatekeepers are free to resume combinations of data they accumulated. In a legislative measure akin to sector-specific competition law, this is a curious situation.[98] The inclusion of user consent as the sole factor capable of justifying data combinations evokes the feeling that the Commission designed the provision to act as a privacy remedy as much as a competition remedy.[99] Secondly, in a recent market inquiry concerned with competition in consumer Internet of Things, the Commission explicitly recognised that undertakings may use privacy protection claims to justify "locking-up" certain data for themselves.[100] Such a direct acknowledgement may be construed as increasing levels of interest, on part of the Commission, in the potential tensions between competition and privacy. Lastly, as iterated earlier, the Commission is pursuing an investigation against Google's Privacy Sandbox initiative.[101] This will be the first instance where the European enforcer will have to deal with potential contradictions between privacy and competition, since in the event the Commission viably establishes a theory of harm, Google is likely to invoke privacy considerations as a justification.[102] The outcome of this case will help determine whether the aforementioned developments espoused by the Commission are, in reality, steps towards a reorientation of European competition law.[103]

As with the European Commission, the Court of Justice also experienced gradual shifts with its approach to privacy and competition. At first glance, it may seem appropriate to place the Court of Justice within the separatist group. After all, in its well-cited *Asnef-Equifax* judgment, the Court ruled that concerns relating to data protection, as such, are outside the purview of competition laws.[104] Less well-known is the *Piau* judgment, where the Court came up with a similar conclusion.[105] In that case, which took place within the context of sports-related activities, Mr. Piau essentially complained that FIFA rules stipulating the transmission of an agreement signed between a player

[97] European Parliament, 'Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a Digital Markets Act' COM(2020)0842.
[98] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12 Journal of European Competition Law & Practice 529.
[99] Kerber (n 52) 27.
[100] Commission, 'Final report – sector inquiry into consumer Internet of Things' (Staff Working Document) COM(2022) 19 final.
[101] See (n 77) and accompanying text.
[102] Geradin, Katsifis and Karanikioti (n 57).
[103] Ioannis Lianos, 'Reorienting competition law' (2022) 10 Journal of Antitrust Enforcement 1.
[104] Case C-238/05, *Asnef-Equifax* [2006].
[105] Case T-193/02, *Piau* [2005].

that FIFA rules stipulating the transmission of an agreement signed between a player and an agent to the relevant national football association contravened his right to privacy. The argument followed that FIFA was able to commit such a breach of personal privacy due to its dominant position. In its judgment affirming the Commission decision, the Court of First Instance asserted that pleas related to privacy are "arguments [...] which are not related to competition law...". These judgments may be viewed as pronouncing the Court's unfavorable position toward privacy concerns in competition. Upon closer inspection, though, it is apparent that a distinction should be made. It is true that not all privacy considerations merit antitrust scrutiny.[106] Standalone privacy concerns with no overarching competitive relevance may find their solutions easier via dedicated rules on data protection. However, this does not mean that the rulings ban the incorporation of privacy considerations in competition law assessments outright.[107] Instead, the judgments should be interpreted as disallowing competition law interventions for purely data protection and privacy-oriented motivations.[108] As some scholars have also pointed out, one should analyse the interaction between privacy and competition on a case-by-case basis[109], taking into account the specific economic, factual, and legal context.[110] Accordingly, it should be possible for European competition law to factor in privacy considerations into competition law analyses insofar as privacy is attached to an upstream theory of competitive harm.[111] In particular, the Court's choice of words in *Asnef-Equifax* to exclude data protection concerns, *as such*, from the scope of competition rules seems to hold promise.[112] Such a conclusion places the Court at roughly the same position as the Commission. However, future developments, especially if the Court encounters a question or an appeal regarding the challenges facing the Commission as outlined above, are likely to yield greater clarity. Of primary importance in this regard is the preliminary ruling procedure, currently

[106] Francisco Costa-Cabral, 'The preliminary opinion of the European data protection supervisor and the discretion of the European Commission in enforcing competition law' (2016) 23 Maastricht Journal of European and Comparative Law 495.
[107] See Witt (n 19); Botta and Wiedemann (n 25).
[108] This argument feeds into the debate on whether breaches of other regulatory norms (such as GDPR rules) by dominant undertakings should lead to a finding of abuse. See Paragraph 3.2. below.
[109] Eliana Garces and Daniel Fanaras, 'Antitrust, Privacy, and Digital Platforms' Use of Big Data' (2018) 28 Journal of the Antitrust, UCL, and Privacy Section of the California Lawyers Committee 23.
[110] The importance of context in European competition law is growing by the day. See, e.g., Case C-525/16, *MEO* [2018], para 31.
[111] Stojanovic (n 14); Miriam Buiten, 'Regulating Data Giants: Between Competition Law and Data Protection Law' in Mathis & Tor (eds), *New Developments in Competition Law and Economics* (Springer 2019).
[112] Aymeric de Moncuit, 'In which ways should privacy concerns serve as an element of the competition assessment' (2018) <https://ec.europa.eu/competition/information/digitisation_2018/contributions/aymeric_de_moncuit.pdf> accessed 27 July 2022.

preliminary ruling procedure, currently pending before the Court, pertaining to the Facebook case in Germany.[113] This ruling is likely to help clarify the contours of the privacy-competition relationship in Europe.

After setting out the general position of the Commission as well as the Union Courts vis-à-vis privacy in competition law assessments, the next two paragraphs now turn to the issue of justifications. By focusing on the second stage of an Article 102 analysis, we will highlight whether undertakings can rely on improvements in user privacy to escape liability.

3.2 Privacy as efficiencies

As well-known, efficiency defenses rely on positive competitive effects of a practice, be it an agreement or unilateral behaviour, with the potential to exonerate conduct otherwise harmful to competition.[114] Throughout the evolution of European competition law, the Court has been called upon to adjudicate matters relating to efficiency arguments. One of the first instances where a claim that an undertaking abused its dominance was met with an efficiency justification was *Tetra Pak*.[115] The case concerned an alleged leveraging of dominance from one market (market for aseptic machines and cartons used for packaging liquids, where Tetra Pak possessed market power) to another, non-dominated market (non-aseptic machines and cartons). Requiring that its customers exclusively purchase and use cartons and machinery together, both manufactured by Tetra Pak, the latter effectively tied the sale of machines and cartons intended for packaging liquid foods. In a bid to escape liability, Tetra Pak argued that the tying arrangement resulted in efficiency gains, as the machinery and cartons acquired from different providers cannot be utilised together, lest the viability of the entire system be compromised.[116] Tetra Pak also argued that its conduct was justified in light of security and public health concerns. In its decision, while the Court addressed the security and public health arguments, it evaded the question on efficiencies. The Court only considered that, although recourse to efficiency arguments may be justified in a competitive market, it cannot be relied upon where the presence of a dominant undertaking already weakens competition.[117]

[113] Case C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social).*
[114] Anna-Lena Baur, 'Analysing the Commission's Guidance on Enforcement Priorities in Applying Article 102 TFEU — An Efficiency Defence for Abusive Behaviour of Dominant Undertakings?' (2012) 19 Maastricht Journal of European and Comparative Law 1.
[115] Case T-83/91 *Tetra Pak* [1994] II-00755. Since the Court of Justice essentially upheld the judgment of the Court of First Instance on appeal, only the first decision is examined here.
[116] *Tetra Pak* (n 115), paras 82-85.
[117] Case 85-76, *Hoffmann – La Roche & Co. AG* [1979].

The Court further qualified the route that attributes special responsibilities on dominant undertakings when it revisited efficiency claims in *Irish Sugar*.[118] Accordingly, the Court acknowledged that, in principle, even dominant undertakings may legitimately protect their interests. However, measures taken to further such aims must, at the very least, stand on "criteria of economic efficiency" and be "consistent with the interests of consumers".[119] Reaffirming its stance, the Court elaborated further in *British Airways* by expressing that the limits of dominant undertakings' efforts to protect their commercial interests are demarcated by the strengthening of their market position.[120] In other words, the Court considered it inappropriate to protect the margin of maneuver accorded to dominant undertakings when such maneuvers led to an abuse by further entrenching a player.

One of the most contentious cases brought before the Court, in which efficiency arguments also featured liberally, was *Microsoft*.[121] The case dealt with the refusal by Microsoft to supply information relating to application programming interfaces ("APIs") to competitors, as well as tying its operating system Windows with Windows Media Player, the latter being installed on the PC by default. After an abuse was established, Microsoft asserted that its conduct was nevertheless justified thanks to efficiencies. In particular, Microsoft argued that consumers benefitted from a smooth and streamlined Windows experience through faster and efficient connections, reduced risks of confusion, and time-saving properties by virtue of an "out-of-the-box" media player.[122] In rejecting these arguments, the Court makes two implicit but noteworthy observations. Firstly, it appears that an efficiency argument needs to rely on an indispensability criterion, in the sense that the only way through which the efficiencies in question can be achieved should be the impugned conduct.[123] In other words, a precondition for accepting efficiency justifications is that such efficiencies should only be attainable via the conduct under scrutiny. Secondly, the Court takes issue not with efficiency gains *per se*, but the fact that the fruits of such efficiencies are reaped by Microsoft. This is illustrated also by the Commission in its original decision, whereby the tying of Media Player via pre-installation was not problematic in itself. What did raise concerns was the sole authority of Microsoft to determine the product that was pre-installed.[124] Put differently, product

[118] Case T-228/97, *Irish Sugar* [1999].
[119] ibid, para 189.
[120] Case T-219/99, *British Airways* [2003].
[121] Case T-201/04, *Microsoft Corp.* [2007].
[122] ibid, para 1093.
[123] ibid, para 1098.
[124] ibid, para 1093. For a related view, see Arianna Andreangeli, 'Tying, technological integration and Article 82 EC: where do we go after the Microsoft case?' in Luca Rubini (ed), *Microsoft on Trial* (Elgar 2010).

Court declared in Microsoft that, at least in European competition law, welfare may not always trump choice.[125]

The way efficiency arguments were treated in Microsoft evoked a wave of backlash from commentators on either side of the Atlantic. For instance, the burden to demonstrate indispensability for efficiency defenses was deemed excessive, likened to a "Herculean task".[126] Elsewhere, scholars like Geradin evaluated efficiencies in a broader manner, scrutinizing the exercise of balancing between ex-ante (preserving the incumbent's as well as the entrants' incentives to innovate) and ex-post (protecting the incentives of access-seeking entrants).[127] Others lamented that the rigid and formalistic approach of the Commission and the Court meant that Europe was unable to take future demand for innovative products into consideration.[128]

The Court returned to the examination of efficiencies in *Post Danmark I*, in which it laid down an analytical framework to assess such claims raised by dominant undertakings.[129] Accordingly, dominant undertakings may show that the anticompetitive effects emanating from the conduct under inquiry are counterbalanced, or even thwarted, by advantages gained in the affected markets.[130] In order to be cognizable, however, efficiencies must be demonstrated, with regards to their "...actual existence and their extent...".[131] Further, there needs to be a causal link between the claimed improvements and the particular conduct. Additionally, and in a manner that confirms the Court's insistence on consumer choice, claimed efficiencies resulting from the conduct must be necessary and should not lead to the elimination of most competition in the market. This last criterion has been the subject of scholarly criticism for presenting a situation of *probatio diabolica*.[132] Indeed, it is nigh-impossible to substantially argue that most competition is not evicted from a market in such circumstances, as the exercise of an Article 102 inquiry inherently necessitates a dominant undertaking, by virtue of

[125] Joshua Wright and Douglas Ginsburg, 'The Goals of Antitrust: Welfare Trumps Choice' (2013) 81 Fordham L. Rev. 2405.
[126] Pierre Larouche, 'The European Microsoft Case at the Crossroads of Competition Policy and Innovation' (2009) 75 Antitrust Law Journal 933.
[127] Damien Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?' (2004) Common Mkt. L. Rev. 1519.
[128] James Ponsoldt and Christopher David, ''Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted' (2007) 27 Nw. J. Int'l L. & Bus. 421.
[129] Case C-209/10, *Post-Danmark* [2012].
[130] Efficiencies across markets are also cognizable; see Urs Haegler and Krishna Nandakumar, 'Efficiencies Under 101 (3) TFEU – did the Commission go far enough in A++?' (2016) 1 Competition Law & Policy Debate 47.
[131] ibid, para 43.
[132] Gianluca Faella, 'The Efficient Abuse: Reflections on the EU, Italian and UK Experience' (2016) 2 Competition Law & Policy Debate 33.

dominant undertaking, by virtue of the existence of which competition in that market has already been weakened.[133] This led some commentators to argue that the ruling introduces an efficiency offense rather than a defense.[134] In addition to efficiencies, the Court in *Post Danmark I* highlights another path through which an otherwise anticompetitive behaviour may nevertheless escape liability: instances where the conduct is objectively necessary. This refers to the demarcation between efficiencies and objective justifications, to which the paper returns below.

