Valeria Falce

Market challenges and Pro-competitive Solutions

SUMMARY: 1. Introduction. – 2. Technological storm and creative destruction. – 3. Competitive assessment. – 4. The European Strategy. – 5. The Regulatory Framework. – 6. National *momentum*. – 7. Conclusions.

1. Introduction

In the context of the digital transition that is taking place in Europe,[1] data are mastering the technological transformation,[2] disintermediation and decentralization of relationships prevail, contamination and subsequent integration of activities, products and services are pivotal, and hence new players, platforms, become key actors of the data economy.[3]

Platforms, data and artificial intelligence are (not surprisingly) elevated to the hallmark of the industrial revolution: new (the fourth) and unique

[1] EUROPEAN COMMISSION, *Directorate-General for Communication, Leyen, U., Political guidelines for the next European Commission 2019-2024*; *Opening statement in the European Parliament plenary session 16 July 2019*; *Speech in the European Parliament plenary session 27 November 2019*.

[2] On this topic, let me refer to V. FALCE, *Strategia dei dati e intelligenza artificiale. Verso un nuovo ordinamento giuridico di mercato*, Turin, 2023; V. FALCE, J. CANNATACI, O. POLLICINO, *Legal Challenges of Big data*, Cheltenham, UK, 2020; V. FALCE, G. GHIDINI, G. OLIVIERI, *Informazione e Big Data tra Innovazione e Mercato*, in *Quaderni romani di diritto commerciale*, 2018; as well as V. FALCE, *Financial Innovation tra disintermediazione e mercato*, Turin, 2021; V. FALCE, A. GENOVESE, *La portabilità dei data in ambito finanziario*, in *Quaderno FinTech*, CONSOB, 2021; V. FALCE, G. FINOCCHIARO, *Fintech: Diritti, Concorrenza, Regole*, Bologna, 2019; V. FALCE, *Competition Law Enforcement in Digital Markets*, Turin, 2021.

[3] OECD, *Big data: bringing competition policy to the digital era, Background note by the Secretariat*, 8; OECD, *Hearing on Competition Economics of Digital Ecosystems held during the 134th Meeting of the Competition Committee on 1-3 December 2020*.

(because while the previous ones were 'ignited' by a single technology (steam engine, electric power, computer), the new revolution is characterized by a set of technologies that, thanks to the Internet, are aggregated in a systemic way.

New players (platforms), new products and services (interconnected through the Internet) and new business models, centered on data and enabling technologies (big data, data analytics and cognitive systems, but also the Internet of Things, cloud, augmented reality, enabling technologies and advanced robotics), disrupt the market, with an extraordinary economic and societal impact.

In this first phase, data is the new oil, platforms refine it and extract value from it.

Thanks to data analytics and AI systems, platforms are increasingly and better adapted to offer better services. Competition is 'between' and 'within' platforms, markets are dynamic, processes innovative, disruptive and fast.

2. Technological storm and creative destruction

Through a process of relentless creative destruction, context and dynamics evolve rapidly. [4] Platforms spring up quickly and are quickly swept away. What remains are digital ecosystems that offer technologically connected and functionally complementary products and services. [5] Examples

[4] For an initial survey of the literature on the subject, see V.H.S.E. ROBERTSON, *Antitrust Market Definition for Digital Ecosystems*, in *Concurrences No. 2-2021/On-Topic/Competition policy in the digital economy*, 3-9; M.J. JACOBIDES, I. LIANOS, *Ecosystems and competition law in theory and practice*, in *Industrial and Corporate Change*, 30(5), 2021, 1199-1229; D.A. CRANE, *Ecosystem Competition and the Antitrust Laws*, in *Nebraska Law Review*, 98(2), 2019, 412 ss.; M. JACOBIDES, *How to compete when Industries Digitize and Collide: An Ecosystem Development Framework*, in *California Management Review*, 64(3), 2022, 99 ff.; M. JACOBIDES, C. CENNAMO, A. GAWER, *Towards a theory of ecosystems*, in *Strategic Management Journal*, 39(8), 2018, 2255 ff.; A. FLETCHER, *Digital competition policy: Are ecosystems different?*, DAF/COMP/WD(2020)96, 2; G. PETROPOULOS, *Competition Economics of Digital Geosystems*, DAF/COMP/WD(2020)91, 5; M. BOURREAU, *Some Economics of Digital Ecosystems*, DAF/COMP/WD(2020)89, 5; M. BOURREAU, A. DE STREEL, *Digital Conglomerates and EU Competition Policy* (CERRE Report, 2019), 9-10; D.A. CANE, *Ecosystem Competition*, DAF/COMP/WD(2020)67. Please also refer to N. FARAONE, V. FALCE, *Digital ecosystems in the wake of a legislative/regulatory turmoil: A first (tentative) antitrust assessment of the Italian (and European) experience in the AGCM case law*, in *World Competition*, vol. 46, Issue 1, 2023, 37.

[5] More generally, for an overview of the mainstream literature on multi-versant (or multi-sided) platforms and markets, see A. HAGIU, J. WRIGHT, *Mulli-sided platforms*, in *Interna-*

of 'happy' ecosystems are Google, which, in addition to the search engine, expands into related products and services, such as browsers, i.e. software for surfing the Internet, operating systems and video streaming, or even Facebook, which from the social network 'expands' into adjacent but also distant products and services, from gaming to messaging, from retail to devices.

In the market context that emerges, it is difficult to compete (because the ecosystem is unequally trained) and it is difficult to enter except under the conditions that the ecosystem requires. Funded innovation is the one that sustains the ecosystem and not the one that can interfere if not disrupt its business models.

The reasons for the primacy of ecosystems are different but all converging.

First of all, due to the fact that it offers both integrated and complementary products, the ecosystem is able to generate substantial economies of scale because the same production factors can be used to produce different goods and services and the savings increase as the quantities increase. Moreover, the more it spans different markets, the stronger it becomes, because the value of the ecosystem and its services increases as the number of users increases. And it consolidates its position thanks to data, which, processed and refined with sophisticated AI techniques, are able to first intercept and then create new needs, classify emotions, and direct directions.[6] Moreover,

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tional Journal of Industrial Organization, vol. 43, 2015, 163 ff.; B. CAILLAUD, B. JULIEN, *Chicken & egg: Competition among intermediation service providers*, in *RAND Journal of Economics*, 34(2), 2003, 309-328; M. ARMSTRONG, *Competition in two-sided markets*, in *RAND Journal of Economics*, 37(3), 2006, 668 ff.; D.S. EVANS, M. NOEL, *Defining antitrust markets when firms operate two-sided platforms*, in *Columbia Business Law Review*, 2005(3), 2005, 101 ff.; L. FILISTRUCCHI, D. GERADIN, E. VAN DAMME, *Identifying Two-Sided Markets*, in *World Competition*, 36(1), 2013, 33 ff.; J. ROCHET, J. TIROEE, *'Pro-sided markets'. A progress report*, in *RAND Journal of Economics*, 37(3), 2006, 645 ff.; J.C. ROCHET, J. TIROLE, *Platform Competition in Two-Sided Markets*, in *Journal off the European Economic Association*, 1(4), 2003, 990 ff.; D.S. EVANS, *The Antitrust Economics of Multi-Sided Platform Markets*, in *Yale Journal on Regulation*, 20(2), 2003, 325 ff.; C.M. DA SILVA PEREIRA NETO, F.M. LANCIERI, *Towards a layered approach to relevant markets in multi-sided Transaction platforms*, in *Antitrust Law Journal*, 82(3), 2020, 701 ss.

