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Comment

# Taming digital gatekeepers: the 'more regulatory approach' to antitrust law

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ABSTRACT

Antitrust enforcement and competition policy in the digital economy is high on the agenda of authorities and policymakers. The distinctive features of digital markets and the strategic role played by large platforms apparently require a rethinking of the antitrust regime. Several reform proposals point to the need to integrate the antitrust toolkit with *ex ante* measures since there is a risk that *ex post* enforcement would be too slow to successfully keep markets competitive and contestable. The aim of this paper is to investigate whether the invoked regulatory approach reflects the distinctive structural features of digital markets or whether it is just an enforcement short-cut.

## 1. Introduction

Antitrust enforcement and competition policy in the digital economy is high on the agenda of authorities and policymakers. The flood of reports and policy papers recently released reflects the ongoing debate over the capability of current antitrust rules and tools to handle the emergence of large technology platforms (hereinafter "BigTechs" or "online platforms"), to scrutinize their practices and business models.[1]

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[1] See Australian Competition and Consumer Commission, 'Digital platforms inquiry', (2019) <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry> accessed 10 June 2020; Austrian Competition Authority, 'Digitalisation and Competition Law', (2020) <https://www.bwb.gv.at/fileadmin/user_upload/Considerations_on_digitalisation_challenges_in_the_economy.pdf> accessed 20 June 2020); Belgian Competition Authority, Dutch Authority for Consumers & Markets, and Luxembourg Conseil de la Concurrence, 'Joint memorandum on challenges faced by competition authorities in a digital world', (2019) <https://www.belgiancompetition.be/en/about-us/publications/joint-memorandum-belgian-dutch-and-luxembourg-competition-authorities> accessed 1 May 2020; J. Crémer, Y.-A. de Montjoye, and H. Schweitzer, 'Competition policy for the digital era', (2019) Report for the European Commission <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 10 May 2020; French Competition Authority, 'Contribution to the debate on competition policy and digital challenges', (2020) <https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf> accessed 4 March 2020; German Commission 'Competition Law 4.0', 'A new competition framework for the digital economy', (2019) <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3> accessed 5 May 2020; Global Antitrust Institute, 'Report on the Digital Economy', (2020) <https://gaidigitalreport.com> accessed 10 January 2021; Nordic Competition Authorities, 'Digital Platforms and the Potential

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The distinctive features of these markets apparently require a rethinking of the antitrust regime. Notably, the presence of strong economies of scale, extreme indirect network effects, remarkable economies of scope due the role of data as a critical input, and conglomerate effects, along with consumers' behavioural biases and single-homing tendency, would represent significant barriers to entry that make digital markets highly concentrated, prone to tipping and not easily contestable. Therefore, large incumbent players appear not to be under threat and hard to dislodge. Their market power is not merely temporary and can be expected to persist at least in the short-medium term. Moreover, online platforms act as gatekeepers and regulators, and frequently play a dual role, being simultaneously operators for the marketplace and sellers of their own products and services in competition with rival sellers. Accordingly, because of this regulatory role and the related intermediation power, dominant platforms should bear a special responsibility in ensuring a level playing field.

To this end, some reports have envisaged the idea of establishing a public utilities-style regulation for the digital economy. They have advocated the creation of a digital authority able to impose measures against companies holding a strategic market status.[2] In similar vein, former U.S. democratic presidential candidate Elizabeth Warren proposed designating large tech companies as 'platform utilities' which should be prevented from competing on their own platforms.[3] Furthermore, several reports have agreed on the need to integrate the traditional antitrust toolkit with *ex ante* interventions to prevent anti-competitive practices by dominant platforms. Indeed, in fast-moving markets characterized by winner-takes-most dynamics there is a risk that *ex post* enforcement comes too late to keep markets competitive and contestable.

The European Commission seems ready to embrace the new regulatory approach. Unveiling its digital strategy, the Commission argued that competition rules need to be adapted to the specific circumstances under which new digital business models operate.[4] Because of their systemic role, certain online platforms, acting as "private gatekeepers to markets, customers and information", may jeopardise the fairness and openness of markets.[5] Since "competition policy alone cannot address all the systemic problems that may arise in the platform economy", additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry.[6] In particular, the Commission announced the launch of a sector inquiry to evaluate the effectiveness of the current competition rules and stated that it would explore whether *ex ante* regulatory responses may be needed to ensure markets contestability against gatekeeping platforms with significant network effects.[7] In addition, the Commission launched a public consultation on the need for a possible new competition tool that would allow addressing structural competition problems in a timely and effective manner by imposing behavioural and, where appropriate, structural remedies.[8] In December 2020 the Commission has finally released its proposal for the Digital Markets Act (DMA).[9]

A new *ex ante* regime aimed at governing digital firms with strategic position ('strategic market status') has been also pro-