As the law stands, the latest judicial interpretation of efficiency arguments is located in *Google (Shopping)*.[135] Indeed, that judgment elaborates on the treatment of efficiencies within the context of alleged abuses of dominance, painting an overall picture by building on the analytical framework first established in *Post Danmark*. In line with *Intel*, the General Court first confirms that the examination under Article 102 TFEU consists of two stages: the establishment of a viable theory of harm, followed by potential justifications, which may materialise either as objective justifications or efficiencies.[136]

After the above clarification, the General Court proceeds to develop the case-law through two avenues. Firstly, the Court explains that efficiency arguments put forward by the undertaking under scrutiny must not be vague, general, or theoretical. Furthermore, when advocating for efficiencies, the undertaking may not only rely on its own commercial interests.[137] Regarding the former contribution, the Court's approach may be viewed as one of symmetry: as the (actual or potential) anticompetitive effects of a practice need to go beyond purely hypothetical considerations, so too should countervailing arguments, such as efficiencies.[138] As for the latter clarification, the Court seems to follow a strict consumer welfare approach, as established in *Irish Sugar*, in the sense that a dominant undertaking may not legitimately protect its own gains at the expense of consumers. Secondly, the Court develops its case-law in *Microsoft* and creates a system of pseudo-hierarchies when dealing with efficiencies. As iterated earlier, product improvements in *Microsoft* were unable to outweigh the decreases in consumer choice. *Google (Shopping)* confirms and furthers that argument. Indeed, as explained by the Court in paragraphs 566-572, generating efficiency gains by improving

[133] Here, the Court's position ties with the *Tetra Pak* judgment discussed earlier. See (n 115) and accompanying text.
[134] Denis F. Waelbroeck, 'The assessment of efficiencies under Article 102 and the Commission's Guidance Paper' in Federico F Etro and Ioannis I Kokkoris (eds), *Competition Law and the Enforcement of Article 82* (OUP 2010).
[135] Case T-612/17, *Google (Shopping)* [2021].
[136] For clarity, *Intel* largely focused on the first stage of the analysis, whereby the plaintiff/enforcer has the burden to demonstrate a plausible competitive harm, and the defendant gets the chance to argue that its conduct is incapable of creating such impact. See, Case T-286/09 RENV, *Intel Corporation v. Commission* [2022].
[137] *Google (Shopping)* (n 135), para 553.
[138] Case C-23/14, *Post Danmark II* [2015], para 65.

explained by the Court in paragraphs 566-572, generating efficiency gains by improving user experience could not save Google, as the conduct through which such improvements materialised (i.e., promotions/demotions of rival services) also led to a reduction in the number of comparison-shopping services available for consumers. This conclusion may also be read in light of *British Airways*, where the Court stated that efficiencies stemming from an otherwise exclusionary conduct must relate to advantages for the market *and* consumers.[139] In other words, in an efficiencies argument, the Court looks for improvements on both the market itself, which may be interpreted as entailing the survival of alternative products/services, as well as on the consumers. Again, it is visible that the Court opts for the triumph of user choice over welfare increases, or at the very least, the concomitant existence of the two. Accordingly, in terms of arguing for efficiencies, it may be sufficient to demonstrate increased consumer choice, since the latter also entails gains in consumer welfare. However, the reverse scenario does not hold. A consumer welfare increase (e.g., as in *Microsoft*) in a market may not necessarily lead to more choice, weakening the argument. Such a conclusion affirms the assertion that European competition law is still under the influence of the German ordoliberal tradition. In this sense, competition law acts as a vehicle by which freedom of competition on the market is ensured, with the ultimate aim to foster consumer welfare through maintaining open choices.[140]

In light of the presented state-of-play of the Court's case-law, as well as the evolution of the European approach towards the privacy-competition conundrum, would it be appropriate to consider privacy as grounds for efficiency? In particular, is it possible and/or desirable to maintain privacy considerations as cognizable efficiencies under European competition rules?

In our view, the answer should be in the affirmative. As can be inferred from the above discussion, the consideration of data protection and privacy in European competition law assessments materialises in a chronological spectrum. As European antitrust enforcement moves from an attitude of strict separation towards qualified integration, it is likely that the possibility of considering privacy as efficiency arguments will increase. There exist three main reasons leading to that conclusion: symmetry, innovation concerns, and legal coherence. We examine each point briefly, before turning to concrete cases to illustrate our case better.

First, a symmetrical application of the law demands the incorporation of privacy considerations, also as efficiencies, into competition analyses. As briefly illustrated, several commentators have delineated potential theories of harm based on diminished

[139] Case C-95/04 P, *British Airways plc* [2007], para 86.
[140] Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact upon EU Competition Law' (2014) Europa-Kolleg Hamburg Discussion Paper No. 1/14.

levels of consumer privacy.[141] Thus, it would be inappropriate to build liability on factors that also touch upon privacy while not allowing those under scrutiny to generate counterarguments based on the same.[142] Concluding otherwise would potentially put the European Commission in a similar situation it faced in *Intel*. In that case, the Commission relied on older, formalistic case-law to determine the illegality of rebates, but also conducted an as-efficient competitor test while not allowing Intel to rebut the findings of the test.[143]

Second, dismissing privacy arguments as efficiency-enhancing factors may represent a myopic understanding of innovation. Players in digital markets interact in complex ways, switching from competition to cooperation and even coopetition.[144] This is especially the case for platforms orchestrating an ecosystem of interdependent modules, capable of exploiting complementarities across users, machines, and sectors through the use of data, software, and networks.[145] Such capabilities may provide platforms with the ability to regulate through code in a Lessigian manner.[146] As regulators of a private origin, platforms often need to manage complex expectations, some of which may materialise as increased levels of user privacy.[147] Thus, alterations in platform practices may be necessary to remedy a market failure, such as informational asymmetries.[148] Alternatively, changes may represent races-to-the-top.[149] Thus, platforms' maneuvers to modify certain aspects of their ecosystems should not be met with inherent suspicion – imposing a principle of *venire contra factum proprium* that assumes all changes are necessarily harmful and does not give the platform operator an opportunity, also on privacy grounds, to justify its potentially efficient conduct, seems

[141] Viktoria Roberson, 'Excessive data collection: Privacy considerations and abuse of dominance in the era of big data' (2020) 57 Common Mkt. L. Rev. 161; Cristina Caffarra and Tommaso Valletti, 'Google/Fitbit review: Privacy is a competition issue' (*VoxEU.org*, 4 March 2020) <https://voxeu.org/content/googlefitbit-review-privacy-competition-issue> accessed 27 July 2022.
[142] Christine Wilson, 'Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies' (*Bates White Antitrust Webinar,* 24 June 2020) <https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20-_final.pdf> accessed 27 July 2022.
[143] Assimakis Komninos, 'Competition Stories: January & February 2022' (*Concurrentialiste Blog*, 11 April 2022) <https://leconcurrentialiste.com/competition-stories-2022-one/> accessed 27 July 2022.
[144] Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (OUP, 2020).
[145] Annabelle Gawer, 'Digital platforms and ecosystems: remarks on the dominant organizational forms of the digital age' (2021) Innovation, Organization & Management 1.
[146] Lawrence Lessig, 'Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv. L. Rev. 501.
[147] European Commission, 'Study on "Support to the observatory for the online platform economy"' (Final Report, 2021) <https://op.europa.eu/en/publication-detail/-/publication/ee55e580-ac80-11eb-9767-01aa75ed71a1/language-en/format-PDF/source-206332284> accessed 27 July 2022.
[148] Nicolas Economides and Ioannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective' (2021) 17 Journal of Competition Law & Economics 765; Pablo Ibanez-Colomo, 'Market failures, transaction costs and Article 101(1) TFEU case-law' (2012) 37 European Law Review 541.
[149] See, by analogy, Garces and Fanaras (n 109).

efficient conduct, seems premature.[150] Here, the usual criticism raised against the incorporation of a traditionally non-economic consideration, such as privacy, into competition assessments is intractability.[151] Indeed, some (mostly separatist) commentators attack the notion of privacy in competition since they contend that its malleable and "unscientific" nature may lead to the interpretation of antitrust laws in a dystopic manner.[152] However, as pointed out by several scholars, narrow efficiency attitudes often also reflect inherent ambiguities and may also be under the influence of politics – effectively becoming terms of social sciences and economic ideology themselves rather than scientific and mathematical concepts.[153] Other critics argue, usually on error-cost analysis grounds, that analyzing such intricate matters does not pass the cost-benefit test.[154] However, considering the rapid propagation and adoption of digital products and services, these issues are likely to keep enforcers busy for the coming years. Moreover, it is also arguable that increasing levels of complexity in modern economies, even in the scenario where economics enjoys technical insularity in antitrust analyses, would cast doubts on the longevity of simplicity in competition law.[155] Thus, abdication of administrative and judicial responsibility in the face of technical complexity invites unpreparedness for the future and should be avoided.[156]

Last but not least, incorporating privacy into unilateral conduct cases also seems necessary from a coherence perspective. As emphasised numerous times by Commission officials, the EU is currently going through a twin transition, a green and a digital one.[157] Recently, we have seen examples where competition policy and environmental protection go hand in hand. For instance, in a recent case, the Commission prohibited an agreement between automobile manufacturers that illegally restricted the

[150] Assimakis Komninos, 'Competition Stories: November & December 2021' (*Concurrentialiste Blog*, 6 January 2022) <https://leconcurrentialiste.com/competition-stories-nov-dec-2021/> accessed 27 July 2022.
[151] William Baxter, 'Responding to the Reaction: The Draftsman's View' (1983) 71 Cal. L. Rev. 618.
[152] Manne and Auer (n 32).
[153] For instance, there are ambiguities as to what constitutes economic efficiency, or which types of efficiencies should be considered, within the meaning portrayed by the adherents of the Chicago school. See Brodley (n 31); Albert Foer, 'On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust' (2015) 60 Antitrust Bulletin 103; Ben Van Rompuy, *Economic efficiency: the sole concern of modern antitrust policy? Non-efficiency considerations under Article 101 TFEU* (Kluwer 2012); Eleanor Fox, 'The Efficiency Paradox' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP 2008).
[154] Alden Abbott, 'Broad-Based FTC Data-Privacy and Security Rulemaking Would Flunk a Cost-Benefit Test' (*Truth on the Market Blog*, 13 October 2021) <https://truthonthemarket.com/2021/10/13/broad-based-ftc-data-privacy-and-security-rulemaking-would-flunk-a-cost-benefit-test/> accessed 27 July 2022.
[155] Timothy Brennan, 'Is complexity in antitrust a virtue? The accuracy-simplicity tradeoff' (2014) 59 Antitrust Bulletin 827.
[156] Frank Pasquale, 'Paradoxes of Digital Antitrust' (2013) Harv. J.L. & Tech Occasional Paper Series, July 2013.
[157] Majcher and Robertson (n 54).

illegally restricted the development of products providing for less-polluting emission systems.[158] However, there have also been developments where the objectives of competition and sustainability potentially clash.[159] The most pertinent example in that regard is the promulgation of the new horizontal guidelines, which entails a dedicated paragraph designed to balance the two competing goals.[160] It is commendable that the Commission endeavors to tackle such a complex task, arguably more difficult than the privacy-competition debate, since it also relates to future consumers.[161] But it is all the more reason to also start scrutinizing the equivalent debate in terms of privacy and competition.