[6] According to estimates in the McKinsey report (2022) *Value creation in the metaverse*. «The real business of the virtual world, are pro-metaverse 60 percent of consumers, mentioned estimates of the potential economic value of the Metaverse vary widely, up to an impact of $5 trillion by 2030, equivalent to the size of the world's current third largest economy, Japan. According to McKinsey's analysis, the potential impact on the e-commerce market would be between $2 trillion and $2.6 trillion by 2030, ranging between base and positive scenarios; likewise, an impact of $180-270 billion on the academic virtual learning market, $144-206 billion on the advertising market, and $108-125 billion on the gaming market».

since the forms of 'pre-emptive occupation' of spaces and areas of possible commercial interest ensure a competitive advantage, it favors cross-sectoral collaborations and strategic acquisitions, but also innovative forms of appropriation of intangible assets.

Two main factors underlie the 'strength' of the 'digital ecosystem' [7]. The first is subjective: the ecosystem arises from a 'community' of interrelated and interdependent actors, who participate in the creation of value that no enterprise could create alone. The second is functional: the ecosystem has a "multi-product" vocation, in the sense that, by leveraging a set of products offered in a dominance regime, it radially extends its market influence to other products and services that are often but not necessarily complementary or related, thus enabling the various member firms to align investments and business strategies. [8]

Ecosystems are strengthened by the presence of significant economies of scope and economies of scale, which attract markets and allow for considerable cost savings (because the same factors of production are used to produce different goods and services, and because the savings increase as the quantities increase). Also relevant are the network effects, by virtue of which the value of the ecosystem and its services increases as the number of users increases and is enriched, each time, by the use and processing of data, which become an inescapable input in the definition of market strategies and investments. [9]

These 'genetic' characteristics facilitate the interaction between services and the convenience of remaining within the ecosystem (while switching costs for users become very high and continue to increase), [10] thus drawing the attention of competition law to verify the behavioral

[7] In the 1990s, James Moore, a pioneer in the studies of business applicated ecosystems, wrote a seminal paper in which he argued how fierce competition among business ecosystems was fueling today's industrial transformation and transition. See J.F. MOORE, *Predators and Prey: A New Ecology of Competition*, in *Harvard Business Review*, 71, 1993, 75.

[8] For an overview of these two definitions of ecosystem in the digital economy, see M. JACOBIDES, C. CENIAMO, A. GAWER, *Towards a theory of ecosystems*, cit., 2255 ff.; A. FLETCHER, *Digital/competition policy: Are ecosystems different?*, cit., 2.

[9] For a general overview, see M.A. CUSUMANO, A. GAWER, D.B. YOFFIE, *The business of Platforms: Strategy in the Age of Digital Competition, Innovation, and Power*, Harper Business, 2019. N. FARAONE, V. FALCE, *Digital ecosystems in the wake of a legislative/regulatory turmoil*, cit., 87 ss.

[10] Digital operators relying on product ecosystems have adopted different business models, now centered on a modular structure (so-called device-centric ecosystems), now on advertising (so-called ad-centric ecosystems). On this differentiation, see M. BOURREAU, *Some Economics of Digital Ecosystems*, cit., 5.

and more recently the structural profiles. [11-12]

Such attention focuses on a double competition dimension: the one which takes place between ecosystems and a second one which unfolds within them. [13] While the latter occurs when firms offering an ecosystem of products and services face a competitive constraint also exerted by "specialized" firms, located at another level of the value chain, the latter refers to a competitive race between incompatible product and service systems, which inevitably keeps the consumer loyal, [14] "locking" them in. [15]

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[11] In the EU, see, among others, the decision on Case AT.40099-Google Android, rendered on July 18, 2018, and the subsequent appellate ruling rendered by the Tribunal, Judgment of September 14, 2022, Case T-604/18, Google and Alphabet v. Commission (Google Android), § 268 ff.; or also European Commission, Case AT.40437, Apple-App Store Practices (music streaming), June 16, 2020; European Commission, Case AT.40652, Apple – App Store Practices (e-books/audiobooks), June 16, 2020; European Commission, Case AT.40452, Apple – Mobile payments, June 16, 2020. In the U.S., see Epic Games, Ine. v. Apple Inc., case No. 4:20-cv-05640-YGR (N.D. Cal.), Judge Y. Gonzalez Rogers, Sept. 10, 2021, l ("Epic v. Apple"), subsequently appealed: Epic Games, Inc. v. Apple Inc., case 21-16506-21-16695, July 15, 2022 (9th Cir).

[12] For further study, Competition and Markets Authority, Mobile Ecosystems Market Study, 10 June 2022. Please refer also to F. BOSTOEN, D. MÀNDRESCU, *Assessing abuse of dominance in Ihe platform economy: e case study of app stores*, in *European Competition Journal*, 431(16), 2020, 7 ff.

[13] See, for this analysis, M. BOURREAU, *Some Economics of Digital Geosystems*, cit. 6.

[14] C. MATUTES, P. REGIBEAU, *"Mix and Match": Product compatibility without network externalities*, in *RAND Journal of Economics*, 19(2), 1988, 221-234.