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Changes to Competition Law at the European Level', (2020) <https://www.kfst.dk/analyser/kfst/publikationer/dansk/2020/20200928-digital-platforms-and-the-potential-changes-to-competition-law/> accessed 10 January 2021; Stigler Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee (2019) <https://research.chicagobooth.edu/stigler/events/single-events/antitrust-competition-conference/digital-platforms-committee> accessed 5 May 2020; Swedish Competition Authority, 'Competition in Digital Markets in Sweden', (2021) <https://www.konkurrensverket.se/en/news/risk-for-competition-problems-on-swedish-digital-markets/> accessed 26 February 2021; UK Competition and Markets Authority, 'Online Platforms and Digital Advertising', (2020) Market Study Report <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> accessed 10 July 2020; UK Digital Competition Expert Panel, 'Unlocking digital competition', (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 10 January 2020; U.S. House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law, 'Investigation of Competition in Digital Markets', Majority Staff Reports and Recommendations, (2020) <https://judiciary.house.gov/uploadedfiles/investigation_of_competition_in_digital_markets_majority_staff_report_and_recommendations.pdf> accessed 10 January 2021.

[2] Stigler Committee (n 1) 78-79 and 83-92; UK Digital Competition Expert Panel (n 1) 5.

[3] E. Warren, 'Here's how we can break up Big Tech', (2019) <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> accessed 15 January 2020. See also L.M. Khan, 'The Separation of Platforms and Commerce', (2019) 119 Columbia Law Review 973; Open Markets Institute, 'Restoring Antimonopoly Through Bright-Line Rules', (2019) <https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/> accessed 5 June 2020; K.S. Rahman, 'Regulating informational infrastructure: internet platforms as the new public utilities', (2018) 2 Georgetown Law Technology Review 234; M. Stoller, S. Miller, and Z. Teachout, 'Addressing Facebook and Google's Harms Through a Regulated Competition Approach', (2020) American Economic Liberties Project <https://static1.squarespace.com/static/5df44e0792ff6a63789b5c02/t/5e90c1f1f177386f95c33662/1586545139529/Working+Paper+Series+on+Corporate+Power_2.pdf> accessed 5 June 2020; J. Taplin, *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy* (Little, Brown & Co., 2017); T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018).

[4] European Commission, Communication 'Shaping Europe's digital future', COM(2020) 67 final, 8.

[5] European Commission (n 4) 8.

[6] European Commission (n 4) 9.

[7] European Commission (n 4) 10. See also European Commission, 'Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market', (2020) Inception impact assessment <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed 2 July 2020.

[8] European Commission, 'New Competition Tool', (2020) Inception impact assessment <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 2 July 2020.

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

moted by the UK Competition and Markets Authority (CMA), which has delivered the advice of its Digital Markets Taskforce to government on the potential design and implementation of pro-competitive measures for unlocking competition in digital markets.[10]

Previously, in their respective inquiries on digital advertising markets, the British authority and the Australian Competition and Consumer Commission (ACCC) shared the view that the emergence of some large online platforms requires new approaches, suggesting the adoption of a code of conduct to address their market power in digital advertising markets and their bargaining power vis-à-vis media businesses.[11]

Conversely, in the U.S., a cautious approach has been advocated by the Council of Economic Advisers to the President, which highlighted some downsides of a new, far-reaching regulation.[12] The Council considered antitrust agencies well-equipped to protect consumers from anti-competitive behaviour also in the digital economy, noting that such agencies have opened reviews into market-leading online platforms. Notably, the Antitrust Division of the Department of Justice (DoJ) is reviewing whether online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers ;[13] and the Federal Trade Commission (FTC) has launched an *ex post* evaluation of BigTech acquisitions.[14]

As a result, the DoJ has recently filed a lawsuit alleging that Google engaged in anticompetitive conduct to preserve monopolies in search and search-advertising,[15] and the FTC has sued Facebook alleging that the company has illegally maintained its dominance through a years-long course of anticompetitive conduct.[16] Further, the FTC is seeking a permanent injunction that could also require divestitures of assets (including Instagram and WhatsApp) and prior notice and approval for future mergers and acquisitions. Moreover, some U.S. States, led by Texas Attorney General, have filed an antitrust lawsuit against Google claiming it has sought to limit competition in online advertising markets through exclusionary tactics and suggesting an unlawful agreement with Facebook over advertising auctions.[17]

Nonetheless, at the end of a long investigation into the state of competition in the digital economy, the U.S. House Judiciary Committee's Antitrust Subcommittee has recommended a massive overhaul of antitrust provisions, also calling for overturning several Supreme Court' decisions,[18] and is holding a series of hearings to consider legislative proposals to modernize the antitrust law.[19]

In sum, with the rise of online platforms, a revival of regulation can be seen on the horizon. At least, it is possible to identify a move towards a 'more regulatory approach'.