Considering the foregoing, would Apple's ATT and Google's Privacy Sandbox initiatives satisfy a justification by appealing to efficiency arguments? Before we briefly analyse that question, it is important to remind that the second stage where possible justifications take place is inherently linked to the first stage of the examination where at least the plausibility of anticompetitive impact is established.[162] Whereas the exercise of setting out detailed theories of harm exceeds the scope of this Article, it should suffice to explain that a few commentators highlighted potential issues with both practices. For ATT, Martinez argues that Apple blocking third-party apps from accessing inputs allowing for the personalization of ads may amount to an implicit refusal to supply, as also argued within *Google (Shopping)*.[163] Sokol and Zhu defend that Apple unreasonably engages in first-line discrimination, what is popularly known as self-preferencing.[164] In brief, they assert that by requiring third-party apps to obtain explicit user consent for tracking across different apps, without applying the same criteria to its own ad business, Apple risks restricting competition. Elsewhere, commentators put forward that Apple hampering personalised advertising ultimately plays into its

[158] Case AT.40178, *Car Emissions* [2021].
[159] Viktoria Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) Journal of European Competition Law & Practice (advance article).
[160] Nicole Kar and Lauren O'Brien, 'Greening EU competition law: Commission invites comments on draft revised rules on horizontal cooperation' (*Linklaters Insights*, 9 March 2022) <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/march/greening-eu-competition-law_commission-invites-comments-on-draft-revised-rules-on-horizontal-coop> accessed 27 July 2022.
[161] Roman Inderst and Stefan Thomas, 'Legal Design in Sustainable Antitrust' (2022) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4058367> accessed 27 July 2022.
[162] Pablo Ibanez-Colomo, 'Capability and likelihood of anticompetitive effects: why the difference exists, and why it matters' (*Chillin'Competition Blog*, 29 January 2021) <https://chillingcompetition.com/2021/01/29/capability-and-likelihood-of-anticompetitive-effects-why-the-difference-exists-and-why-it-matters/> accessed 27 July 2022.
[163] Martinez (n 57).
[164] Sokol and Zhu (n 78). For a similar view, see Brian Chen and Daisuke Wakabayashi, 'You're Still Being Tracked on the Internet, Just in a Different Way' (*The New York Times*, 6 April 2022) <https://www.nytimes.com/2022/04/06/technology/online-tracking-privacy.html> accessed 27 July 2022.

plays into its own hands: by discouraging the use of ad-funded business models, so the theory goes, app developers will eventually turn to subscription-based models, which will have to go through Apple's 30% commission fee.[165] However, the case is not that simple. As iterated, ATT does not ban the collection and use of third-party data or tracking for that matter. In earlier versions, consumers were just as capable of turning off cross-app tracking. It is therefore inappropriate to categorise the update as inherently hampering the use of personalised advertising. In fact, the difference brought about by iOS 14.5 is that consumers are explicitly presented with a choice. If anything, it seems ATT is working towards alleviating a market failure, namely informational asymmetries. Next, contentions that Apple artificially favors its own ad business, and profits from it, are also controversial. As delineated in detail in its responses to a CMA inquiry, Apple's own ad business does not engage in third-party tracking.[166] Therefore, the changes that affect the way in which third party data are being collected do not concern Apple, in the same manner that they do not concern Google collecting data via the apps in its ecosystem, such as YouTube and Google Shopping. Moreover, whereas it is true that Apple saw an increase in its advertising revenue after the introduction of ATT, this is certainly not uniform, as it also saw a decrease in app commissions as a result of ATT.[167] As outlined above, it is true that Apple's move may lead to greater concentration of data in the hands of a few ecosystems, as the latter rely on first-party data and thus not cross-party tracking. However, this is a different issue than self-preferencing understood within the meaning of existing case-law. This mixed picture may be the reason behind the decision of the French Competition Authority not to impose interim measures on Apple due to ATT, but also to continue the investigation to solve the intricacies behind the case.[168] Lastly, some authors also contend that Apple's practices, rather than resulting in improvements, actually degrade user privacy.[169]

As regards Google's Privacy Sandbox initiatives, similar theories permeate the literature. In particular, scholars argue that by implementing the changes, Google eliminates the cookie, which constitutes the cornerstone of user tracking across the

[165] Hoppner and Westerhoff (n 79).
[166] 'Mobile Systems Market Study: Apple Response to Interim Report' (2022) <https://assets.publishing.service.gov.uk/media/62277271d3bf7f158779fe39/Apple_11.3.22.pdf> accessed 27 July 2022. Determining what exactly constitutes first- and third-party tracking should be a case-specific inquiry. Recently, the UK's CMA ascertained that the two may not be so different, in line with an opinion obtained from the Information Commissioner's Office. A similar exercise with the help of EDPB should be considered in the EU as well.
[167] Jeffrey Rousseau, 'AppsFlyer: In-app gaming purchase revenue declined 35% globally in 2021' (*GamesIndustry*, 23 February 2022) <https://www.gamesindustry.biz/articles/2022-02-23-appsflyer-in-app-gaming-purchase-revenue-declined-35-percent-globally-in-2021> accessed 27 July 2022.
[168] Vincent Giovannini, 'The French Apple competition & privacy case' (*Competition Forum*, 3 May 2021) < https://competition-forum.com/the-french-apple-competition-privacy-case/ > accessed 27 July 2022.
[169] Hoppner and Westerhoff (n 79).

eliminates the cookie, which constitutes the cornerstone of user tracking across the web. A potential consequence of such a maneuver is the strengthening of the already powerful Chrome browser, to the detriment of often smaller, third party web sites, and with the extension of the initiative to the Android OS, ad-funded third party apps.[170] Of critical importance here is the fact that Google's plans imply the complete obliteration of cookies – unlike ATT, Privacy Sandbox does not provide users with a choice to opt-in if they wish to benefit from personalization.

In light of the above theories of harm, it seems at least possible for ATT to pass muster under a prospective efficiencies assessment. Following the analytical framework in *Post Danmark*, Apple can argue that ATT produces efficiencies via promoting user privacy, as a potential metric of competition on quality. It ultimately falls upon the Commission to determine, as it did in *Microsoft/LinkedIn* and *Google/Fitbit*, whether user privacy plays a role in competition within the online advertising services market, however narrowly or widely defined. The fact that a large chunk of consumers changed their attitudes towards cross-app tracking after the introduction of the ATT may signify that it indeed does.[171] These statistics may also be coupled with user surveys and other qualitative indicators to demonstrate, as in the words of *Post Danmark I*, the existence and the extent of claimed efficiencies. That leaves the *probatio diabolica*, that is, the requirement that consumer choice is essentially not constrained. Here, it makes sense to recall that ATT does not prohibit cross-app tracking at all. If consumers derive more benefit from personalised advertising by virtue of cross-app tracking, they are free, and arguably in a better position, to opt for it. The fact that ATT does not eliminate cookies or personalised advertising entirely, but instead shifts the default from automatic tracking to a scenario where tracking is disabled, seems essentially compatible with the consumer choice paradigm, endorsed by the Commission and the Court in *Microsoft*, *Google (Android)*, and *Google (Shopping)*. Whereas some commentators voice legitimate concerns directed at Apple for the design of the choice architecture behind the tracking prompt, that is, the way the consumers are presented with the opt-in screen, that should not outright overrule an efficiency justification.[172] In fact, Apple has already taken concrete steps, after consulting with industry stakeholders, to enable app

[170] Geradin, Katsifis and Karanikioti (n 57).
[171] For instance, CMA considered privacy a key metric of competition in digital advertising markets. See Competition and Markets Authority & Information Commissioner's Office, 'Competition and data protection in digital markets: a joint statement between the CMA and the ICO' (2021) <https://ico.org.uk/media/about-the-ico/documents/2619797/cma-ico-public-statement-20210518.pdf> accessed 27 July 2022.
[172] Competition and Markets Authority, 'Online Choice Architecture: how digital design can harm competition and consumers' (*CMA Research and Analysis*, 5 April 2022) <https://www.gov.uk/government/publications/online-choice-architecture-how-digital-design-can-harm-competition-and-consumers> accessed 27 July 2022.

developers to add prompts providing additional information regarding cross-app tracking.[173]

By contrast, the chances for Google arguing for efficiencies to justify the potential anticompetitive impacts of its Privacy Sandbox initiative seem slim. The problem firstly materialises in the construction of a theory of harm: unlike Apple's ATT, it is not clear whether Google will stop utilizing *third-party* tracking to inform its own advertising business. This presents a clear danger of first-line discrimination, or self-preferencing, for which Google had already been fined in Europe. Secondly, Privacy Sandbox may fail to satisfy the conditions of the analytical framework as laid down by the Court. In particular, by completely destroying the cookie, Google is likely to reduce consumer choice, especially to the detriment of users valuing personalised ads more. Whereas it is true that Google is preparing to offer alternatives, such as Topics/federated credential management, it is unclear whether these systems provide equivalent levels of personalization. As iterated earlier, as the case-law stands, relying only on product improvements, such as the case may be with Privacy Sandbox increasing user privacy, is insufficient if such improvements come attached to a reduction in consumer choice.

3.3 Privacy as objective justification

As confirmed in *Tomra*, there exists a clear separation between objective justifications on the one hand, and efficiencies on the other, for escaping liability in European competition law. The existence of these avenues through which harmful conduct may be justified highlights the fact that there are no 'per se abuses' in European competition law.[174] According to the Commission's Guidance Paper, objective justifications are factors external to the dominant undertaking, which exonerate the exclusionary conduct falling under the prohibition in Article 102 TFEU.[175] Whereas the Commission only enumerates public health and safety as examples of external factors, an over-

[173] Hoppner and Westerhoff (n 79).
[174] Eric Gippini-Fournier, 'Resale Price Maintenance in the EU: In Statu Quo Ante Bellum?' in Barry Hawk (ed), *International Antitrust Law and Policy* (Fordham 2009).
[175] After Intel, the importance of the Commission Guidance Paper has arguably increased. See Pablo Ibanez-Colomo, 'The (growing) role of the Guidance Paper on exclusionary abuses in the case-law: the legal and the non-legal' (*Chillin'Competition Blog*, 9 February 2022) <https://chillingcompetition.com/2022/02/09/the-growing-role-of-the-guidance-paper-on-exclusionary-abuses-in-the-case-law-the-legal-and-the-non-legal/> accessed 27 July 2022.

addition to providing an acceptable ground for justification, case-law requires undertakings to act in an appropriate manner to achieve their objectives (necessity) and without exceeding what is necessary to tackle such aims (proportionality).[180] For instance, in *Romanian Power Exchange/OPCOM,* the undertaking argued that certain instances of discriminatory treatment to the detriment of foreign electricity vendors were justified as the behaviour in question had the aim to protect against tax mismatches.[181] However, the Commission asserted that there were alternative ways to alleviate such mismatch concerns that were overall less restrictive of competition.[182]

Although the formal state-of-play regarding objective justifications in European competition law may be summarised as above, scholars have expressed doubts as to the practical applicability of the notion.[183] For instance, some commentators, such as Advocate-General Jacobs, have argued that the distinction between the stage where abusive conduct is established, on the one hand, and where it is justified via recourse to objective necessities, on the other, is artificially constructed.[184] Even though this view is less relevant in the light of recent case-law, such as *Intel*, there is little doubt that objective justifications remain rather underutilised – to date, there exists no case whose conclusion relied on objectively justified reasons. Moreover, as highlighted in *Tetra Pak* and *Hilti*, the Court is skeptical of undertakings that claim to serve public policy objectives, such as health and safety.[185] Accordingly, the Court considers private undertakings ill-suited to tackle such aims, which remain within the remit of public authorities and regulators. Hence, it is clear that European competition law does not view what is dubbed "regulatory vigilantism" favorably.[186]

The treatment of privacy as an objective justification must be examined within the boundaries of the above analysis. It is likely that undertakings will point towards privacy considerations as possible grounds for justification. Their success, however, is equally unlikely. As iterated earlier, even though the Commission refers only to public health and safety as 'external factors', this should not be taken as an exhaustive list. Indeed, the Court in its case-law has recognised several potential grounds for justifying otherwise harmful conduct. Furthermore, due to the enmity towards regulatory vigilantism, declaring public health and safety as the sole grounds through which an objective

[180] Alison Jones, Brenda Sufrin, & Niamh Dunne, *Jones' and Sufrin's EU Competition Law : Text, Cases, and Materials* (OUP 2017).
[181] Case AT.39984, *Romanian Power Exchange/OPCOM* [2014].
[182] ibid, paras 198-227.
[183] Renato Nazini, 'The wood begun to move: an essay on consumer welfare, evidence and burden of proof in Article 82 cases' (2006) 4 European Law Review 518.
[184] Case C-53/03, *Syfait and Others* [2005], Opinion of AG Jacobs, para 72.
[185] Case T-30/89, *Hilti v Commission* [1991], para 118.
[186] Niamh Dunne, 'The Role of Regulation in EU Competition Law Assessment' (2021) LSE Legal Studies Working Paper No. 09/2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871315> accessed 27 July 2022.

justification defense can be made risks rendering the concept nugatory. However, since privacy as a distinct field of law already enjoys the presence of dedicated regulators, a similar case of hostility towards undertakings purporting to protect consumer privacy can be made, in the sense that data protection authorities are better placed to deal with such issues, not private undertakings with profit-seeking motives.