[15] See P. AGHION, N. BEOOM, R. BLUNDELL, R. GRIFFITH, P. HOWITT, *Competition and innovation: An inverted-U relationship*, in *Quarterly Journal of Economics*, 120(2), 2005, 701 ff. and F. MARTY, T. WARIN, *Innovation in Digital Ecosystems: Challenges and Questions for Competition Policy*, in *CIRANO Cahier Scientifique*, 20205-10, 4, according to which a dominant firm, even if protected by barriers to entry, may have incentives to innovate, especially outside the digital world, when, for example, they market durable goods and innovation is necessary to induce customers to renew their equipment. Second, it may have incentives to innovate especially when competing with other digital platforms. In this regard, such companies have an incentive to innovate to ensure the continuity of the data streams they have and, thus, increase the predictive capabilities of their algorithms. The predictive capabilities of algorithms are the greater the more up-to-date and diverse the data. The more a platform diversifies its services, the better its "predictive performance". Finally, innovation can be a means of sustaining and expanding one's dominant position. Moreover, innovation is also an essential factor for the provider firm operating within the ecosystem, since the success of its business strategy and inclination depends on being part of a dynamic ecosystem. At the same time, a low innovation rate may expose them to being replaced by other firms operating within the platform or even or, even, excluded from the platform. Finally, we find three additional reasons why "complementary" firms operating within the ecosystem have an incentive to innovate. The first reason is competition among the "complementary" providers themselves. The second reason lies in the risk that the platform will integrate the service provided into its own offering if not satisfied with the quality of the product or service performance. The third reason is the need to diversify

3. Competitive assessment

In order to assess each of the above dimensions of competition, the definition of the relevant market [16] remains essential: an process that is typically linked to a product [17] and geographic [18] dimension and, therefore, to the

the risk if a strategic change driven by the platform/ecosystem is abstractly capable of challenging the sustainability of its technology or business model.

[16] Multi-product firms that are part of an ecosystem will, in fact, have an incentive to "bundle" and "centralize" even more the supply of services and products, thereby attenuating, the level of competition in the market, especially since "monad" firms, which sell complementary products, do not "internalize" the additional "living" costs resulting from not taking part in the ecosystem and tend, therefore, to set higher average prices, to the benefit of firms operating within the ecosystem. Moreover, that not all innovations that "ecosystems" bring are instrumental in promoting the "desirable" level of competition in a given market is now a given. In ecosystems, in fact, investments in innovation could well serve to make the platform even more "central", assimilating it into a quasi-monopoly with insurmountable barriers to entry, preventing users from multi-homing (i.e., the ability for users to use more than one platform at the same time) and "locking them in" within the digital ecosystem. In fact, the gatekeeper concept and designation, defined by Article 3 of the DMA, offers a new parameter for the European Commission's existing regulatory intervention that breaks with the traditional "relevant market" approach. These criteria are based on a set of qualitative and quantitative evidentiary thresholds (or a case-by-case assessment if a platform does not meet these thresholds) that support the designation of a platform as a gatekeeper. Moreover, apart from the establishment of these qualitative and quantitative criteria, it can be seen from the definition of gatekeeper in Article 3 that, through definitions such as "significant impact on the internal market", "important access point" for reaching end users, and "established and enduring position", a new perspective of market definition has been introduced, far removed from the classical definition of the relevant market. In addition, under Article 3(8), the Commission should designate gatekeepers even if they do not meet the qualitative and quantitative criteria, taking into account additional elements such as, among others, network effects and data-driven advantages, possible scale effects, lock-in of business and end-users, a conglomerate corporate structure or vertical integration of the firm. In conclusion, even if the role of the DMA will be limited to supplementing and supplementing competition protection legislation, it should be considered that the notion of "gatekeeper" is a clear indication that, in determining the existence of market power in the digital age, we should conduct a comprehensive and case-by-case analysis of the market power of the company involved, without limiting the analysis to defining the relevant markets from a product (or service) and geographic perspective.

[17] The relevant product market includes all products that customers regard as interchangeable with or substitutable for the product or products of the undertaking or undertakings concerned, on the basis of the characteristics of the products, their prices and their intended use, taking into account the conditions of competition and the structure of supply and demand in the market. See COURT OF JUSTICE, Judgment of February 13, 1979, Case 85/76, Hoffmann-La Roche v. Commission, para. 51.

[18] The relevant geographic market comprises the area in which the undertaking or undertakings concerned supply and purchase relevant products, which is characterized by sufficiently homogeneous conditions of competition and which can be distinguished from contiguous geographic areas in particular because appreciably different conditions of competition exist there.

analysis of the economic substitutability between products, as measured by the notion of market power.

According to this approach, the relevant market can thus be defined as the smallest perimeter (set of products in a given geographical area) where the creation of a significant degree of market power is possible, taking into account existing substitution possibilities.

The theoretical criterion used to determine whether all sufficiently 'contiguous' substitutes are identified is the possibility that a hypothetical monopolist could exercise market power in the 'candidate' market. That is, whether a hypothetical monopolist in the candidate market would find it advantageous to apply a small but significant non-transitory price increase (the so-called 'SSNIP test', which is equivalent to the English 'small but significant and non-transitory increase in price'). [19] Should this price increase prove unprofitable for the hypothetical monopolist, the process of adding further substitutes to the candidate market continues with the addition of the next closest substitute. If the price increase proves profitable for the hypothetical monopolist, the process stops and the products of the candidate market constitute a relevant market.

Well, in digital markets, competitive constraints may not originate from the relationship of substitutability (or 'rivalry') between goods and services, which, on the contrary, proves to be an unsuitable criterion. [20] In the context

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See COURT OF JUSTICE, Judgment of February 14, 1978, Case 27/76, United Brands v. Commission, para. 11.

[19] The small but significant non-transitory price increase taken into consideration usually corresponds to a price increase of between 5 percent and 10% applied to one or more products in the candidate market, including at least one product of the firm or firms concerned. However, the size of the price increase and how it is applied may depend on the specific case. For example, when the firms involved provide relatively little value added to the supply chain (because the raw materials or components purchased represent a high percentage of the total price), the question of whether a hypothetical monopolist may exercise market power may be better assessed in relation to its effect on that value added. Accordingly, in such cases, the Commission may apply the SSNIP test to the value added rather than the selling price.

[20] In this regard, L. KAPLOW, *Why (Ever) Define Markets?,* in *Harvard Law Review*, 124(2), 2010, 439 ff., according to which «[...] the market definition process should be abandoned. The central, conceptual ‹argument is that there does not exist any coherent way to choose a relevant market power, whereas the entire rationale for the market definition process is to enable an inference about market power. Why ever define markets when the only sensible way to do so presumes an answer to the very question that the method is designed Io address? A market definition conclusion can never contain more or better information about market power than that used to define the market in the first place. Even worse, the inferences drawn from market shares in relevant markets generally contain less information and accordingly can generate erroneous legal conclusions – unless one adopts a purely results-oriented market definition stratagem under which one first determines Ihe right legal answer and then announces a market def-

of markets in which companies compete on parameters other than price, such as quality or the level of innovation, the definition of the relevant market according to "traditional" canons is not exhaustive, especially when services are offered "free of charge"[21] and in so-called zero-price markets.[22] Secondly, econometric instruments such as the 'SSNIP' test do not hit the mark, as they focus solely on the willingness of consumers/users to switch providers in the event of a hypothetical price increase.[23] Finally, the 'static' approach of identifying interchangeable (or 'competing') products and services on the demand side gives way to the 'dynamic' reality of digital markets, where complementary products and services also compete with each other.