Rather than wrestling with the long-standing question about the primacy of antitrust over regulation, or vice versa whether a regulatory regime should displace antitrust laws, the aim of this paper is to investigate whether the invoked regulatory approach reflects the distinctive structural features of digital markets, which would impede self-correction by preventing competition from solving by itself problems associated with them, or whether it represents just an enforcement short-cut, that is, an attempt to address some anti-competitive practices by dominant online platforms avoiding the hurdles and burdens of standard antitrust analysis.

The paper is structured as follows. Section 2 provides an analysis of the interplay between antitrust and regulation. Section 3 explains how the emergence of platform business models might shift the current equilibrium between antitrust and regulation and illustrates the features of the main regimes emerged so far. Section 4 evaluates the premises and implications of the more regulatory approach to antitrust law. The fifth Section concludes by maintaining that the *raison d'être* of the invoked *ex ante* regulation seems to reside more in an enforcement failure because of an alleged gap in the current antitrust rules, than in a market failure.

## 2. Antitrust vs. regulation: where do we stand?

The boundaries between antitrust and regulation have always been erratic. This is mainly attributable to the fact that the concepts themselves of antitrust and regulation have been long debated. However, over time the literature has managed to converge on a limited set of shared theoretical conclusions.

Aside from debated questions concerning the ultimate goals of antitrust, competition is commonly accepted as the

[10] UK Competition and Markets Authority, 'A new pro-competition regime for digital markets. Advice of the Digital Markets Taskforce', (2020) <https://www.gov.uk/cma-cases/digital-markets-taskforce> accessed 11 January 2021.

[11] Australian Competition and Consumer Commission (n 1); UK Competition and Markets Authority (n 1).

[12] U.S. Council of Economic Advisers, 'Economic Report of the President', (2020) 222 <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf> accessed 12 February 2020.

[13] U.S. Department of Justice, 'Justice Department Reviewing the Practices of Market-Leading Online Platforms', (2019) <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms> accessed 20 April 2020.

[14] U.S. Federal Trade Commission, 'FTC to Examine Past Acquisitions by Large Technology Companies', (2020) <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed 20 April 2020.

[15] U.S. Department of Justice, 'Justice Department Sues Monopolist Google For Violating Antitrust Laws', (2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 12 January 2021.

[16] U.S. Federal Trade Commission, 'FTC Sues Facebook for Illegal Monopolization', (2020) <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 12 January 2021.

[17] *The State of Texas et al. v. Google, LLC*, Case 4:20-cv-00957 (E.D. Tex. 2020).

[18] U.S. House of Representatives (n 1).

[19] U.S. House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law, 'House Judiciary Antitrust Subcommittee Announces Series of Hearings on Proposals to Curb the Dominance of Online Platforms and Modernize Antitrust Law', (2021) <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4379> accessed 19 February 2021.

best regulator, meaning that an effective antitrust policy reduces the need for regulation. Indeed, it has been empirically observed that effective competition leads to lower prices, better quality (for existing products and services) and innovation (in new products and services).[20] To this end, antitrust addresses the problem of market power through a flexible and horizontal system of proscriptions typically enforced with a backward-looking procedure. In this sense, antitrust performs a prophylactic function by safeguarding the competitive process, instead of dictating market outcomes. Conversely, regulation is prescriptive in nature. It favours forward-looking intervention based on a rigid set of (normally, sector-specific) clear-cut rules where the conduct required is identified from the outset. Hence, regulation ensures higher technical specialization and is more effective in addressing competition problems that result from structural market imperfections. Furthermore, regulation has a wider scope than antitrust because it copes with a larger number of market defects and also pursues social aims. Indeed, in addition to the problem of market power, economic regulation deals with aspects such as externalities or spill-overs, information asymmetry, buyers' inability to take care of their interests or to implement the exchange on their own, unfair allocation of resources and welfare.[21]

Considering their partial overlap in addressing market power, antitrust and economic regulation are often referred to as part of the same broad family.[22] It follows that the choice between antitrust and regulation depends to a great extent on the trade-offs in the specific case concerned.[23] Notably, it requires assessment of whether *ex ante* regulatory intervention in the market furnishes significant incremental benefits with respect to existing *ex post* antitrust policies of general applicability. This approach has, for instance, recently fuelled the debate on net neutrality regulation in the U.S..[24] Indeed, according to a proportionality test, in a perfect scenario economic regulation should leave as much room as possible for competition law.[25] Moreover, not only does the proportionality principle condition the choice between economic regulation and antitrust, but, once the former has been favoured, it also affects how regulation can impact on the market. Therefore, regulation should refrain from introducing artificial barriers to entry, such as excessive compliance and administrative costs; it should be transitory in time and in scope; and it should be as flexible as possible, especially when dynamic markets are involved.[26]

Against this background, the interplay between antitrust and regulation has gone through various phases, swinging back and forth from rivalry to complementarity.