Besides, the invocation of privacy as grounds for objective justification may be problematic due to the relationship between European competition law and sector-specific regulation. Specifically, appeals to privacy to justify otherwise anticompetitive conduct may be viewed as mere compliance with what already exists.[187] As explained by the Court in *AstraZeneca*, compliance (or non-compliance) with other legal rules does not relate to whether a dominant undertaking breached its obligation not to abuse its market position.[188] In other words, violations of other legal rules do not readily imply competition infringements; symmetrically, sole compliance with other strands of law is insufficient to escape liability. Thus, it should not be possible for a dominant undertaking to invoke compliance with privacy and data protection regulations, such as the GDPR, as an objective justification for its anticompetitive behaviour. Such an approach is sensible since, as also explained by the Regional Administrative Tribunal of Lazio, deeming the lawfulness of conduct under separate regulatory regimes as a safe harbour against the reach of competition laws would render the application of the latter almost "inconceivable".[189]

Nevertheless, the latest jurisprudence of the Court blurs the antitrust-regulation picture to a certain degree. For instance, in *Lietuvos gelezinkeliai*, the General Court asserted that legislative measures are capable of influencing (or even determining) the results of the application of a legal test in competition law assessments.[190] Similarly, in *Slovak Telekom*, the Court of Justice acknowledged that "…a regulatory obligation can be relevant for the assessment of abusive conduct…" if the dominant undertaking is subject to sectoral rules.[191] Here seems to lie a tension between the cited judgments. On the one hand, *AstraZeneca* considers that an undertaking's position vis-à-vis a regulatory regime is *irrelevant* for the purposes of Article 102, whereas on the other hand, *Lietuvos gelezinkeliai* and *Slovak Telekom* assert that regulatory requirements are

[187] Whereas the GDPR is primarily concerned with the protection of personal data, it also entails a number of provisions that touch upon privacy, such as data minimization and privacy by design.
[188] Case C-457/10 P, *AstraZeneca v Commission* [2012], para 132.
[189] Federico Balestra & Lucia Antonazzi, 'From abuse of dominance to abuse of rights: the last resort tool to apply Article 102 TFEU?' (*Bird & Bird Insights*, 16 March 2022) <https://www.twobirds.com/en/insights/2022/italy/from-abuse-of-dominance-to-abuse-of-rights> accessed 27 July 2022.
[190] Pablo Ibanez-Colomo, 'GC Judgment in Case T-814/17, Lithuanian Railways – Part I: object and indispensability' (*Chillin'Competition Blog*, 1 December 2020) <https://chillingcompetition.com/2020/12/01/gc-judgment-in-case-t%E2%80%91814-17-lithuanian-railways-part-i-object-and-indispensability/> accessed 26 March 2022.
[191] Case C-165/19 P, *Slovak Telekom* [2021], para 57.

hand, *Lietuvos gelezinkeliai* and *Slovak Telekom* assert that regulatory requirements are relevant for a competitive assessment. Granted, it may be the case that *AstraZeneca* judgment should be read as the inappropriateness of equating a regulatory breach to a competition law breach. A more reconciliatory reading of the case-law thus signals that the regulatory environment forms part of the legal context, in which the allegedly abusive conduct takes place.[192] There exists support for this line of reasoning in the case-law.[193] However, the fact that the Court directly used the term "irrelevant" when speaking of the connection between the two legal regimes in *AstraZeneca* somewhat contradicts this conclusion. Moreover, the scene is arguably even more ambiguous after *Google (Shopping)*. In that case, the General Court supplemented its finding that Google's conduct was in fact abusive, as the latter failed to instate a level playing field in breach of net neutrality regulations.[194] It is true that the General Court inserted this argument "for the sake of completeness" so as to solidify its position. Still, it appears that, for a regulatory regime to influence the application of competition law to a dominant undertaking, the latter does not even need to be a subject of that regulation. This argument goes further than what the Court of Justice expressed in *Slovak Telekom* and will probably be clarified on appeal.[195]

The above analysis presents significant implications for the role of privacy as an objective justification in competition assessments. Accordingly, if *AstraZeneca* case-law is pertinent, one needs to conclude that Google or Apple should not be able to rely on an argument of compliance (with the GDPR) to exonerate themselves. A symmetrical treatment necessitates that, if a theory of harm cannot be established simply by recourse to violations of other laws, a justification should not be cognizable simply by complying with legal rules. However, if the recent developments in the Court's case-law are to be followed, it becomes more and more feasible to argue that, since regulatory considerations are relevant for competition law assessments, the Court should also bear them in mind when scrutinizing claims of objective justifications. Clearly, the Facebook saga of the Bundeskartellamt will also shed light on this controversy since the case precisely deals with whether breaches of data protection regulations can be equated to vehicles for abusive conduct.[196]

[192] Dunne (n 186).
[193] Case C-32/11, *Allianz Hungaria* [2013]; Maximilian Volmar and Katharina Helmdach, 'Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation' (2018) 14 European Competition Journal 195; Lianos (n 96).
[194] For a brief analysis, see Friso Bostoen, 'The General Court's *Google Shopping* Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse' (2022) Journal of European Competition Law & Practice (advance article).
[195] 'Google launches fresh appeal to overturn $2.8 bln fine at top EU court' (*Reuters*, 20 January 2022) <https://www.reuters.com/technology/google-launches-fresh-appeal-overturn-28-bln-fine-top-eu-court-2022-01-20/> accessed 26 March 2022.
[196] See *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)* (n 113).

Before closing this paragraph, it is important to focus on a distinct but nevertheless related issue. As established, the case-law formally accepts that an analysis of abuse under Article 102 TFEU consists of two stages. However, in practice, it is often the case that whether a conduct is abusive is determined primarily in the first stage, and the second stage (justifications) is often relegated to what late Justice Scalia would call a "parchment guarantee".[197] In light of this finding, the first stage of the analysis presents a conducive environment in which dominant undertakings can rebut claims made against them. Here, the undertakings essentially have two options: substantiate that their conduct is overall incapable of presenting anticompetitive effects à la *Intel*[198], or argue that their behaviour is on the whole competition-enhancing. The latter, in turn, may materialise in two shapes. Firstly, conduct may be, as a whole, pro-competitive if its anticompetitive results are attached to a greater, pro-competitive commercial practice, a situation labelled as the ancillary restraints doctrine. Secondly, as in *Wouters*, undertakings may argue that their conduct, while potentially anticompetitive, pursues legitimate and non-economic goals in a proportionate manner. Here, the premises advanced by the *Wouters* line of cases should not be interpreted as interchangeable with objective justifications. Whereas the former enables the Court to examine whether the conduct in question falls, as a whole, outside the scope of the prohibition on abuse of dominance (first stage analysis), objective justifications belong to the second stage of the analysis and exonerate behaviour whose capability to harm competition has already been established.[199]

With regards to the implications of the *Wouters* line of cases, there is the possibility to argue that a particular conduct serves a legitimate aim in a proportionate manner and is thus, on the whole, not within the purview of Article 102.[200] In *Wouters*, the Court

[197] Similarly, some authors refer to the second stage as a mere "theoretical possibility". See Victoria Mertikopoulou, 'Evolution of the objective justification concept in European competition law and the uncharted waters of efficiency defences', in Assimakis Komninos, Ekaterina Rousseva, Christopher Brown, Victoria Mertikopoulou, Gianluca Faella and Antonello Schettino, 'Efficiency defences in abuse of dominance cases', May 2014, Concurrences N° 2-2014, Art. N° 65382, available at <https://www.concurrences.com/en/review/issues/no-2-2014/dossier/efficiency-defences-in-abuse-of-dominance-cases-65382> accessed 27 July 2022.

[198] Pablo Ibanez-Colomo, 'Anticompetitive Effects in EU Competition Law' (2021) 17 Journal of Competition Law & Economics 309.

[199] The two concepts are frequently conflated, and confusion is rampant also with regards to Article 101 TFEU. To that end, see Case C-382/12 P, *MasterCard* [2014], paras 89-95; Pablo Ibanez-Colomo, 'The ISU case and the SuperLeague: on ancillarity, object and burden of proof in the General Court's judgment (Case T-93/18)' (*Chillin'Competition Blog*, 17 May 2021) <https://chillingcompetition.com/2021/05/17/the-isu-case-and-the-superleague-on-ancillarity-object-and-burden-of-proof-in-the-general-courts-judgment-case-t%e2%80%9193-18/> accessed 26 March 2022.

[200] It must be pointed out that, even though *Wouters* and related case-law focus on Article 101 TFEU, there is nothing in the way of extending their application to Article 102 TFEU as well. See, in that regard, Ben Van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations' (2015) 22 Maastricht Journal of European and Comparative Law 179.

accepted that the restriction of competition resulting from a ban on partnerships between lawyers and accountants, as instated by the Dutch Bar Association, was an inherent part of the pursuit of a legitimate objective (ensuring proper legal practice).[201] In light of this doctrine, could platforms argue that a restriction of competition, such as disadvantaging some undertakings operating certain (e.g., ad-funded) business models is inherently affixed to the pursuit of an overall legitimate objective (e.g., improving user privacy)?[202] As the law stands, that question should be answered in the negative. As commentators have observed, *Wouters* (and related case-law) requires the involvement, at least to a certain degree, of governmental authority in the enactment of the decisions under scrutiny.[203] The undertaking in question should use delegated governmental power to legitimately pursue non-economic objectives. Implicit support for this argument can readily be found in the judgment itself, whereby the Court states, in paragraphs 105-107 that "[t]he Bar of Netherlands was *entitled* to consider that members of the bar might no longer be in a position to advise…".[204] In other words, the Bar of Netherlands was equipped with the power to engage in *prima facie* anticompetitive conduct that nonetheless qualified as "regulatory ancillarity".[205] Accordingly, for Apple and Google to be able to rely on *Wouters* in justifying the consequences of the changes they introduced, they must be vested with regulatory powers. This conclusion can also be viewed as a reflection of the case-law on objective justifications, as private undertakings' efforts to safeguard public interests were seen suspiciously.[206] However, due to recent regulatory developments under the umbrella of the Digital Services Act, it is unclear whether Google for example, as a very large online platform, is to be deemed as equipped with a certain degree of authority.[207] In that regard, search engines such as Google Search may be subject to extended rules, for instance acting as takedown agents of illegal content, or enhancing user privacy.[208] If similar powers are granted to such platforms in the final version of the Digital Services Act, there may be valid grounds for

[201] Case C-309/99, *Wouters* [2002] ECR I-1577.
[202] The *Wouters* doctrine is invoked as a valid route for accommodating sustainability agreements as well. See Inderst and Thomas (n 161).
[203] Charlotte Janssen and Erik Kloosterhuis, 'The Wouters case-law, special for a different reason?' (2016) 37 European Competition Law Review 335.
[204] Emphasis added.
[205] Richard Whish and David Bailey, *Competition Law* (7th edn OUP 2012).
[206] Indeed, the Court in Hilti explained that "…it is clearly not the task of an undertaking in a dominant position to take steps *on its own initiative* to eliminate products…" (emphasis added). See *Hilti* (n 185) para 118.
[207] 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 (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en> accessed 26 March 2022.
[208] Matthew Newman and Nicholas Wallace, 'Google Search may come under DSA rules to remove search results as EU regulator seeks compromise' (*MLex Regulatory Insight*, 24 March 2022) <https://content.mlex.com/#/content/1367520?referrer=search_linkclick> accessed 26 March 2022.

similar powers are granted to such platforms in the final version of the Digital Services Act, there may be valid grounds for arguing that the *Wouters* case-law may also find room for application. Such a scenario would turn Google from a *de facto* privacy regulator to a *de jure* one, and may constitute a potential unintended consequence of the upcoming legislative measures.[209]

As to the applicability of objective justifications to the concrete cases of ATT and Privacy Sandbox, there seems to be a mixed picture. As iterated earlier, some commentators argue that examples of objective justifications in European competition law are close to non-existent. Combined with the enmity towards regulatory vigilantism, the chances of an appeal to privacy being upheld as an objective justification are slim. This is unfortunate, as the recently approved Digital Markets Act also lacks provisions capable of allowing the undertaking under scrutiny to escape liability. In fact, the Act differentiates itself from traditional competition law by virtue of the theoretical possibility under competition enforcement to bring forward arguments of efficiencies and objective justifications. Strengthening, or at least clarifying further, the application of objective justification claims in the digital economy would thus be a welcome development. One line of inquiry that awaits explanation is the regulatory compliance claim. As discussed above, since regulatory considerations become increasingly relevant for the establishment of a theory of harm under the first prong of Article 102 TFEU, it should also be possible for regulatory compliance to inform the assessment of the second prong. For instance, in the case of ATT, Apple should be able to rely on the fact that it upholds, and probably goes beyond, the requirements of the GDPR vis-à-vis user privacy to enrich potential arguments of objective justification. Here, one can argue that, owing to their special responsibility not to further distort competition in their market, conduct of dominant undertakings that go beyond the stipulations of another regulatory regime should be viewed as inherently suspicious.[210] However, it is curious to also note that, in the sustainability arena where tensions with competition law are rife, the Commission decided to take enforcement action against companies preventing the emergence of products that go beyond the requirements applicable regulations.[211] This seems to imply, at least implicitly, that it is also important for the Commission to protect initiatives that venture beyond what the law simply stipulates, with potential implications for the assessment of ATT and the Privacy Sandbox in a prospective investigation.