Digital ecosystems denounce this contradiction even more clearly, 'lifting the veil' of the inadequacy of the current definition of the relevant market.[24]

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inition that ratifies it. Additional, largely unavoidable difficulties are identified with the economic logic underlying market redefinition. Because virtually all of Ihe argument reveals inherent problems in the very conception of the market definition market share paradigm, it follows that the conclusion here do not depend on ore's assessment of the quality of various means of measuring market power either in general or in particular cases and that they are independent of the legal application at hand». Please refer also to, L.M. WOW, *Market Definition: Impossible and Counterproductive*, in *Antirust Law Journal*, 79(1), 2013, 361 ff.; R.S. MARKOVITS, *Why One Should Never Define Markets or Use Market-Oriented Approaches to Analyze the Legality of Business Conduct under U.S. Antitrust Law. My Arguments and a Critique of Professor Kaplom's*, in *Antitrust Bulletin*, 57(4), 2012, 747 ff.

[21] See Google Shopping case (Case AT.39740, decision of June 27, 2017, Google Search (Shopping), para. 158 ff.), in which the European Commission delineated a relevant market for a zero-price service, namely that of general on-line search. According to the Commission, this was justified by the fact that users were "paging with their data" when using Google's search engine. Moreover, free for users was an integral part of the business model of Google's platform, and price was not the most important competitive parameter in online general search. More recently, see also European Commission, decision of December 17, 2020, Case COMP/M.9660), Google/e Fitbit.

[22] See European Commission, COMP/M.4731-Google/DoubleClick, March 11, 2008, and of the Court of Justice (Third Chamber), judgment of September 11, 2014, Case C-382/12 P, Mastercard Inc. and others v. European Commission. At the national level, also Bundeskartellamt, Facebook (Br-22/16, Feb. 6, 2019), paras 422-521 (in January 2021, the German legislature adopted the long-awaited amendment to update German competition law to the digitization of markets (see "Act Amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions" ("GWB-Digitalisierungsgesetz" – GWB Digitalization Act)). For the perspective taken overseas, see Ohio v. American Express, 585 US (2018).

[23] According to the Report "A new competition framework for the digital economy" promoted by the German Ministry for European Affairs, realized by the Commission c.d. "Competition Law 4.0" and published on 30 September 2019 ("Altmaier Report"), [a]analytical methods like the SSNIP test do not work as they focus on the willingness of customers to switch providers, in Ihe event of a hypothetical price increase› (28).

[24] Similarly, the European Commission and the General Court have recognized that market

First of all, the traditional delineation of the relevant market does not cover the fate of related or 'adjacent' markets, those where, for instance, a firm leverages its established market power in one market to 'tip' it towards another adjacent or neighbouring market at a contiguous level of the value chain. In fact, closely related 'families' of products that create autonomous ecosystems are able to artificially increase the costs imposed on potential entrants, who are forced to create, in turn, an autonomous ecosystem or to cooperate with existing complementary products/services.[25] However, a dominant player might respond strategically by making its core product/service incompatible with that of its rivals, thus undermining attempts to create replacement ecosystems based on more advanced technologies.[26]

Secondly, in the context of digital platforms, as mentioned above, the (market) value of the platform increases with each additional user and the quality of the product takes on a comparatively and progressively decreasing relevance with respect to the added value provided by the platform or ecosystem to the relevant user categories (most often, configured as a contractual performance concerning the exchange between digital services and personal data).[27]

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shares may not adequately reflect the existence of market power in the digital sector. See General Court (Fourth Chamber), Judgment of 11 December 2013, Case T-79/12, Cisco Systems, Inc. and Messagenet SpA v. European Commission, stating that «the private communication sector is a recent booming sector characterized by short innovation cycles in which large market shares can be ephemeral. In such a dynamic context, large market shares are not necessarily indicative of market power and, therefore, of the lasting harm to competition that Regulation No 139/2004 seeks to prevent». (§ 69). Shortly thereafter, in the 2014 Facebook/WhatsApp case, the Commission ruled in the same terms, again in the context of consumer communication services. According to European Commission, decision of October 3, 2014, Case COMP/M.7217, Facebook/WhatsApp, «[...] the Commission notes that the consumer communication sector is a recent and fast, growing sector which is characterized by frequent market entry and short innovation cycles in which large market shares may tum out to be ephemeral. In such a dynamic context, the Commission takes the drew that in this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition» (§ 99). In European Commission, decision of 6 September 2018, Caso M.8788, Apple/Shazam, «[t]he Commission acknowledges that market shares may not be a perfect prof for measuring market power in recent and fast-growing sectors characterized by frequent market entry and short innovation cycles» (§ 162). However, in the present case, the Commission defined the market as a mature market, not subject to this logic.

[25] Please refer to M. KATZ, C. SHAPIRO, *Systems Competition and Network Effects*, in *Journal of Economics Perspectives*, 8(2), 1994, 93 ff.; M. JACOBIDES, I. LIANOS, *Ecosystems and competition law in theory and practice*, cit., 1206 ff.

[26] J.F. MOORE, *Business Ecosystems and the View from the firm*, in *Antitrust Bulletin*, 51(1), 2006, 31-75.

[27] In the case of an advertising-based multi-versant platform that sells space to advertisers

The 'gauntlet' thrown down to the traditional narrative of the relevant market is clear: antitrust law needs to move away from a narrow emphasis on the price of final goods as a measure of market power, to encompass the dynamics of multi-product and multi-actor ecosystems.

In response to the above-mentioned concerns, in April 2020, the European Commission embarked on a process of evaluating and revising its 1997 guidelines (the 'Communication')[28] in order to take into account case-law orientations and new market dynamics.[29]

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while providing free search to users, such a configuration reinforces the positive feedback sky between search and the data inferences that the platform sells to advertisers: free search increases the demand for ads sold by Google, driving up the price of ads. Note, however, that search and ads are complementary services sold in different relevant markets, and focusing only on one market would miss the overall dynamics of the ecosystem. Cf. N. ECONOMIDES, I. LIANOS, *Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective*, in *Journal of Competition Law & Economics*, 17(4), 2021, 765-847.

[28] Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), Official Journal No. C 372, 09/12/1997, 0005-0013. This Notice is, even today, the oldest of the acts of "secondary legislation" that make up the corpus of European competition law, which is clearly not accidental but rather an objective indicator of the quality of the document, which has punctually fulfilled its function as an instrument aimed at individuating the application perimeter within which the competitive contest between market operators develops.