In application of a 'plain repugnancy' standard, U.S. antitrust laws have for long predominated over regulation.[27] However, more recently the U.S. Supreme Court has shifted the balance, suggesting antitrust deference to regulation because of expertise and costs concerns.[28] Namely, according to the Court's line of reasoning, where a regulatory structure designed to deter and remedy anti-competitive harm already exists, the additional benefit to competition provided by antitrust enforcement will tend to be small. Furthermore, the risk of mistaken findings of antitrust violations and the resulting cost of false positives are considered especially significant, because they may stifle the very conduct that antitrust law is designed to protect. Moreover, some actions consisting of anti-competitive violations may be beyond the practical ability of an antitrust court to control, requiring an effective day-to-day supervision of a highly detailed decree.

This approach has been harshly criticized.[29] The limitations of blind faith in regulatory oversight have been well ex-

[20] UK Competition and Markets Authority, 'Regulation and Competition. A Review of the Evidence', (2020) paras. 1.3 and 2.4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857024/Regulation_and_Competition_report_-_web_version.pdf> accessed 20 April 2020.

[21] J. Tirole, *Economics for the Common Good*', (Princeton University Press, 2017) 160.

[22] M. Handler, 'Regulation versus Competition', (1973-74) 43 Antitrust Law Journal 277; M. Maggiolino, 'The Regulatory Breakthrough of Competition Law: Definitions and Worries', (2015) in J. Drexl J. and F. Di Porto (eds.), *Competition law as regulation* (Edward Elgar Publishing) 3.

[23] N. Dunne, *Competition Law and Economic Regulation. Making and Managing Markets* (Cambridge University Press, 2015) 34-46.

[24] See e.g. A.D. Melamed and A.W. Chang, 'What Thinking About Antitrust Law Can Tell Us About Net Neutrality', (2016) 15 Colorado Technology Law Journal 93; M.K. Ohlhausen, 'Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously', (2016) 15 Colorado Technology Law Journal 119.

[25] See Dunne (n 23) 55, arguing that when faced with market imperfections competition law is the option of first resort, regulation the option of second resort, and comprehensive central planning that of last resort.

[26] UK Competition and Markets Authority (n 21) paras. 1.13, 1.16, 4.63, and 4.65. See also R. Baldwin, M. Cave, and M. Lodge, *Understanding Regulation* (Oxford University Press, 2012).

[27] See *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

[28] See *NYNEX Corp. v. Discon Inc.*, 525 U.S. 128 (1998); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009). See also D.W. Carlton and R.C. Picker, 'Antitrust and Regulation', (2014) in N.L. Rose (ed.), *Economic Regulation and its Reform* (University of Chicago Press) 24-26: "[I]n the century-long seesaw battle over how to design competition policy, [antitrust law] has turned out to be more enduring than regulation. … Antitrust can say no, but struggles with saying yes. … antitrust is a poor framework for price setting or for establishing affirmative duties toward rivals. Price setting in a nonmarket context often requires detailed industry knowledge and often turns on political decisions about levels of service and the rate of return to capital needed to provide those services. … However, antitrust says no very well, while regulators often have a hard time saying no. Area-specific regulation through special agencies gives rise to the fear that the regulators will be captured by the regulated industry."

[29] See e.g. R.M. Brunnell, 'In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity', (2012) 78 Antitrust Law Journal 279; S.L. Dogan and M.A. Lemley, 'Antitrust Law and Regulatory Gaming', (2009) 87 Texas Law Review 687 (2009); U.S. Federal Trade Commission, 'Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries', (2010) Statement before the U.S. House of Representatives <https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-courts-and-competition-policy-committee-judiciary-united/100615antitrusttestimony.pdf> accessed 18 April 2020; H.A.

plained not solely in light of the risks of regulatory capture, as framed by private-interest and public choice theories. Indeed, even the most competition-conscious regulatory structure cannot preclude abuses of that structure, since the very regulatory structure that exists to promote competition can create gaming opportunities for rivals bent on achieving anti-competitive goals.[30] In addition, the cost of false positives cannot be overstated. Rather, quite ironically, the concern raised by recent reports on digital markets is about antitrust under-enforcement, since the harm to competition is expected to be longer term than in traditional markets because of the stickiness of market power.[31]

On the other side of the Atlantic, the European Court of Justice (CJEU) has expressed greater favour for the application of antitrust rules in regulated industries. Notably, regarding the margin squeeze of competitors, the CJEU has ruled that the approval by a national sector regulator of a dominant undertaking's pricing practices cannot, as such, absolve that undertaking from responsibility under antitrust rules.[32] It is only if anti-competitive behaviour is required by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity, that a firm may escape liability (so-called 'State action defence').[33] Where the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings, mere encouragement of anti-competitive conduct is insufficient. According to the Court, because antitrust provisions are of general application, they cannot be restricted by the existence of a regulatory framework adopted by the EU legislature for *ex ante* regulation of specific industries.[34]