[209] Geradin, Katsifis and Karanikioti (n 57).
[210] Balestra and Antonazzi (n 189).
[211] See the *Car Emissions* case (n 158).

4 Conclusion

This Article has analysed whether European antitrust law, as it stands, allows the invocation of privacy considerations as efficiency arguments or objective justifications by dominant undertakings to escape liability stemming from conduct that otherwise contravenes competition rules. It is apparent that, with the evolving decisional practice of the Commission, European competition enforcement slowly abandons strict separation of privacy and competition in favor of qualified integration. This line of thinking is also being embraced by the Union Courts as well. Accordingly, as long as privacy considerations are not put forward as standalone arguments, but come affixed to an overarching theory of harm, they can be considered in competition assessments. Specifically, privacy may form an element of abusive behaviour; at the same time, symmetrical application of the law demands that it may also be cognizable as a potential justification, such as through efficiency arguments. Furthermore, privacy is bound to become pertinent also by virtue of the twin transition, through which the EU is travelling at the moment. Recent developments that aspire to tackle the complex relationships between sustainability and competition should also materialise with regard to privacy as well. However, in order to become successful, efficiency arguments need to satisfy the cumulative criteria laid down in the case-law, not least the consumer choice criterion. Accordingly, improvements in product quality, such as the use of privacy-enhancing technologies and practices, are unlikely to exonerate abusive conduct if coupled with reductions in the number of available alternatives for consumers.

In addition to efficiencies, the Article also touched upon the concept of objective justifications in unilateral conduct cases. The analysis of the limited case-law revealed that European competition law is generally suspicious of private undertakings assuming the role of guardians of public policy. However, even though regulatory vigilantism is prohibited, it is not obvious how the existence and breadth of regulatory obligations incumbent upon dominant undertakings influence the legitimacy of private initiatives to endeavor for the greater good. The development of the case-law, coupled with recent regulatory developments at the Union level, may bring about unforeseen consequences that may allow for a more relaxed interpretation of the concept of objective justification in digital markets.

Overall, increasing levels of complexity in the digital economy should induce enforcers to proceed with caution when considering novel additions to the antitrust toolkit, but nevertheless should not serve as a pretext for hostility towards rigorous scrutiny of dominant firm behaviour. In the near future, it is apparent that the tensions between privacy and competition will materialise more frequently. The trick is to ensure that successful firms, having been urged to protect and promote user privacy,

are not readily turned upon by means of antitrust enforcement, all the while ensuring that they also do not engage in regulatory gaming. By examining the case of single-firm conduct in European competition law, this Article has contributed to an emerging strand of literature that has only recently started to analyse these intricacies.

Ana Luíza Calil[*]

PUBLIC AGENTS IN SOCIAL MEDIA REGULATION: THE BRAZILIAN CASE IN A COMPARATIVE PERSPECTIVE

Abstract

The use of social media by public agents, including politicians, is an ordinary practice throughout countries, part of the daily life of the public administration and States are currently dealing with the challenge of social media regulation. This article aims to show how social media has become a government toll throughout the years and how public agents and institutions are using this mechanism as part of the administrative routine. One of the key points is that the use of social media by governments is part of the movement to transform transparency and publicity, both from an internal point of view and for the public arena's engagement in social participation.

Based on this, the article presents the results of a research conducted to identify if social media regulation is dealing with this scenario. In Brazil, the issue of social media use in the public sector is relevant because the country has approximately 9 million public agents, and around 242 million smartphone users. Brazilian politicians have personal accounts with loads of followers. A general social media regulation in the country is being drafted – while Courts deals with content control and blocking cases.

This article analyses how rules and regulations are assessing the matter, specifically if its text includes provisions for public agents or public institutions. The main goal is to identify whether there is a differentiation by the rules on the author of the content or content sharing. It investigates if there are differences on how regulations handle public and private persons. The comparative research was conducted in 8 countries and in the European Union sphere and has identified two models regarding social media regulation design. The results were compared to the Brazilian case, which presented some particularities in a comparative perspective. The research adopted the concept of regulation in an extended way.

In the conclusion, a roadmap for regulators in Brazil is proposed, with three elements to be considered when drafting a social media regulation. The roadmap intends to provide guidance for regulators when dealing with the challenge of regulating social media, considering the importance of properly identifying its subject.

JEL CLASSIFICATION: D70; K23; L59

SUMMARY

1 Introduction – 2 Use of social media as a government tool – 3 How public agents are addressed in social media regulation – 3.1 The normative model – 3.2 The non-normative model – 4 The current scenario of

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social media regulation in Brazil – 4.1 The Brazilian particular case - 4.1.1 Normative model – 4.1.2 Non-normative model – 4.2 Brazilian Supreme Court: President Bolsonaro "blocking" cases – 5 Conclusion: a proposed roadmap for Brazilian regulators and legislators

1 Introduction

On January 6, 2021, the Capitol in Washington, USA, was invaded by supporters of former President Donald Trump, driven by false claims that there had been electoral fraud in the election of Joe Biden – the "Rally to Save America"[1] episode. The movement was the result of a series of posts on the former President's personal account on Twitter, who was suspended from the network. To circumvent the suspension, Trump used an official account of the presidency to go against Twitter, claiming a violation of his freedom of speech. It resulted in the definitive banning of Trump.

In Brazil, the story is not different. Since the 2018 elections, when there has been a large movement of fake news and social media engagement for electoral purposes, the use of social media by politicians has been consolidated.

There are 242 million smartphones in use in Brazil, an average of more than 1 per inhabitant, as calculated in 2021.[2] On the spectrum of social media, there are around 127 million active users on the *Facebook* in the country, and it is estimated that by 2025 more than 72% of the population will be active in the social network.[3] These data are a sample of the potential for capillarity and relevance of digital media for State-Society interaction.

Social media has become the central tool for coordinating political movements around the world,[4] whether from liberal or authoritarian governments. Under the guise of the protection of freedom of speech, there are government demands from different fronts against content restrictions by providers.[5]

[1] Dan Barry, Mike McIntire and Matthew Rosenberg, "Our President Wants Us Here': The Mob That Stormed the Capitol' (*The New York Times*, 9 January 2021) <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> accessed 15 July 2022.

[2] See data by Fernando de Souza Meirelles, 'Pesquisa Anual do Uso de TI' (*FGV EAESP*, May 2022) <https://eaesp.fgv.br/producao-intelectual/pesquisa-anual-uso-ti> accessed 6 December 2021.

[3] See data available on the website Statista, Stacy Jo Dixon, 'Leading countries based on Facebook audience size as of January 2022' (*Statista*, 15 July 2022) <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/> accessed 25 July 2022.

[4] Clay Shirky, 'The Political Power of Social Media: Technology, the Public Sphere and Political Change' *Foreign Affairs* (New York, January/February 2011) 28, 30.

[5] ibid 32: 'Despite this basic truth - that communicative freedom is good for political freedom - the instrumental mode of internet statecraft is still problematic. [...] Dissidents can be exposed by the unintended effects of novel tools. A government's demands for Internet freedom abroad can vary from country to country, depending on the importance of the relationship, leading to cynicism about its motives'.

The complexity of the issue invites us to analyse the subject of the regulation, considering that social media platforms are usually provided by private actors, and, at the same time, the use of those networks is widely spread for public and private parties.

This article aims to present an overview current scenario of how public agents are addressed in social media regulation,[6] with special focus on the Brazilian case and considering social media as a government tool. As for the research methodology, the definition of *public agent* adopted includes civil servants and political agents (including politicians and public agents or political staff such as Ministries, State Secretaries, among others).[7]

Through a literature review on the topic, it was possible to conclude that (i) social media regulation seems to be a relevant topic for legal scholars, under the lens of public and private law; (ii) most of the findings were related to free speech or freedom of information themes and if a private party could promote content regulation or restrictions; and (iii) a legal analysis of how social media regulation is handling or intends to handle the public agents' behaviour was not found.

Based on this review, it was relevant to conduct research on selected rules and regulation, in force or under construction, to investigate if there are special rules for public agents' behaviour in social media regulation or if regulation handles equally content sharing, regardless of who is the author.

In addition to this introduction, this paper has four paragraphs. First, it is briefly presented and justified how social media became a government tool, as a mean of fostering transparency and a new way for States to relate with their civil society. Second, the main results of the regulation research are presented, focused on the legal models found. Third, the Brazilian case is described, considering the research scenario of the previous topic. The conclusion, then, presents a roadmap for Brazilian regulators encompassing parameters for social media regulation.

2 The use of social media as a government tool

In the book *The Structural Transformation of the Public Sphere*, Habermas describes the movement of expansion of the public sphere, with the evolution of the press and advertising. The author explains that the political use of advertisements became a new

[6] This work adopts the concept of regulation in an extended way. By way of example: '[the] regulation is broadly defined, referring to the diverse set of instruments by which governments establish requirements for companies and citizens. Regulations include laws, formal and informal rules and subordinate rules issued at all levels of government, as well as rules issued by non-governmental or self-regulated bodies to which governments have delegated regulatory powers' (OECD, *Council Recommendation on Regulatory Policy and Governance* (OECD Publishing 2012)).

[7] It does not include public persons, such as influencers, celebrities, technical experts or others.

mode of political action.[8] This movement gave a new final meaning to the publicity principle, through the consolidation of a new apparatus, "which meets the new need and publicity of the State and federations."[9]

Habermas reflects on the unexpected effects of advertising on political action and how this has become crucial as a mechanism of political pressure[10] that requires the State itself to rethink its structures.[11] This ideal was reinforced by other authors as a precursor of the possibility of citizen engagement by the State in the democratic context.[12]

The use of social media by governments is part of the movement to transform transparency and publicity, both from an internal point of view and for the public arena's engagement in social participation. As for the government structure, the current scenario is part of the incorporation of social media to the administration tools, as an element of the digital government strategies.

In 2014, the Organisation for Economic Co-operation and Development (OECD) published a document to discuss trends in the use of social media by governments.[13] In Ecuador, the United Kingdom and Chile, for example, 4% of the population follow the most popular institutional accounts on Twitter.[14] If, at the time of the survey, half of the OECD countries[15] had expectations of creating a strategy for the use of social media for government purposes, it is possible that this number has increased in recent years.

The moment of change driven by digital government, heated during the Covid-19 pandemic, could mean an opportunity to rethink and redesign administrative structures, their processes, and actions.[16] The fact is that Social media has become part of the administrative toolbox for Governments.

The World Bank, in the release of the latest report of the *ranking* of digital government ("GovTech")[17] stressed that although investments are growing, they are still

[8] Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Thomas Burger tr, MIT Press 1962) 408 and 414.
[9] ibid 420.
[10] ibid 429.
[11] Habermas (n 8) 443.
[12] Shirky (n 4) 32.
[13] Arthur Mickoleit, ' *Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers*' OECD Working Papers on Public Governance No. 26 (*OECD*, 22 December 2014) <https://www.oecd-ilibrary.org/docserver/5jxrcmghmk0s-en.pdf?expires=1658706113&id=id&accname=guest&checksum=23F6043CB5EE25E036B83E1F0C50B28D> accessed 25 July 2022.
[14] ibid 2.
[15] ibid 14.
[16] Bouchaïb Bounabat, 'From e-government to digital government: stakes and evolution models', (2017) 10 EJIT 1, 12.
[17] Cem Dener, Hubert Nii-Aponsah, Love E. Ghunney and Kimberly D. Johns, GovTech Maturity Index: The State of Public Sector Digital Transformation (World Bank, 2021).

The World Bank, in the release of the latest report of the *ranking* of digital government ("GovTech")[17] stressed that although investments are growing, they are still below expectations.[18] The report expressly mentions the use of social media by the public sector as a way of increasing State-citizen communication,[19] despite not bringing data on the degree of regulation in this area of the countries evaluated.

One of the problems of digital government in Brazil is the overlapping of regulatory frameworks on the subject. Excessive regulation does not necessarily generate more effectiveness - in practice, the effect tends to be the opposite. And, at the same time, there is a regulatory gap for topics such as social media regulation that could ordinate its use by the government.

The potential of digital government must consider several challenges – one of them being the difficulty of creating adequate regulatory frameworks, not curbing innovation, but, at the same time, protecting guarantees in the digital universe. Regulatory frameworks should be useful in this context to: (i) ensure legal certainty; (ii) promote efficiency in the use of digital instruments by the public sector; and (iii) structure mechanisms for coordination between the public and private sectors, given the difficulty of drafting standards in a technically complex field.