[29] Commission staff working document evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD (2021) 199 final, 12.07.2021. Following the aforementioned assessment, the European Commission addressed the issue of market definition with reference to general competition policy considerations in the Communication 'A Competition Policy Fit for New Challenges' (COM(2021) 713 final) issued on 18 November 2021 and announced the revision of the current Communication. More recently, on 8 November 2022, the Commission published a new draft Notice, inviting stakeholders to comment by January 2023, with a view to the definitive publication of a new Notice in the third quarter of 2023. See European Commission Press Release, Competition: Commission seeks feedback on draft revised Notice on market definition, 8 November 2022. That the time was ripe for a new redefinition of the relevant market aimed at reincluding digital ecosystems was already evident from the European Commission's Crémer Report, which, already in 2019, emphasized that competition between ecosystems could not overlap with traditional competition law instruments that focus on the relevant market and the principle of substitutability between supply and demand. Cfr. *Crémer Report*, 46 ff., according to which «in digital markets, less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anticompetitive strategies. [...] Another problem of market definition arises when a dynamic market environment leads Io fluid, quickly changing relationships of substitutability and possibly partial overlaps of carrying significance between different services, sometimes combined with practices of multi-homing and for changing perceptions of consumer needs. Many experts argue, for example, that demand for cars is turning into a broader demand for mobility. Consumer demand for travel information can be met in very different ways compared to a fer years ago, and consumer perceptions of viable substitutes may change. In such settings, the determination of

For the first time, the European Commission thus opens up to an all-encompassing definition of the ecosystem as being part of a relevant market in its own right and drawing inspiration from principles similar to those applied to customer service markets and two-vertical markets.[30] In certain circumstances, digital ecosystems may be considered to consist of a main product and several secondary products, the consumption of which is linked to the main product, e.g. via technological links or the interoperability 'access key'.[31] When secondary (digital) products are offered in the

substitutability relationships based on the present patterns of choice may tum out to be too narrow in hindsight and lead to "false positives". Al the same time, inaction in Ihe light of a mere possibility of changing market boundaries may lead to "false negatives"».

[30] According to the new draft Notice (39-40), under certain circumstances the consumption of one durable product (primary product) leads to the consumption of another related product (secondary product) (which is often referred to as a "customer service market"). In such circumstances, in defining the relevant markets for primary and secondary products I was in the competitive assessment, the Commission also takes into account the competitive constraints imposed by existing market conditions in the respective relevant markets. In general, there are three possible ways to define relevant product markets in the case of primary and secondary products, namely (i) as a system market comprising both the primary and secondary product; (ii) as multiple markets, i.e., one market for the primary product and separate markets for the secondary products associated with each brand of the primary product; or (iii) as dual markets, i.e., the primary product market on the one hand and the secondary product market on the other The system market definition may be more appropriate: (i) the more likely it is that customers will consider full lifecycle costs when purchasing the primary product; (ii) the higher the expenditure on the secondary product(s) (or the higher their value) relative to the expenditure on the primary product (or the higher the value of the latter); (iii) the higher the degree of substitutability among primary products, the lower the switching costs from one primary product to another; and (iv) when there are no, or few, suppliers specializing only in the secondary product(s). When the occurrence of such circumstances is less likely, it may be more appropriate to define dual or multiple markets, depending on the degree of substitutability among the secondary products of different suppliers. For example, if secondary products from different suppliers are compatible with all or most of the primary products, the definition of dual markets may be more appropriate, whereas if customers of the primary product are constrained to the use of a narrow set of secondary products, the definition of multiple markets may be more appropriate. In other circumstances, even if consumption of one or more products is not dependent on a primary product, customers may still prefer to consume several products jointly in the form of a bundle (grouping of products). In such circumstances, the Commission may assess whether such a bundle of products constitutes a relevant product market distinct from individual products.

[31] According to the ruling of the Court of 14 September 2022, case T-604/18, Google and Alphabet v. Commission, cit., para. 116, in a digital "ecosystem", the products or services that are part of the relevant markets that constitute this ecosystem can overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken as a whole, the relevant markets may also have a global dimension, in light of the system discussing its components and any competing pressures within that system or coming from other systems. An example of a digital ecosystem would be a product ecosystem developed around a mobile operating system, including hardware, an application sales portal, and software.

form of bundles, the Commission may also assess whether the bundle in itself constitutes a relevant market.

Not that, in the past, alternative paths were not 'beaten'. In order to address the inadequacy of the 'traditional' definition of the relevant market in the context of the digital ecosystem and to take into account the growing importance of users' attention for the purpose of attracting advertising revenues, the possibility of defining the relevant markets, especially in the media sector, as 'attention markets' [32] (or Attention Brokerage [33]) has been discussed in many quarters.

Beyond the strictly economic and philosophical meaning of the term 'attention market', [34] the question has been raised as to how to define the substitutability relationship (and, consequently, the relevant market) between operators and technological players competing to 'monetize' users' attention, rather than specific products/services. [35]

In this respect, it has been suggested to define the relevant market

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[32] For an embryonic analysis of the importance of competition in attracting the attention of users in the television and radio market, see A. MBRUS, R. ARGENZIANO, *Asymmetric Networks in Two-Sided Markets*, in *American Economic Journal. Microeconomics*, 1(1), 2016, 17-52; S. ANDERSON, Ø. FOROS, H.J. KIND, *Competition for Advertisers and for Viewers in Media Markets*, in *The Economic Journal*, 128, 2018, 34; A. PET, T. VALLETTI, *Attention Oligopoly*, in *American Economic Roman. Microeconomics*, 14(3), 2022, 530-557.

[33] For the origin of this definition, see T. WU, *The Attention merchants: the epic scramble I get inside our heads*, Knopf Doubleday Publishing, 2016.

[34] In the sense of the qualification of attention as a "currency" and a scarce resource, see D.S. EVANS, *Attention to Rivalry among Online Platforms*, in *Journal of Competition Law & Economics*, 9(2), 2013, 313-357. In the sense of the qualification of attention as a scarce resource linked to time in terms of "cost-opportunity", see G.S. BECKER, *Theory of the Allocation of Time*, in *The Economic Journal*, 75(299), 1965, 493-517; ARJO A. KEAMER, A. MIGNOSA, O. VELTHIUS, *The economics of attention*, in *Journal of Cultural Economics*, 2(1), 2000, 1-7; D. EVANS, *Attention Platforms, the Value of Content, and Public Policy*, in *Review of Industrial Organization*, 54, 2019, 775-792.