However, the regulatory framework is not considered irrelevant to the antitrust analysis. In the most regulated industry (the pharmaceutical sector), the CJEU intervened against the risks of regulatory gaming, i.e. of strategic implementation of the regulatory framework, stating, on the one hand, that a dominant undertaking cannot use regulatory procedures in such a way as to prevent or impede the entry of competitors in the market,[35] and, on the other hand, that the assessment of whether there is potential competition must be carried out with consideration of the regulatory constraints characteristic of the sector.[36]

## 3. Competition policy in the age of BigTechs: the challenges of digital markets

Because of the combination of the aforementioned factors, along with strategic investment policies, sunk costs and strong corporate cultures, competition in the digital economy is increasingly a competition among ecosystems.[37] Notably, a circular relationship exists among network effects, the data advantage and portfolio effects, which, in their reciprocal interactions, design the perimeter of the digital ecosystem. The more users are attracted to the platform, the more the platform is considered valuable, the more data are collected, the more the service provided can be improved (either by means of a higher level of personalization or by means of a wider range of services offered to the logged user), the more the user is encouraged to stay within the digital ecosystem and discouraged from trying the competing services.

Once a digital ecosystem has been established, it increasingly attracts hardware, devices, software, apps, websites and a varied range of complementary services. This centripetal force facilitates the creation of ecosystem technical standards, which can pose serious protocol interoperability problems and, in so doing, increase switching costs and lock-in scenarios.

The multi-layered technical architecture described above is fostered by a deep knowledge of users' behaviours, especially when commercial use is made of their personal data and attention. Online platforms are able to inspire customer loyalty and to steer demand by leveraging on a wide range of sophisticated techniques, including consumers' stickiness with default settings (status quo or confirmation bias), free-effect, addiction, ever-greater use, short-term gratification, salience or impatience. The ability of BigTechs to take advantage of such behaviours significantly limits multi-homing and further increases barriers to entry.

In sum, all these features make digital markets highly concentrated, prone to tipping, and not easily contestable.[38] Hence, incumbent platforms appear hard to dislodge.

In addition, large online platforms act as gatekeepers and regulators due to their rule-setting role within the ecosystem. Indeed, online platforms develop ranking algorithms, determine the conditions under which a business user can enter the network, and fix the criteria governing the suspension, delisting, dimming or termination of their accounts and of the associated goods/services sold via the platform. Such actions are perceived as particularly threatening whenever a BigTech performs a dual role, acting as both an intermediary and a trader operating on the platform, because in such circumstance it may have the incentive to discriminate to its own benefit (self-preferencing).

Because of their gatekeeper (or strategic market) status, online platforms are unavoidable trading partners in a wide

Shelanski, 'The Case for Rebalancing Antitrust and Regulation', (2011) 109 Michigan Law Review 683.

[30] Dogan and Lemley (n 29).

[31] See Crémer, de Montjoye, and Schweitzer (n 1) 42; Stigler Committee (n 1) 74.

[32] CJEU, 14 October 2010, Case C-280/08 P, *Deutsche Telekom v. European Commission*, paras. 80-85; CJEU, 10 July 2014, Case C–295/12 P, *Telefónica SA and Telefónica de España SAU v European Commission*. See also CJEU, 25 March 2021, Case C-165/19 P, *Slovak Telekom v. European Commission*.

[33] CJEU, 9 September 2003, Case C-198/01, Consorzio *Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*, para 53.

[34] *Telefónica* (n 32) para. 128.

[35] CJEU, 6 December 2012, Case C-457/10 P, AstraZeneca *v. European Commission*, para. 134.

[36] CJEU, 30 January 2020, Case C-307/18, *Generics UK Ltd and others v. Competition and Markets Authority*, para. 40.

[37] Crémer, de Montjoye, and Schweitzer (n 1) 33-34.

[38] See also Mark Lemley and Andrew McCreary, 'Exit Strategy', (2021) 101 Boston University Law Review, suggesting that the venture capital industry, which plays a critical role in funding innovative startups, contributes to market consolidation by encouraging startups to exit via a sale to an incumbent firm.

range of contexts, thus exercising an intermediation (or bottleneck) power even in apparently fragmented marketplaces, i.e. those where the market share is significantly below 40%.[39] The combination of gatekeeper status on the platform market and regulatory power within the platform brings with it a special responsibility to ensure a level playing field and undistorted competition both on the platform and on neighbouring markets.