These three points aim to establish a regulatory environment for knowledge reducing asymmetries. The environment must be built continuously and gradually, in the achievement of defined goals.[20]

Clear, well-defined rules and adequate monitoring systems are needed for a quality regulation, which serves as an instrument for the development of public policies.[21] It is also important to incorporate relevant local and organisational aspects into regulation, considering there is no single model for government strategy around the use of social media.[22]

How public agents are addressed in social media regulation

[17] Cem Dener, Hubert Nii-Aponsah, Love E. Ghunney and Kimberly D. Johns, GovTech Maturity Index: The State of Public Sector Digital Transformation (World Bank, 2021).
[18] ibid 92.
[19] ibid 45.
[20] Diogo R. Coutinho and Pedro S.B. Mouallem, '*O Direito Contra a Inovação? A persistência dos gargalos jurídicos à inovação no Brasil*' in Helena Lastres, José Eduardo Cassiolato, Gabriela Laplane and Fernando Sarti (eds), *O futuro do Desenvolvimento: ensaios em homenagem a Luciano Coutinho* (Unicamp 2016) 193, 197.
[21] OECD, *The Governance of Regulators* (OECD Best Practice Principles for Regulatory Policy, OECD Publishing 2014).
[22] Cf Mickoleit (n 13) 3: 'Social media have the potential to make policy processes more inclusive and thereby rebuild some confidence between governments and citizens. But there are no "one size fits all" approaches and government strategies need to seriously consider context and demand factors to be effective'".

Considering social media as a government tool, the current challenge is to how to design a proper regulation for the use of social media by public agents and institutions, in the State structure. As defined in the introduction, part of the effort regarding this challenge must respond to the question on how social media regulation addresses public agents' behaviour.

In this topic, regulation research was conducted to seek how some countries are providing for public agents' behaviour in their own legal order. For the analysis, two parameters were considered: what is the nature of the regulation (e.g., formal rule or bill, soft law, regulatory agency rule or other type); and if the regulation differentiates its' application by considering who is the author of the content (if it is a private person or a public agent or a public institution/entity/body).

The selection in the analysis included the European Union and eight countries: (i) Brazil, as it is the central jurisdiction of this study; (ii) European Union, due to its high developed discussion in the subject of data protection/privacy and its multilateral character; (iii) Germany, for having a regulation focused on networks already consolidated since 2018 and used as a reference for other proposals; (iv) United Kingdom, due to the fact that its proposal is currently considered broad and paradigmatic on the subject by specialists; (v) Australia, which has an advanced proposal in progress; (vi) China, for having a social media regulation block and being a peculiar case in the regulatory arrangement of the subject; (vii) Nigeria, as it is a restrictive and relevant experience in Africa, whose network regulation is not yet widely developed; (viii) United States, for the option of not assigning the State responsibility for regulation and opting for the self-regulation of platforms; (ix) Colombia, as it is, in Latin America, the country with the most interventionist proposal, from the point of view of creating a formal legal relationship between the State and Providers for the responsibilities regarding content control.

The results led to the conclusion that social media regulation is handled by two legal models governing the matter in the jurisdictions: (i) a normative model, which do not have specific provisions for public agents, but not differentiating content sharing from public and private parties, and (ii) a non-normative model, in which was possible to identify specific reference to public agents' behaviour. Those models are presented in the following topics.

It is important to note that the relevant finding of the research was not the existence of two models, which is quite common in regulation designs, but that normative and, so, binding models do not differ the subject element for the purpose of defining who is entitled to the regulation and at what level. The Brazilian case will be presented in paragraph 4.

2.1 The normative model

The first model is focused on the normative regulation of the activity of digital services and places platforms, providers, and applications as their regulated subject, in greater or lesser scope depending on the jurisdiction. Normative is understood as the traditional regulation, whether a command-and-control type or more flexible models, but always grounded on a binding rule.[23]

For this normative model, differentiations between public and private persons, as content authors, were not found in the European Union or in any of the countries part of the research. Regulation is focused on the content control by the providers and platforms, but not with who is their author.

In the European Union and its institutions, the proposal for the *Digital Services Act*[24] scope is wider than social media. In the preamble to the proposal, social networks are just part of the broader core of information services. The proposal is part of a package, which includes the *Digital Markets Act,* aimed at containing unfair competition from platforms.[25] The regulation turns against the concentration and closing of the platform market, with a view to increasing the sector's efficiency. Also, no reference to the author as part of the content control parameter is made.

For other countries in Europe, regulation scope may vary, but do not consider, again, the subject part of the issue. Germany approved the *Network Enforcement Act* (*Netzwerkdurchsetzungsgesetz*), in force since 2017, which is intended to fix the limit of social media accountability against the spread of hate crime and the spread of *fake news*.[26] The Act applies to media service providers that, for profit, operate internet platforms designed to allow users to share any content with other users or make it available to the public (which would be social media).[27] The regulation came to contain the spread of *hate speech* and criminal content on the internet in Germany.[28] In June 2021, the Act was amended[29] to improve the procedure for users regarding the removal of content, so that it is clear and transparent, allowing an appeal right to a higher instance.

[23] Glen Hepburn, Alternatives to Traditional Regulation (2018) OECD Regulatory Policy Report, 4 <https://www.oecd.org/gov/regulatory-policy/42245468.pdf> accessed 25 July 2022.
[24] European Commission [2020] Proposal 2020/0361 (COD).
[25] European Commission [2020] Proposal 2020/0374 (COD).
[26] Bundesministerium der Justiz und für Verbraucherschutz, Act to Improve Enforcement of the Law in Social Networks 2017.
[27] The following are excluded from the scope of the Act: (i) journalistic or editorial content platforms, the responsibility of which lies with the service provider itself; and (ii) platforms that are designed to allow individual communication or dissemination of specific content.
[28] Amélie Heldt, 'Germany is amending its online speech act NetzDG... but not only that' (*Policy Review*, 6 April 2020) <https://policyreview.info/articles/news/germany-amending-its-online-speech-act-netzdg-not-only/1464> accessed 4 December 2021.
[29] Act to Amend the Network Enforcement Act 2021.

of content, so that it is clear and transparent, allowing an appeal right to a higher instance.

In the UK, the proposed *Online Safety Bill* is being discussed and aims to repress harmful content in the digital environment. The problem that the Bill sought to solve, according to the Impact Assessment Report, is the lack of transparency for consumers regarding potential harm in the digital environment and to enable them to adopt more informed choices. The Bill is justified by the need for state intervention to ensure compliance with laws to mitigate the damage scenario.

The Bill focuses on two digital service types: user-to-user services and search services. The first type is considered an internet service through which content is generated/shared by a user, making it accessible to other users. This scope also covers content forwarding - which attracts instant messaging services to regulation. The second type covers platforms with search services in a broad way.

The proposal is consistent with the UK's record of protecting privacy and inherent rights of the personality, weighing them against the right to freedom of speech.[30] This differs from the US case, in which freedom of speech, as a fundamental right, is protected almost in an absolute way by the Supreme Court.

This structure focused on a rule or binding regulation, providing standards for content control will be the same in other continents.

In Australia, regulation is also in progress, for drafting standards for content remove, in the form of an amendment to the Privacy Act (Regulating in the digital age - Report. 2019).[31] The standard will aim at "OP" organizations (*Organizations providing social media services*), defined as those that are providers of online services.

The creation of a monitoring and inspection entity is expected (*Digital Platforms Ombudsman*), whose competence would encompass solving conflicts between users and platforms.[32] It should be noted that the Competition and Consumer Commission of Australia - ACCC is currently active in monitoring and controlling the services provided by digital platforms, not just social networks, but search engines and others.[33]

[30] Alexandra Paslawasky, 'The Growth of Social Media Norms and the Governments' Attempts at Regulation' (2017) 35 Fordham Int'l L.J. 1485, 1501.

[31] The Draft Bill aims to protect consumers, from the point of view of their privacy on social networks, considering the increase in the use of platforms in recent years.

[32] 'The Government will develop a pilot external dispute resolution scheme, the outcomes of which will inform whether to establish a Digital Platforms Ombudsman to resolve complaints and disputes between digital platforms and individual consumers and small businesses using their services': Australian Government, 'Regulating in the digital age' (2019) 7 <https://www.aph.gov.au/-/media/Estimates/ec/add1920/Tabled_documents/Tabled_Doc10.pdf?la=en&hash=25B37672EA2225DAB544A15B3C67EE9FD7C2E14E> accessed 9 December 2021.

[33] As per reports made available by the Australian Government: Australian Competition & Consumer Commission, Digital platform services inquiry 2020-2025 <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025> accessed 9 December 2021.

In Asia, China has a particular example, as its' model differs from the others as the countries rules and regulations impose restrictions on free competition and the use of private capital, with the service of social networks being offered by domestic platforms, controlled by the regulator,[34] called the Cyberspace *Administration of China* (CAC). Chinese regulations differ in their object regarding the scope of control, with a dozen standards in force.[35] There is a regulation of platforms in general, focused on controlling the content of comments, groups, technological security assessment of applications and technologies, and official profiles on platforms. Others focus on specific types such as instant messaging apps (which in China is WeChat, equivalent to WhatsApp), applications that aggregate news, streaming, among others.

As for Africa, Nigeria is a country with a relevant number of internet users, who progressively become politically active, especially after 2014.[36] In regulatory terms, there is not a regulation specifically approved for social media, only the Cyber Crimes Law of 2015.[37] A 2019 Bill is currently under discussion in the Nigerian Senate (*The Protection from Internet Falsehood and Manipulation Bill*), focused on repressing user behaviours that are harmful to national security, health, finances and that may negatively influence elections (Senate Bill n. 32). The Bill is aimed at users and intermediaries and is of a criminal nature, with a provision for fines and a prison sentence of up to three years.[38] Responsibilities are foreseen for both the authors of the content and for the intermediaries in the sense of the duty to repress conduct prohibited by the standard.

This is not the first attempt to regulate social networks in Nigeria, but, according to the news, there is resistance as to the model to be adopted. In 2021, the Government banned the *twitter* to operate in Nigeria,[39] after the network deletes a post from the President Muhammadu Buhari for violating the rules on abusive language. The ban lasted for months, until the network reached an agreement with the Government.[40] After the episode, the expectation of regulation of the subject in the country remains.

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[34] Jufang Wang, '*Regulation of Digital Media Platforms: The case of China* (The Foundation for Law, Justice and Society, in association with the Centre for Socio-Legal Studies and Wolfson College, University of Oxford, 30 June 2020), 2.

[35] 'The fact that more than a dozen sets of regulations concerning platforms have been issued in such a short period demonstrates not only China's changing policies regarding its Internet regulatory framework, but also the concerns of the party-state about the increasing impact of platforms on its own control of information': Wang (n 35) 3.

[36] Mohammed Abdullateef, 'Regulating social media in Nigeria: A quantitative perception study' (2021) 2 Nile Journal of Political Science 52, 55-6.

[37] ibid 59.

[38] ibid 63.

[39] BBC, 'Viewpoint: Why Twitter got it wrong in Nigeria' (*BBC*, 14 August 2021) <https://www.bbc.com/news/world-africa-58175708> accessed 7 December 2021.

[40] Helen Nyambura, 'Nigeria Lifts Twitter Ban With Limits After Four-Month Sanction' (*Bloomberg*, 1 October 2021) <https: //www.bloomberg.com/news/article s/2021-10-01/nigerian-president-announces-

lasted for months, until the network reached an agreement with the Government.[40] After the episode, the expectation of regulation of the subject in the country remains.