[35] In the media sector, the application practice of the European Commission has implemented, to some extent, this trend, leaving the definition of the relevant market "open". Please refer to European Commission, decision of 7 April 2017 in case M.8354 – Fox/Sky and European Commission, decision of 15 June 2018 in case M.8861 – Comcast/Sky. As is known, in the past, the European Commission has divided the retail supply of television services into two distinct markets: (i) FTA and pay-TV. The Commission also questioned whether the pay-TV market could be further segmented into the following sub-markets: (ii) linear versus non-linear pay television services; (iii) according to distribution technologies (for example via cable, satellite or terrestrial); and (iv) premium pay television services compared to basic ones. See, on this, European Commission, decision of 24 February 2015 in case M.7194 – Liberty Global/Corelio/W&W/DeVijver Media; European Commission, decision of 25 June 2008 in case M.5121 – News Corp/Premiere; European Commission, decision of 10 October 2014 in the case M.7000 – Liberty Global/Ziggo.

based on the 'time spent' by the user/consumer and, therefore, by resorting to the 'A-SSNIP' test, or the 'Attentional Small But Significant and Non-Transitory Increase in Price' test.[36] The A-SSNIP test could be conducted simply by adding publicity to a product permanently and not transiently and determining whether this addition causes a significant number of consumers/users to spend their time with a different product/service/platform (and with a different device).[37]

Thus, a competitive 'playing field' seems to be emerging, focused on the attention of users/customers to the different services and products offered by the ecosystem.

On 8 February 2024, the European Commission has adopted a revised Notice on relevant market,[38] with the view to reflect the significant developments of the intervening years, in particular the increased digitalisation and the new ways of offering goods and services, and with the ambition to

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[36] T. WU, *Blind Spot: The Attention Economy and t/ze Lav*, in *Antitrust Law Journal*, 82, 2018, 771. On the contrary, David Evans argued that everything on the web that competes for the "market for attention" belongs to the same relevant market: in other words, while each of the global technological players comes from different "ecosystems" (e.g., operating systems, social media, online search and indexing, hardware), all seem, in reality, to converge towards a single and all-encompassing relevant market, in which they try to compete for their respective share of user attention. According to D.S. Evans, Attention to Rivalry Among Online Platforms, cit., 343, «Twitter provides a very different service to viewers (micro-blogging) than Yahoo (content curation) [...]. The reason for this article, though, is that those differences are not necessarily relevant for assessing competition among online platforms. These attention rivals are all competing aggressively with each other to secure attention».

[37] According to T. WU, *Blind Spot: the Attention Economy and the Law*, cit., 777, «if one added a fine-second advertising video that played before emery usage of Google search, would some number of consumers switch to Bing? Presumably yes, meaning that Google search and Bing are substitutes and competitors. But what if the additional load was added to all search engines – would consumers spend less time on search and spend more time on Facebook or Twitter instead? If not – if consumers continue using search, even at the new, higher attentional price – then this could suggest that search is, in fact, the right market definition and that a hypothetical search engine monopolist is in a position to raise attentional prices». Similarly – continues the Author –, «[f]or Ihe Google-Waze merger, the "online mobile mapping" market might have been the appropriate market; the hypothesis can be tested using an Attentional-SSNIP test [...]. The A-SSNIP could posit a hypothetical monopolist who adds a 5-second advertisement before the mobile map, and leaves it here for a year. If consumers accepted Ihe delay, instead of switching to streaming video or other attentional/options, then the market is correctly defined and calculation of market shares could be in order». Alternatively, dominant players in the market for attention may choose to exercise their market power by increasing the costs of attention, just as some traditional monopolists opt to ringfence the market (and sideline potential new entrants) by increasing prices. In these cases, the SSNIP test could be modified to facilitate the introduction of a so-called "SSNIC" test ("small but significant and non-transient increase in cost").

[38] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6001.

ensure transparency and predictability in its competition law enforcement, including through guidance, across sectors and at the sectoral level, also for strategic sectors. As recalled by the Commission, the revised Notice includes the following key elements: i) More accessible guidance thanks to a detailed structure and concrete examples, illustrating the practical application of market definition concepts; ii) A description of the general principles of market definition; iii) A recognition of the importance of non-price parameters for market definition, including innovation, quality, reliable supply and sustainability; iv) Specific guidance on the application of market definition concepts in specific circumstances, including: digital markets, for instance with respect to multi-sided markets and digital "ecosystems" (e.g., products built around a mobile operating system); v) innovation-intensive industries, where companies compete on innovation, including through the development of new products; vi) Clarifications on dynamic and forward-looking assessments especially in markets undergoing structural transitions, such as regulatory or technological changes; vii) Expanded guidance on geographic market definition focusing on the factors that can justify defining markets as global, EEA-wide, national, or local, and on the role of imports when defining the relevant geographic market; viii) Clarifications on various quantitative techniques used when defining markets, such as the small but significant and non-transitory increase in price ('SSNIP') test; ix) Guidance on alternative metrics relevant for the calculation of market shares, such as shares based on sales or capacity, or shares based on usage metrics like the number of (active) users or website visits; x) Extensive overview of the various sources of evidence and their probative value for market definition analyses.

Within the system markets, (digital) ecosystems can, in certain circumstances, be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability.[39] When considering (digital) ecosystems, the Commission may thus apply similar

[39] In its judgment of 14 September 2022, Google and Alphabet v. Commission, T-604/18, EU:T:2022:541 the General Court stated in paragraph 116: «in a digital 'ecosystem' […] the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken together, the relevant markets may also have a global dimension in the light of the system that brings its components together and of any competitive constraints within that system or from other systems». An example of a digital ecosystem would be an ecosystem of products built around a mobile operating system, including hardware, an application store and software applications.

principles to those applied to after-markets to define the relevant product market(s).[40] When the secondary (digital) products are offered as a bundle, the Commission may also assess the possibility of that bundle constituting a relevant market on its own. Although not all (digital) ecosystems fit an after-market or bundle market approach, the Commission takes into account, where relevant, factors such as network effects, switching costs (including factors capable of leading to customer lock-in) and (single – or multi –) homing decisions for the purpose of defining the relevant product market(s).

4. The European Strategy

In order to exploit the potential of ecosystems without foregoing innovation and competition, there have been various proposals for solutions. While the OECD ventures down the road of regulation, Europe with the Digital Single Market Strategy brings technological disruption back to two lowest common denominators.[41]

On one hand, the new economy is based on data (personal, anonymous and commercial), the value of which is certain and the implications of which are closely linked to the current and potential uses to which individual data are or can be put through the use of extremely sophisticated digital techniques;[42] on other hand, antitrust law, the guardian of the functioning of the internal market, is confronted with an 'inevitable' novelty, which the enforcement tools and techniques with which it is equipped

[40] See case AT.40099 – Google Android, paragraph 299, on the definition of the market for app stores, where the Commission concluded that the conditions to define a system market comprising app stores and smart mobile operating systems were not present.

[41] As recalled in the passage that has become "iconic" by R. BORK, *The Antitrust Paradox: A Policy at War with itself*, Basic Books, 1978, 50, «antitrust policy control be made rational until we are able to gite firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give».