The economic features of digital markets and the strategic role played by large platforms are the premises of a significant shift in the approach to the interface between antitrust and regulation, whereas traditionally the former has been seen as preferable to the latter.[40]

### 3.1. *The 'breakup and regulate' approach*

The hardest solution is advanced by the supporters of breakups and bans on vertical integration. Notably, U.S. Senator Elizabeth Warren has proposed to restore competition to the technology sector by designating BigTechs as 'platform utilities' that should be prevented from competing on their own platforms.[41] In a similar vein, Lina Khan, the Open Markets Institute, and the American Economic Liberties Project has invited to recover the common carriage regime and structural remedies to ensure that new bottleneck facilities do not distort competition.[42] By this view, the best way to preserve competition and other essential values of a democratic society (such as privacy, free speech, and non-discrimination) is to ban any vertical integration.

Releasing the findings of its investigation, the U.S. House Judiciary Committee's Antitrust Subcommittee has shared these concerns and recommended to consider legislative reforms drawing on both structural separation and line of business restrictions in order to reduce the conflict of interests faced by dominant platforms functioning as critical intermediaries.[43]

The UK CMA is also open to exploring the separation (namely, a range of options from accounting and management separation to full ownership separation) of Google and Facebook as a remedy to address concerns around transparency, conflicts, and market power in the advertising intermediation (so-called "ad tech stack").[44]

In contrast, the ACCC does not recommend that either Google or Facebook divest its subsidiary businesses, but rather relies exclusively on the adoption of a code of conduct to address the imbalance of bargaining power between online platforms and media businesses.[45] By the same token, and more in general, several scholars have expressed reservations about divestitures in the tech industry considering old-style regulation impractical in an era of global firms, rapid technological progress and contestable markets, and noting that authorities do not have a good track record with enforced breakups for monopolistic practices.[46] Notably, Jean Tirole highlights the difficulty to identify a stable essential facility, the risk of destroying the benefits of network externalities, and the possibility that dominant firms may strategically intertwine different services to make it difficult for authorities to "unscramble the eggs."[47] Herbert Hovenkamp sees little merit in proposals to break up large online platforms, because they appear to consider size itself as the wrong to be proscribed and offer little assurance that price or output will improve.[48] The Stigler centre and the Furman reports also consider the break up option very disruptive, while other tools offer a more targeted, pro-business, and pro-consumer solution to foster competition in digital markets.[49]

### 3.2. Ex ante *regulatory approaches*

A second approach to the regulation of online platforms is embraced by several antitrust authorities, policy makers and academics, which stress the inefficiency of relying solely on

[39] See H. Schweitzer, J. Haucap, W. Kerber, and R. Welker, 'Modernisation of abuse control for companies with a dominant market position', (2018) <https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.html> accessed 20 April 2020, holding that unilateral conduct which could promote the tipping of the market should be prohibited even below the threshold for dominance.

[40] See A.D. Melamed, 'Antitrust Law and its Critics', (2020) 83 Antitrust Law Journal 269, noting that it is surprising that regulation seems to be very much on the minds of members of the mainstream antitrust communities.

[41] Warren (n 3).

[42] Khan (n 3); Open Markets Institute (n 3); Stoller, Miller, and Teachout (n 3). See also N. Guggenberg, 'Essential Platforms', (forthcoming) Stanford Technology Law Review; and R. Van Loo, 'In Defense of Breakups: Administering a "Radical" Remedy', (2020) 106 Cornell Law Review 1955.

[43] U.S. House of Representatives (n 1) 380.

[44] UK Competition and Markets Authority (n 1) 24.

[45] See Australian Competition and Consumer Commission (n 1) 116-117.

[46] See e.g. H. Hovenkamp, Statement before the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law, (2020) 6 <https://ssrn.com/abstract=3579693> accessed 30 May 2020; J. Tirole, 'Competition and the Industrial Challenge for the Digital Age', (2020) <https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/competition_and_the_industrial_challenge_april_3_2020.pdf> accessed 10 July 2020; C.S. Wilson and K. Klovers, 'The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech', (2020) 8 Journal of Antitrust Enforcement 10.

[47] Tirole (n 46). Conversely, see J. Kwoka and T. Valletti, 'Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms', (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613> accessed 20 February 2021. See also R.J. Gilbert, 'Separation: A Cure for Abuse of Platform Dominance?', (forthcoming) Information Economics and Policy, arguing that structural separation does not eliminate incentives for platforms to discriminate in the provision of service quality and the ability of vertically integrated platforms to imitate rivals does not necessarily harm consumers.

[48] Hovenkamp (n 46).

[49] Stigler Committee for the Study of Digital Platforms (n 1) 80; UK Digital Competition Expert Panel (n 1) 77. See also American Antitrust Institute, 'The State of Antitrust Enforcement and Competition Policy in the U.S.', (2020) 37 <https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL.pdf> accessed 1 June 2020.