Moving the lens to North America, the orientation in the United States, especially based on the First and Fourth Amendments, is around the almost absolute protection of freedom of expression, favouring self-regulation without broad parameters defined by the Administration.[41] The jurisprudence in the country is in the sense that restrictions established by the public power can be valid, if they are not based on the content of the speech, are related to governmental interests, and leave open alternative paths for communication.[42]

However, for restrictions from private entities, the First Amendment would not apply. Based on the case law precedent *Christopher Langdon v. Google Inc., et al.*,[43] decided in 2007, when interpreting the First Amendment, the understanding was established that its protection is limited to government restrictions, but it does not cover removal of content of the private sector, for example.[44] To intermediaries (search providers, social media and related digital services), jurisprudence has given wide deference to decision making in this regard.[45]

The doctrine confirms the option of non-state intervention. Bringing a historical perspective, with reference to cases and understandings about internet regulation in a broader way, the US Government must respect the original perspective that grounded internet existence since its conception: the open network principle. This means that it should privilege freedom, transparency, and openness, with a sceptical posture regarding the presence of the State in this area.[46]

In South America, the Colombian case is recent. The House of Representatives Bill 176 of 2019 has the purpose "to establish general parameters and procedures for the use of social networks on the internet that allow users to be protected from harmful or potentially dangerous behaviour resulting from the abusive or inappropriate use of virtual social media". The Colombian regulation proposal aims to regulate the use of networks from the perspective of the user, whether an individual or a legal entity and

[40] Helen Nyambura, 'Nigeria Lifts Twitter Ban With Limits After Four-Month Sanction' (*Bloomberg*, 1 October 2021) <https: //www.bloomberg.com/news/article s/2021-10-01/nigerian-president-announces-conditional-lifting-of-twitter-ban> accessed 7 December 2021.
[41] Shirky (n 4) 41.
[42] Paslawasky (n 30) 1495.
[43] *Langdon v. Google*, Inc., 474 F. Supp. 2d 622, 631-2 (D. Del. 2007) (a search engine is neither a state actor nor a public forum). The case was about an individual who was denied advertising by Google because of its content.
[44] Paslawasky (n 30) 1495.
[45] ibid 1497.
[46] ibid 1539.

the regulatory focus is on user safety, with only partial State control, observing freedom of speech.[47]

The main mechanism is the signing of agreements between the Government and technology companies. Article 13 of the proposal attributes to the Ministry of Technology and Information and the Superintendence of Industry and Commerce the duty to "sign up agreements or codes of conduct with *Facebook, Twitter, YouTube, Google* and other social media or digital platforms that arise". Under the agreements, the companies assume a formal responsibility towards the State, in the adoption of control mechanisms for publications, comments and content spread.[48]

For all the above mentioned cases, there was not a special and express concern with who is sharing the content. The focus of the regulatory scope is how providers of social media may or may not conduct content control as well as what are the limits for restricting content without harming free speech right. In all cases, formal rules and regulations, issued by the Congress or Parliament or the Executive Branch grounded or will ground its terms. As this first step of the research did not indicate a differentiation regarding the author, the research moved to a second stage, aiming for soft law and complimentary regulation.

2.2 The non-normative model

The second stage of this research concluded that, in the non-normative (soft law or alternative regulation) model, based on guidelines or rule interpretation documents, specific orientation for public agents or public institutions active in social media were found. However, this second model does not refer to providers, but to public agents (or public institutions), in a way of controlling their behaviour. Their content seems not to deal directly with the main aspects of regulating agents' or institutions' use of social media.

The research findings included guidelines for the performance of public functions, such codes of ethics, and includes orientation on the use of media by public agents themselves (individuals) or even institutionally (which encompasses profiles of bodies and entities, for example). More specifically, those documents bring light to the limitations that public agents may have in using social media while working in the public sector.

[47] Diana Camila Caro Martínez, 'Análisis del proyecto de ley 176 del 2019: regulación de uso de redes sociales para evitar conductas lesivas que vulneren los derechos constitucionales de las personas', [2020] Iter ad Veritatem 19.

[48] The Colombian Chamber of Informatics and Telecommunications signalled the risks of the project with regard to the possible mass surveillance and the inefficiency of content control.

As soft law, compliance with the recommendations is based on good faith and the idea of mutual consent, typical of international agreements.[49] Soft law models, in terms of justification of use by public law, are attached to the concept of public governance and the paradigm shift of Public Administration management. OECD recommends that member countries, for example, assess whether the choice of the regulatory model (normative or non-normative) is consistent with the objectives of the standard and that the effects be evaluated to design responsive implementation strategies.[50]

In public law, there are three elements that are linked to the soft law use:[51] (i) regulation via soft law it aims to create a standard of compliance, whose non-compliance would not imply a specific legal response; (ii) to soft law it must be adopted by the competent government, both in territorial and material terms; and (iii) there may be different levels of effects, depending on the way in which the preparation and incorporation of the soft law in the legal order.

For social media, the traditional conduct rules in the provision of public services proved to be insufficient to adapt agents to the reality. Several governments used experimental strategies to deal with the issue and started to adopt guidelines to alleviate uncertainty about how to use these new instruments.[52]

Regarding the countries that were part of the research, it was identified that Australia (Australia Government Department of Social Services. Social Media Policy and guidance for making public comment online, January 2020), Colombia (*Republica de Colombia, Presidencia. Circular 01*, March 2019), United States (Hatch Act Guidance on Social Media of the U.S. Office of Special Counsel), Nigeria (Nigeria Communications Commission. Technical Framework for the Use of Social Media Network in Nigeria. June, 2019) and United Kingdom[53] have guidelines on the use of social media, applying laws and rules aimed at public agents. The nature of such documents is not uniform, both in terms of model and issuing authority, but none of them has a normative

[49] Fernando da Silva Gregório, 'Consequências sistêmicas da soft law para a evolução do Direito Internacional e o reforço da regulação globa' [2016] Revista de Direito Constitucional e Internacional 299.
[50] OECD (n 6).
[51] Daniel Sarmiento, 'La autoridad del derecho y la naturaleza del soft law' [2006] Cuadernos de derecho público 221.
[52] Ines Mergel, 'A Framework for Interpreting Social Media Interactions in the Public Sector' (2013) 30 Government Information Quarterly 327, 329.
[53] In the UK, government bodies and entities have their own guidelines for their networks and profiles. By way of example, see HM Revenue and Custom, 'UK Social media use - Why and how HM Revenue and Customs uses social media, what we expect from you and what you can expect from us' (*Gov.uk*) <https://www.gov.uk/government/organisations/hm-revenue-customs/about/social-media-use> accessed 11 December 2021.

character. There was no indication that those documents went through a collegiate or similar deliberative or rulemaking procedure.[54]

The research had no relevant results in China, possibly because the Chinese model is premised on state ownership of the platforms. There were also no results for the case of Germany,[55] although the use of social media is a reality within the Federal Government. For the European Union, regulation and/or guidance, in this area, is applicable to each member state.

3 The current scenario of social media regulation in Brazil

Brazil is a federal State, in which public service – broadly considered – is performed by career civil servants, approved in entrance examinations, or by temporary workers, politicians and hired appointed professionals for certain vacancies. There are specific rules applicable to each career and considering the federal state level, whether federal, regional, or local. According to the Brazilian Atlas of Public Administration, there are more than 9,5 million public agents (not including politicians) in the country,[56] which corresponds to 4,5% of Brazilian population (212 million, approx.).

A profile in social media is considered, in Brazil, as a digital property, by Ordinance 540/2020 of the Federal Government (Article 3, II). Social networks are digital social structures composed of natural or legal persons connected by one or more types of relationships (Article 3, XII). The Internet Bill of Rights (Law 12,965/2014) does not provide a specific definition for social networks, but only for the expression "internet applications", which would be the set of features that can be accessed through a terminal connected to the internet (Article 5, VII).

As will be shown in the following paragraphs, the Brazilian case is different from the other jurisdictions analysed in the research. Considering the numbers of the administrative structure of the country in addition to the intense use of social media by public agents and institutions, legislators and regulators are aware of the need of drafting specific rules considering this scenario. It will be presented that duties for both public agents and institutions and platforms are provided for in the Bill that is being analysed by the Congress. Also, soft law plays an important role to the issue.

[54] The research focused on regulations of a general nature referring to the performance of public agents and/or public servants, without entering into specific careers.

[55] Examples of use by public institutions were found in Mickoleit (n 13) and in the paper by Cigdem Akkaya, Jane Fedorowicz and Helmut Krcmar, 'Use of Social Media by the German police: The case of Munich' in Various Authors *dg.o '18: Proceedings of the 19th Annual International Conference on Digital Government Research: Governance in the Data Age* (Association for Computing Machinery 2018).

[56] Official Data from IPEA (*Instituto de Pesquisa Econômica Aplicada*), available at <https://www.ipea.gov.br/atlasestado/> accessed 25 July 2022.

3.1 The Brazilian particular case

The normative model

Referring to normative models, Brazil has specific legislation applicable to elections when dealing with social media regulation. Electoral Rule 23,610/2019 regulates campaign advertising and includes rules for its use over the internet, regulating the Elections Statute, which, since the amendment by Law 12,891/2013,[57] also deals with online content removal.

In the electoral rule, social media is the "social structure composed of people or organisations, connected by one or several types of relationships, which share common values and objectives" (Article 37, XV). These differ conceptually from instant messaging applications, defined as the "multiplatform instant messaging and voice calling application for smartphones" (Article 37, XVI).

Besides the specific rule for the electoral sphere, there was, in 2021, an unsuccessful attempt to regulate the use of social media in Brazil through Provisional Measure 1,068/2021. Six unconstitutionality challenges were proposed against the rule,[58] by different political parties, with arguments linked to the free market and undue intervention in social media platforms, as well as the inadequacy of the Presidential Provisional Measure as an appropriate way to regulate the matter.

The National Congress rejected the rule, supported by the Brazilian Bar Association and the State Attorney General's Office, understanding that it generated legal uncertainty. National Congress considered that the topic is highly complex, and is already being addressed in the Bill 2,630/2020,[59] that establishes the Brazilian Law on Freedom, Responsibility and Transparency on the Internet.

The Bill focuses on providers of social networks, search tools and instant messaging, in the form of a legal entity, "*that offer services to the Brazilian public and carry out activities in an organised, professional and economic manner, whose number of registered users in the country is greater than 10,000,000 (ten million), including providers whose activities are carried out by a legal entity headquartered abroad*" (Article 2). The proposal

[57] Article 57-D. The expression of thought is free, with anonymity prohibited during the electoral campaign, through the world wide web - internet, the right of reply is guaranteed, pursuant to sub-paragraphs a, b and c of item IV of Paragraph 3 of article 58 and 58-A, and by other means of interpersonal communication through electronic message. [...] Paragraph 3 Without prejudice to the civil and criminal sanctions applicable to the person responsible, the Electoral Court may determine, at the request of the victim, the removal of publications that contain attacks or attacks on candidates on websites, including social networks.

[58] Cases filed before the Brazilian Supreme Court by six different parties: PDT (ADI 6996), New Party (ADI 6995), PT (ADI 6994), PSDB (ADI 6993), Solidarity (ADI 6992) and PSB (ADI 6991).

[59] In Portuguese: *Projeto de Lei n° 2630, de 2020 (Projeto de Lei das Fake News).*

addresses transparency duties for providers, differentiating the types of providers, as well as defining general content control parameters.

However, there are provisions in Brazil that differ from the analysed countries in paragraph 3 of this paper. The Bill 2630/2020 has a specific chapter for the use of social media, search tools and instant messaging by public agents. Article 22 confers public interest on the accounts and profiles of politicians that holds elective mandates in any sphere; occupants of Public Administration positions in the Executive Branch (such as State Ministers, for example); judges and members of the Judiciary Branch; members of the Prosecution Office and members of the Armed Forces.

Among the obligations arising from this framework are the equalisation of communication through the general communication network, subjecting the agent to the principles of administration. There is also an express prohibition for any public agent or public institution on restricting users on any social media - blocking or preventing the viewing of publications - due to access to information.

On the providers' and platforms side, it will be possible to file a lawsuit in Courts, in case of abuse of power or illegality in intervening in the public interest profile. This is provided for in Article 22, paragraph 2, that brings to the Bill the necessary observance of fundamental rights and with the principles of legality, impersonality, morality, transparency, and efficiency.

The proposed standard is concerned with ensuring transparency and the forbiddance to use of public interest accounts/profiles for purposes that are contrary to the democratic rule of law. For content control, the use of public resources for advertising purposes is prohibited in two cases: I – committing crimes against the democratic rule of law, and II - discrimination and incitement to violence against a person or group, especially on account of their race, colour, ethnicity, gender, genetic characteristics, philosophical or religious beliefs, among other (Article 25).

There is a more interventionist restriction in the sole paragraph of Article 25, which prohibits the maintenance of public interest accounts in providers "that are not constituted in accordance with Brazilian law and with representation in the country".

The legislative option of Article 25 considers the events that took place in the years 2020 and 2021, in which social networks were used to incite the closing of the Supreme Court and Congress either by public agents or private persons.[60] The other provisions are aimed at guaranteeing transparency in the resources used in institutional advertising on the Internet, which is currently covered by the rules in force related to the subject.

[60] Erick Mota, 'Bolsonaristas ameaçam invader STF e Congresso com apoio de militares da reserva' (*Congresso em Foco*, 7 May 2020) <https://congressoemfoco.uol.com.br/area/governo/bolsonaristas-ameacam-invadir-stf-e-congresso-com-apoio-de-militares-da-reserva/> accessed 25 July 2021.

For public institutions, the Bill has also provided for a duty that the State should promote campaigns for public servants on the importance of combating misinformation and transparency of sponsored content on the internet.[61]

The Bill 2630/2020 is in the House of Representatives. On December 7, 2021, the Working Group created to analyse and improve the current draft approved the replacement base text-draft for the Bill. The expectation, at this moment, is that this draft will be submitted to the plenary of the House of Representatives for voting.