[42] Please refer to the study promoted by the Committee on Payments and Market Infrastructures (CPMI), 2014, which distinguished the different categories of non-banking entities currently operating in the financial market (front-end providers – i.e. providers of interface services between end users of payment services and the traditional clearing and settlement process; Back-end providers – non-banking entities that provide services, outsourced by banks, linked to certain stages of the payment chain, such as services data security, data centers, audits, etc.; Retail payment infrastructure operators – operators who offer, often collaborating with banks, specific clearing and processing services for card transactions; Provider end – to-end – which category is made up of a combination of the previous ones).

struggle to intercept the anti-competitive strategies of digital operators in a timely and effective manner.[43]

A new season of European interventionism is being inaugurated through five complementary actions. Reference is made to: 1. the modernization of antitrust regulation and enforcement; 2. the introduction of asymmetrical rules graded on market power, type of services and related risks, in order to sow the seeds of market contestability and fairness of transactions (Regulations on digital markets and services[44]); 3. the promo-

[43] L. KHAN, *Amazon's antitrust paradox*, in *The Yale Law Journal*, 126(3), 2017, 710 ff.; A. EZRACHI, *EU competition las goals and the digital economy*, Oxford Legal Studies Research, Paper No. 17/2018, 4-21; A. EZRACHI, M.E. STUCKE, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, 2016; O. ODUDU, *The wider concerns of competition law*, in *Oxford Journal of Legal Studies*, 30(3), 2010, 599-613; O. BROOK, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 Tfeu*, Cambridge, 2022; I. LIANOS, *Polycentric competition law*, in *Current Legal Problems*, 71, 2018, 161; K. STYLIANOU, M. IACOVIDES, *The goals of EU competition law: A comprehensive empirical investigation*, in *Legal Studies*, 42(4), 2022, 620-648. Introduced into the antitrust debate in recent years is the notion of fairness, which exemplifies the change of pace from the traditional approach: see M. VESTAGER, *Competition and fairness in a digital society*, Speech, 22 November 2018; N. DUNNE, *Fairness and The Challenge of Making Markets Work Better*, in *The Modem Law Review*, 84, 2021, 230-264; S.M. COLINO, *The Antitrust F Word: Fairness Considerations in Competition Law*, CUHK Faculty of Law Research, Paper n. 2018-09, 18. At the same time, in the United States, this novelty has been facilitated by the rise of the so-called 'Neo-Brandeisian' wave, which prospectively foreshadows a 'renewed' role for antitrust law, free from the 'bottlenecks' of the Chicago School, oriented towards welfare and efficiency: see A.D. MELAMED, N. PETIT, *The misguided assault on the consumer welfare standard in the age of Platform markets*, in *Review of Industrial Organization*, 54, 2019, 741-774; T. WU, *After consumer welfare, now what? The "protection of competition" standard in practice*, in *Competition Policy International*, 2018, 4-9; L. KUM, *The New Brandeis Movement: America's Antimonopoly Debate*, in *Journal of European Competition Law & Practice*, 9(3), 2018, 131 ff. For an overview of the Italian literature on the subject, see M. CAPPAI, G. COLANGELO, *Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S.*, Stanford-Vienna TTLF Working Paper n. 55, 10 April 2020; G. FERRARI, M. MAGGIOLINO, *Il potere across markets delle GAFAM: come reagire?*, in *Orizzonti del diritto commerciale*, 2021, 463-488. V. FALCE, *Fairness e innovazione nel mercato unico digitale*, Turin, 2020. For an initial bibliography, please refer to V. FALCE, N. FARAONE, *Mercati digitali e DMA: note minime in tema di enforcement*, in *Diritto industriale*, 2022. Please refer also to V. FALCE, N. FARAONE, *Il Digital Markets Act: profili istituzionali*, in G. CAGGIANO, G. CONTALDI, P. MANZINI, *Verso una legislazione europea su mercati e servizi digitali*, Bari, 2021.

[44] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Regulation). The DMA was approved by the European Parliament and the Council on 14 September 2022 and published in the Official Journal on 12 October 2022. The DMA officially entered into force on 1 November 2022 and will be applicable starting from next May 2, 2023. However, the preparatory work was relatively short, albeit troubled. Below we summarize the main approval stages starting from the Pro-

tion of the statute of access and circulation of public and private data, whose compatibility, interoperability and portability are safeguarded (Open Data Directive,[45] Data Governance Act,[46] Regulation on the Data Act[47] and Proposal on interoperability[48]), but also the strengthening of the digital identity and of the rules protecting digital finance instruments (Eidas Regulation[49] and Digital Finance Package); 4. the pursuit of strategic autonomy (the Chips Act, investments and initiatives to solve the dependency on third countries in terms of supply, but also programs and investments in skills and applications); 5. the outline of the European Strategy under the banner of innovation, but also artificial intelligence, security, including cyber security and fundamental rights.

Within this framework, the threshold of attention has been raised in relation to the so-called "killer acquisitions",[50] acquisition operations that

posal for a Regulation of the European Parliament and of the Council on fair and competitive markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 2020/0374(COD), December 15, 2020. Subsequently, the ed. Internal Market and Consumer Protection Committee ("IMCO") within the European Parliament adopted, on 23 November 2021, with 42 votes in favor, 2 against and 1 abstention, its position on the DMA proposal, then voted on in plenary session on 15 December 2021, confirming the European Parliament's mandate for the negotiations. At the same time, the Council – and, specifically, the "Competitiveness Council (Internal market and industry)" – unanimously approved its position in favor of the adoption of the DMA on 25 November 2021. The multilateral dialogue and negotiations between the co-legislators left at the beginning of 2022. On 24 March 2022, the European Union presented the final (and updated) text of DMA, agreed following the trilateral negotiation between the European Commission, the European Parliament and the Member States (led by the French Presidency of the European Council), which was approved by the representatives of the Member States on 11 May 2022.

[45] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and re-use of public sector information (recast) PE/28/2019/REV/1.

[46] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Regulation) PE/85/2021/ REV/1.

[47] Proposal for a Regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (data law), Brussels, 23 February 2022 COM(2022) 68 final 2022/0047(COD) .

[48] Proposal for a Regulation of the European Parliament and of the Council laying down measures for a high level of public sector interoperability across the Union (Interoperable Europe Act), Brussels, 18 November 2022 COM(2022) 720 final 2022/0379 (COD).

[49] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 910/2014 as regards the establishment of a framework for a European digital identity, Brussels, 3 June, 2021 COM(2021) 281 final 2021/0136(COD).