*ex post* antitrust enforcement and call for an *ex ante* regulatory framework to complement antitrust rules in addressing competition issues in digital contexts. On this view, long-lasting antitrust investigations appear ill-suited to dealing effectively with the fast-moving dynamics of digital markets since there is a risk that *ex post* enforcement will come too late to keep markets competitive and contestable. Furthermore, the antitrust toolkit is of general application, so that it is not well-equipped to handle the disruptive business models concerned, whereas BigTechs present competition issues that cannot be adequately addressed by rules suitable for all industries. Moreover, current antitrust remedies can often be ineffective in the digital landscape and, in any case, they lack the same reach and the degree of legal certainty and predictability associated with *ex ante* regulation.

Notably, as a result of its market study on digital advertising markets and ad-supported platforms, the UK CMA has welcomed the proposal advanced by the Digital Competition Expert Panel for the development of a pro-competitive regulatory regime.[50] The Furman report has indeed recommended establishing a code of conduct for online platforms with a strategic market status.[51] The code is to be based on a set of core principles aimed at ensuring that business users are (i) provided with access to designated platforms on a fair, consistent and transparent basis; (ii) are provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and (iii) are not unfairly restricted from utilising alternative platforms or routes to market. A newly-established Digital Markets Unit will monitor and enforce this set of rules (enforced co-regulation).

By the same token, the Stigler Committee suggests establishing a Digital Authority with a wide range of tasks in order to provide a valuable complement to antitrust enforcement for platforms with bottleneck power.[52] Moreover, on the antitrust litigation side, by addressing the risks of underenforcement, the Committee proposes recalibrating the balance between the risks of false positives and false negatives, and relaxing the proof requirements imposed upon plaintiffs in appropriate cases or reversing burdens of proof.[53] For instance, rules that presume anti-competitive harm on the basis of preliminary showings by antitrust plaintiffs and shift the burden of exculpation to the defendant may be adopted, as well as rules ensuring that plaintiffs are not required to prove matters in regard to which the defendants have greater knowledge and better access to relevant information.

The ACCC shares the view that the business models of online platforms, their global nature, and the speed with which digital technologies and services evolve and iterate require new approaches. In particular, similarly to the UK Digital Competition Expert Panel, the ACCC advocates the adoption of a code of conduct to address the imbalance of bargaining power between online platforms and media businesses. It also recommended the creation of a specialist digital platforms branch within the antitrust agency in order to supplement existing investigative tools with additional proactive investigation, monitoring and enforcement powers.[54]

Once the ACCC started working with Facebook, Google, and news media businesses to develop and implement voluntary codes of conduct, it reported to the Government that the core issue of payment for content was highly unlikely to be resolved through this voluntary process. As a result, the Government asked the ACCC to develop a mandatory code of conduct and in December 2020 "The News Media and Digital Platforms Mandatory Bargaining Code Bill" has been introduced to Parliament.[55]

The German Commission 'Competition Law 4.0' takes a position against the creation of a Digital Agency and the underlying idea of establishing a public utilities-style regulation for the digital economy.[56] However, it proposes a set of new clear-cut prohibitions for dominant online platforms, with a possibility for them to prove that an exception is justified.[57] Indeed, since digital markets tend towards rapid concentrations of power, hence requiring speedy intervention against anti-competitive practices, the best approach is to apply relatively simple rules of conduct.[58] On the same grounds, the French Competition Authority considers it useful to draw up a list of practices that raise concerns specific to "structuring digital platforms."[59] Furthermore, the German Commission proposes accelerating the development of these new rules of conduct for dominant digital platforms through an EU Platform Regulation that would both flesh out and supplement competition law.[60]

The Benelux joint memorandum calls for the introduction of an *ex ante* intervention mechanism to prevent anti-

[50] UK Competition and Markets Authority (n 1).
[51] UK Digital Competition Expert Panel (n 1).
[52] Stigler Committee (n 1) 78-79 and 83-92.
[53] Stigler Committee (n 1) 74 and 77-78, where it is also observed that such a reshaping of antitrust litigation would require a statutory intervention and might be accompanied by the establishment of specialized courts.

[54] Australian Competition and Consumer Commission (n 1) 138-142 and 255-257. See also Australian Government, 'Regulating in the digital age', (2019) Government Response and Implementation Roadmap for the Digital Platforms Inquiry <https://treasury.gov.au/publication/p2019-41708> accessed 28 April 2020, committing $27 million over four years for a Digital Platforms Branch within the ACCC.
[55] Parliament of Australia, 'Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill', (2020) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6652> accessed 28 January 2021. See also Australian Treasurer, 'Additional amendments to News Media and Digital Platforms Mandatory Bargaining Code' (2021) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/additional-amendments-news-media-and-digital> accessed 23 February 2021.
[56] German Commission 'Competition Law 4.0' (n 1) 25 and 77-81.
[57] German Commission 'Competition Law 4.0' (n 1) 49. In the same vein, Monopolkommission, 'Competition 2020', (2020) Biennial Report <https://monopolkommission.de/en/reports/biennial-reports/342-biennial-report-xxiii-competition-2020.html> accessed 30 July 2020.
[58] German Commission 'Competition Law 4.0' (n 1) 24.
[59] French Competition Authority (n 1) 7-8.
[60] German Commission 'Competition Law 4.0' (n 1) 49. Indeed, according to the German Commission, this shift would amount to a transition from an "infringement by effect" to an "infringement by object" rule of Article 102 TFEU, which can hardly be achieved through a soft-law instrument such as a Commission Notice. See also Monopolkommission (n 57).