The non-normative model

Regarding administrative planning and organisation, at the federal level, the Special Secretariat for Social Communication published the "Guidelines for Social Media Use", presenting the main instructions for the assertive and ethical use of social media by federal public agents that are part of public institutions. The document does not establish straight rules on prohibitions and control parameters for the public agents' performance.

Good practices are defined, of general content, which must be observed by public agents at the federal level, such as (i) to avoid the posting of content that could cause damage to the institution in which it works; (ii) to check, before publishing any information, that the user is not in the institution's profile, if the agent has access to it; and (ii) to avoid public discussions.

The Federal Office of the Inspector General issued Technical Note 1.556/2020, which deals with the scope and content of Article 116, II[62] and of Article 117, V,[63] both the Federal Civil Servants Statute (Law 8,112/1990). It aims to promote the fair adaptation of these provisions to the cases of misuse of digital services by Federal Agents. As an example, the conduct of disclosing, on social media, posts of indignation with superiors or co-workers or opinions contrary to the understanding of the house by the server would violate the duties of loyalty.

Two unconstitutionality challenges were filed against the Note before the Brazilian Supreme Court (ADI 6.499 and ADI 6.530). In both, the Supreme Court understood that, as the Note is not a primary normative act, the abstract review of constitutionality would not be applicable. In the monocratic decision handed down by Reporting-Justice Lewandowski in ADI 6,530, despite denying the case to be followed up, the Justice confirmed the inadequacy of the document's content in view of a potential offence to

[61] In Portuguese: Art. 27: 'A União, os Estados, o Distrito Federal e os Municípios devem promover campanhas para servidores públicos sobre a importância do combate à desinformação e transparência de conteúdos patrocinados na internet'.

[62] Article 116: 'The duties of the server are: II - be loyal to the institutions it serves.'

[63] Article 117: 'To the public servant it is prohibited: V - promoting expressions of appreciation or disapproval within the office.'

freedom of speech.[64]

As for the electoral scope, there are prohibitions and restrictions on the use of social media during election periods, as provided for in Law 9,507/1997 and Supreme Electoral Court Rule 23,610/2019. About the use of institutional profiles on social media, article 73, VI, "b" of Law 9,504/1997 provides that posting any institutional publication is a conduct prohibited to public agents in the three months prior to the elections. In the case of the institutions' accounts, Electoral Courts case law[65] determines the removal of all posts from the timeline, including those made before the three-month period prior to the election.

Regarding the personal profiles of candidates who occupy elective positions, the Court authorises content posting with their political positions, by virtue of freedom of speech. However, there are limitations arising from the fact that they hold public office. According to Supreme Electoral Court case law,[66] personal posts that in any way demonstrate the use of the public machine or are derived from public resources are not allowed.

3.2 Brazilian supreme court: president Bolsonaro "blocking" cases

By searching the Supreme Court case law in Brazil with the term "social network" or "social media" on the official search website, only one case was found directly involving the subject that is related to this Article. The case involved the determination of a formal warning to a State Prosecutor from the Prosecution Office for the misuse of the service application WhatsApp.

In the understanding of the Reporting-Justice, the dissemination of messages in groups, without any request for confidentiality, entails the inherent risk of leaks.[67] The conduct of the public agent in the case involved broadcasting offences to other prosecutors in an audio posted as a group, which would violate the functional duties established in Prosecutors' Ethical Statute. The ruling considered that the Federal Prosecutor's behaviour was incompatible with its public duties. In the case, the Supreme Court did not differentiate private messages applications from other types of "open" social media – such as Twitter or Facebook.

Even though there is only one case formally included in the Supreme Court case law,

[64] Brazilian Supreme Court, Justice Decision on Case ADI #6,530 [2021] Plaintiff Brazilian Socialist Party - PSB. Reporting-Justice Ricardo Lewandowski, decided on 8 March 2021.
[65] Electoral Superior Court [2014] RESPE 0001490-19.2014.6.16.0000, Reporting-Justice João Otávio de Noronha, decided on 24 September 2015.
[66] Electoral Superior Court [2016] Interlocutory Appeal in RESPE 0001519-92.2016.6.13.0029, Reporting-Justice Luis Roberto Barroso, date of judgement April 23, 2019.
[67] Brazilian Supreme Court [2020] Writ of Mandamus #37.325. Reporting-Justice Rosa Weber.

there are two relevant ongoing cases awaiting the Supreme Court ruling regarding the use of social media by public agents: Constitutional Writ of Mandamus 37,132[68] and Constitutional Writ of Mandamus 38,097.[69]

The first case was filed by a citizen, an attorney at law, who had his personal profile blocked from the account of the President of Jair Bolsonaro, in 2020, after posting a critical comment to the President on *Instagram*. The challenged act pointed at the initial brief was the blocking act itself. The petitioner alleges a violation of his freedom of speech, the principle of publicity and access to information as a mechanism for exercising citizenship. A President's profile has public interest and, therefore, should not restrict the views of citizens.

In the President's defence, both the private legal firm acting on his behalf and the Federal Attorney General's Office ("AGU") understood that this is a personal profile of the President and, therefore, there would be no public act embedded with public authority to be challenged before the Supreme Court. The Federal Prosecutors Office (PGR) understood in the same way – however, PGR had recognised that the President broadcasts, in his personal profile, information of public interest as well as official information.

The second case was filed by the Brazilian Association of Investigative Journalism (ABRAJI) against the blocking of 65 (sixty-five) journalists' Twitter accounts by President Jair Bolsonaro's official account. The journalists reinforced, in the same sense of the first case, the public interest nature of a President's profile in social networks, the right of access to information, and the seriousness of the situation considering that those who were blocked are journalists. AGU and PGR held the same arguments.

In the case dockets of both writs, the United States episode regarding Donald Trump's accounts on *Twitter* was mentioned. The case was ruled by the United States Court of Appeals for the Second Circuit in which the Court understood that there would be no way to distinguish a personal account from an institutional one. The reason is that for a person who is the country's President, the content provided naturally conveys information of public interest.[70]

For the first case, a virtual ruling session of the Supreme Court was previously scheduled, but it was withdrawn from the agenda since December 11, 2020. The Reporting-Justice Marco Aurelio had advanced release his written opinion, in the same understating of the US Court. As the President is a public figure, in the exercise of an elective term, transmitting information of general interest in his account, the public

[68] Brazilian Supreme Court [2020] Writ of Mandamus #37,132. Reporting-Justice: Justice Marco Aurélio.
[69] Brazilian Supreme Court [2021] Writ of Mandamus #38,097. Reporting-Justice: Justice Carmen Lucia.
[70] United States Court of Appeals for the Second Circuit, *Knight First Amendment Institute v Donald J. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (S. Ct.). (9 July 2019) and United States Court of Appeals for the Fourth Circuit, *Davison v Randall*, 912 F.3d 666, 680 (7 January 2019).

interest is inherent to the social network account's nature. It is worth waiting for the next chapters of the deliberation at the Supreme Court on the subject. On the other hand, the second case did not have further developments yet.

4 Conclusion: a proposed roadmap for Brazilian regulators and legislators

Many controversial issues are part of the discussion on social media regulation. This article does not intend to present a general or final solution to the problem but seeks to clarify elements for the regulatory design. The focus was the definition of whether regulations should make a distinction considering who is the author of the posts and who is sharing content online. The concern relates to the progressive use of social media by public agents, public institutions, and politicians, in the exercise of public function and in the electoral context.

For the conclusion, it is presented as a proposal for a roadmap to be considered in any decision-making process regarding social media regulation in Brazil, regarding *who* should comply with the regulatory standards. Three basic elements should be considered by regulators or legislators in the rulemaking procedure: (i) whether the regulation will differentiate who is the author of the post/content, considered the role of public agents or institutions in social media and its differences from private users; (ii) whether the regulation will differentiate types of social media and consider the private or public ownership of providers/platforms; and (iii) the need to plan and elaborate a strategy for the use of networks by public agents and public institutions.

As for the first element (i), the establishment of different standards considering who is the author is relevant because of the public interest involved, when dealing with public agents or institutions as content sharing parties. Considering cases identified in different jurisdictions, it is common for public figures – especially politicians – to use their personal accounts to broadcast official content, even if merely informative. The current understanding is that it is not possible to differentiate the public figure from the private figure in such cases. Therefore, the private account and the official account of the government should be both considered of public interest.

It is also necessary to consider that public agents are subject to a complex of responsibility, duties and obligations, arising from the public law rules in force in the legal orders, which bind them. In this context, transparency is a fundamental principle and a duty inherent to the State and its agents, in which access to information must be respected. This aspect is often protected by the Constitutions - as is the case in Brazil, where it is a fundamental right and a Public Administration binding principle.

In the same sense, institutional profiles must be managed in view of this bounding paradigm. It is necessary that governments provide transparency in how official institutional profiles are managed in the networks, setting limits and possibilities for their use. For this purpose, the regulation itself should differentiate private profiles from profiles of public interest, including in the last both institutions and individual agents' profiles.

For example, it is necessary to understand to what extent a given network can be used for purposes of requesting information. Some institutional ombudsman profiles have already been created in *Twitter* in Brazil - like the one from ANVISA, that is the Brazilian FDA (@*OuvidoriaAnvisa*). Law 12,527/2011 (Freedom of Information Requests) provides a specific procedure for managing requests for information and complaints, along with the Public Services User Code (Law 13.460/2017). Would a complaint or request through Twitter be addressed in the same way as a request made on the official Government platforms? The response is not clear in Brazilian Law.

The second element (ii) of the road map is related to the Brazilian FDA example. The type of platform and social network is relevant to the regulatory definition. In general, when talking about the use of networks, especially social media, the immediate scenario is the public use of private networks. However, it is possible that government official platforms are used for the same purpose. The accountability model and the arrangement to be adopted must vary accordingly, considering that in private platforms the public authorities may have more restricted interference from third private parties.

There must be a distinction in the regulator's analysis regarding the platform provider[71] – if it belongs to the Government itself or if it belongs to third parties (as would be the case with Twitter, Facebook and others). Understanding this difference is important, including due to the degree of engagement and interactivity and how the measurement and response to social interaction will be carried out.

When it comes to social media types, yet on item (ii) of the road map, it should be considered if the jurisdiction will differ message applications, regular social media, and search engines in the standards. In the case of the German Law, individual communication platforms are not in the scope of the in-force Act, which apparently excludes, for example, its applicability for WhatsApp and related message applications. In the same sense, the Chinese model does not aggregate all types of social media platforms into a single group, as it decomposes different rules according to the service model.

UE Digital Services Act does not carry on a differentiation, by dealing with digital services in a general manner, with some specificities provided for in the proposed

[71] Mergel (n 52) 328.

regulation. In Brazil, Bill 2630/2020 is divided into several sections, in the same way of the Digital Services Act. However, both cases seem not to exclude any type of social network from its scope of protection regarding the regulation subject.

An alternative to regulation might be, within the same rule, to create separate chapters considering the function of each social network and each platform, with a principle-based general chapter applicable for all cases. Automatic message triggering tools should be considered by regulators in this definition, as even private application has this type of mechanism that spreads information without proper control. The particularities of the main existing platform should be considered in order to adapt the regulated subject, preserving freedom of speech and, at the same time, ensuring innovation in the form of digital government development.[72] Also, there should be flexibility for the proposed regulation to evolve with the digital development of platforms.

The third (iii) and last element to be considered is that not all types of institutional content should be conveyed through social media in private platforms. Public engagement, its control and a need for a Public and formal response vary according to the matter. It is the role of the Public Administration to define the most adequate means to fulfil the access of information duty.[73]

For this, social media and transparency strategic planning is necessary. The plan should include: (i) defining goals and limits for each type of social network used by the Government, which shall be aligned with each governmental institution duties; (ii) setting the role of the public entity responsible for the institutional communication, drafting use standards, and coordinating the use of the network to IT management to enable its proper functioning – also considering, for example, cybersecurity; and (iii) design of a media-use strategy that should address engagement rules for citizens, internal content moderation by public agents, content policies, among others.[74]

[72] Jack M. Balkin 'How to Regulate (and Not Regulate) Social Media' [2021] Journal of Free Speech Law 71.
[73] Mergel (n 52) 333.
[74] Gohar F. Khan, *Social Media for Government A Practical Guide to Understanding, Implementing, and Managing Social Media Tools in the Public Sphere* (Springer Nature Singapore 2017) 113.

Journal of Law, Market & Innovation

https://www.ojs.unito.it/index.php/JLMI/index
ISSN: 2785-7867

https://www.ojs.unito.it/index.php/JLMI
email: editors.jlmi@iuse.it

The JLMI is edited as part of the
Open Access online scientific journals of the University of Turin
Via Verdi 8, 10124
Turin, Italy

Vol. 1 - 2/2022