[50] The literature relating to the so-called killer acquisitions is now very large. See, for an initial bibliography, C. CUNNINGHAM, F. EDERER, S. MA, *Killer Acquisitions*, in *Journal of Political Economy*, 129(3), 2021, 649 ff.; OECD, *Start-ups, Killers Acquisitions and Mergers Control -*

involve small and medium-sized newly-established companies (sometimes, actual start-ups) which, due to zero or decidedly limited profits, generally do not reach the turnover thresholds envisaged at national and European level[51] and which, notwithstanding their objective of neutralizing competing innovation, escape scrutiny by both the Member States and the European Commission.[52-53-54]

Background Note; Materials for the Meeting of the Competition Committee on 10-12 June 2020; N. LEVY, H. MOSTYN, B. BUZATU, *Reforming EU merger control to capture "killer acquisitions" – The case for caution*, in *Competition Law Journal*, 19(2), 2020, 51 ff.; T. LECUYER, *Digital Conglomerates and Killer Acquisitions – A Discussion of the Competitive Effects of Start-up Acquisitions by Digital Platforms*, in *Concurrences*, 1, 2020, 42 ff.; C. CAFFARRA, G. CRAWFORD, T. VALLETTI, *"How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions*, in *Antitrust Chronicle*, 2(1) 2020, 1 ff.; D. MELAMED, *Mergers involving nascent competition*, Stanford Law & Economics Olin Working Paper No. 566, 17 January 2022; C. SCOTT HEMPHILL, T. WU, *Nascent Competitors*, in *University of Pennsylvania Law Review*, 168, 2020, 1879 ff. For an informative contribution, please refer to V. FALCE, N. FARAONE, *Killer acquisition sotto la lente nella UE: cosa fa l'Italia, l'attivismo della Germania*, in Agendadigitale.eu – *Il Giornale sull'agenda digitale italiana*, 31 January 2023, available at the following link: https://www.agendadigitale.eu/mercati-digitali/killer-acquisition-sotto-la-lente-nella-ue-cosa-fa-litalia-lattivismo-della-germania/.

[51] Regulation (EC) No. 139/2004 of the Council, of 20 January 2004, relating to the control of concentrations between companies, Official Journal of the European Union L 24 of 29 January 2004.

[52] Communication from the Commission, Commission Guidelines on the application of the referral mechanism under Article 22 of the Merger Regulation for certain categories of cases (2021/C 113/01), 31.3.2021. This publication follows the evaluation of the procedural and jurisdictional aspects of merger control carried out by the Commission itself, which sees competence divided between the latter and the Member States on the basis of criteria related to turnover of the companies involved. See, therefore, Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control, SWD(2021) 66 final, 26 March 2021.

[53] Article 22 of Regulation (EC) No. 139/2004, entitled "Referral to the Commission", in paragraph 1 provides: «[...] One or more Member States may ask the Commission to examine any concentration, as defined in Article 3, which has no within the meaning of Article 1 but affects trade between Member States and risks significantly affecting competition in the territory of the State or Member States making the request. The request must be submitted at the latest within 15 working days of the date on which the concentration was notified or, if notification is not required, made known in another way to the Member State concerned [...]».

[54] Speech entitled "The future of EU Merger Control" dated 11 September 2020 on the occasion of the International Bar Association 24th Annual Competition Conference, in which European Commissioner Vestager called for a change of approach. More specifically, this is how he expressed himself on the point: «We plan to start accepting referrals from national competition authorities of vergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves. This won't happen overnight – we need time for everyone to adjust to the change, and time to put guidance in place about how and when we'll accept these referrals».

5. The Regulatory Framework

From a legal point of view, the path of self-regulation (and codes of conduct) is flanked by the result-oriented regulation (Regulation on B2B relations), which imposes a canon of conduct (fairness) in the relations and contractual conditions practiced by online platforms and search engines that provide intermediation services. In particular, the Regulation elevates transparency to a statute of market relations (in the drafting of contractual clauses,[55] positioning criteria, differential treatment and access to data).

As to the obligations and prohibitions for the drafting of contractual terms, the Regulation directs the market towards (i) the use of simple and comprehensible language in the prearrangement of clauses; (ii) the easy access to contractual documents at all stages of the contractual relationship; (iii) the express indication within contracts of the reasons justifying the right to suspend, terminate or limit, in whole or in part, the provision of the services of the online platform; (iv) the obligation of the platform operator to communicate unilateral changes to the contractual terms and conditions, with at least 15 days' notice, unless the changes are necessary to comply with a legal obligation or to address an imminent danger related to the protection of the services, consumers and business users against fraud, malware, spam, data breaches or cyber security risks; (v) the obligation to be transparent about the identity of the business user providing the goods or services via the platform; (vi) the prohibition of retroactive application of contractual changes; (vii) the obligation to include information regarding the possibility of termination of the contract by the business user and the existence (or lack thereof) of technical and contractual access to the data provided or generated by the business user and retained by the platform after termination of the contract.

With respect to the obligations concerning ranking criteria, these include: (i) the obligation to include in the contractual documents the main parameters determining ranking and the criteria for balancing these and further parameters for online brokering service providers; (ii) the obligation to describe the main parameters used to determine the ranking and their relationship to any other parameters used by search engines. This de-

[55] Please refer to Regulation (EU) 2019/1150 of the European Parliament and of the council of 20 June 2019 which promotes fairness and transparency for commercial users of online intermediation services.

scription shall be placed in an easily accessible manner and written in a simple and understandable language.

In relation to the obligations regarding differential treatment, these refer to the mandatory inclusion in the contract of the description of any differential treatment that may be reserved to the products or services offered to consumers through online intermediary services by the service provider itself or by business users controlled by that provider, on the one hand, and other users to the use of data (personal and non-personal), in the possession of the platform or search engine, which are provided by the business user or consumers themselves for the use of the services of the platform or search engine or generated through the use of such services.

Obligations relating to access to data include: (i) the obligation to include in contracts a description of whether or not personal data or other data that are provided or generated by both consumers and business users themself can be accessed; (ii) the obligation to provide specific information, including on the possibility for business users to access the data in aggregate form and whether or not data sharing with third parties is envisaged.

Finally, the regulation on business relations introduces an important novelty concerning the establishment by online platforms of an internal complaint handling mechanism that must be easily accessible and free of charge for business users.

The regulatory drift deepens.

The Copyright Directive strengthens the obligations of online content-sharing platforms, providing that whenever they perform an act of communication to the public or an act of making available to the public without prior authorization from the copyright holder, the limitation of liability under Article 14(1) of the E-Commerce Directive does not apply and that they will therefore be directly liable unless they can prove that they have made best efforts to obtain authorization. The assessment of the (co-)liability of the provider/provider of online content sharing services – and, therefore, of the 'best endeavors' requirement – must be made in the light of the degree of diligence that can be expected of professional operators in the exercise of their economic activity.

With the DMA (Regulation (EU) 2022/1925),[56] Europe pursues digital contestability, regulating certain designated providers of basic intermediary services on the basis of qualitative prerequisites (annual turnover in the

[56] Please refer to V. FALCE, N. FARAONE, *Spunti di diritto positivo sull'art. 17 della Direttiva Copyright*, in *Rivista di diritto industriale*, 2021.