competitive conduct by digital gatekeepers.[61] Notably, competition authorities should be equipped with the power to intervene on dominant platforms without establishing the infringement, by imposing proportionate remedies, behavioural and non-punitive in nature. Rebuttable presumptions on the proportionality of certain remedies are considered appropriate, as well as a punitive mechanism, for companies which do not abide with the imposed remedies.

In the same vein, with regard to banking and financial markets, the Expert Group on Regulatory Obstacles to Financial Innovation has recommended the Commission to introduce *ex ante* rules to prevent large, vertically integrated platforms from discriminating against product and service provision by third parties.[62]

Finally, the European Commission has remarked that the rules on competition are currently under revision so that they are better suited to the digital economy.[63] The Commission is concerned that competition policy alone may not address all the systemic problems that can arise in the platform economy, where certain online players act as private gatekeepers to markets, customers and information. Hence, additional *ex ante* rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as to safeguard public interests that extend beyond purely economic considerations.

According to the inception impact assessment, the adoption of an *ex ante* regulatory framework for large online platforms acting as gatekeepers would include two sub-options.[64] The first option would introduce a prohibition or restriction of certain unfair trading practices (blacklisted practices), such as certain forms of self-preferencing and the acceptance of supplementary commercial conditions that by their nature have no connection with the underlying contractual relationship. The second pillar of a new *ex ante* regulatory framework would also include tailor-made remedies covering specific issues and individual large online platform companies, and applied on a flexible, case-by-case basis. These remedies would be adopted and enforced by a competent regulatory body and could include platform-specific non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements.

Moreover, the European Commission has published a public consultation on the need for a new competition tool that would allow addressing structural competition problems in a timely and effective manner.[65] The proposal aims at providing the Commission with powers akin to those exercised by the CMA when it carries out market investigations.[66] In particular, after establishing a structural competition problem through a market investigation, the new tool should allow the Commission to impose behavioural and, where appropriate, structural remedies, without running a proceeding under the antitrust provisions.

The debate provides useful insights for US policy circles as well, since the U.S. House Judiciary Committee's Antitrust Subcommittee has suggested emulating the European model imposing a special responsibility on dominant firms by introducing the notion of the abuse of dominant position and overriding several Supreme Court' decisions in order to clarify prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying, and self-preferencing.[67] The Subcommittee is currently holding a series of hearings to consider legislative proposals to modernize the antitrust law and strengthen its enforcement.[68]

Against this background, although the described proposals share the common belief that digital markets require a specific intervention, at the same time they diverge among themselves on the solutions advocated to address this issue. Notably, three main models emerged so far.

#### 3.2.1. *The UK solution: firm-specific and principles-based code of conduct*

As already mentioned, relying on the recommendations of the Digital Competition Expert Panel's report and drawing evidence from the market study into online platforms and digital advertising, the CMA has supported the adoption of an *ex ante* regulatory framework for online platforms with a strategic market status and the appointment of a specific Digital Markets Unit tasked at overseeing this framework and enforcing the new set of rules. Finally, the CMA has recently provided advice to the Government on the design and implementation of this pro-competition regime for digital markets.[69]

According to CMA's recommendations, the process of designation should be led by an evidence-based economic assessment aimed at evaluating whether "a firm has substantial,

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[61] Belgian Competition Authority, Dutch Authority for Consumers & Markets, and Luxembourg Conseil de la Concurrence (n 1) 5-6.

[62] Expert Group on Regulatory Obstacles to Financial Innovation, 'Thirty Recommendations on Regulation, Innovation and Finance', (2019) 79-80 Final Report to the European Commission <https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191113-report-expert-group-regulatory-obstacles-financial-innovation_en.pdf>.

[63] European Commission (n 4) 8-10.

[64] European Commission (n 7) 4.

[65] European Commission (n 8).

[66] UK Enterprise Act 2002, Section 134. See A. Fletcher, 'Market Investigations for Digital Platforms: Panacea or Complement?', (2021) 12 Journal of European Competition Law and Practice 44, considering the pros and cons of the new competition tool by comparing it with the UK market investigation powers granted to the CMA; and G.S. Crawford, P. Rey, and M. Schnitzer, 'An Economic Evaluation of the EC's Proposed "New Competition Tool", (2020) <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html> accessed 10 January 2021. On the institutional set-up of the new competition tool, see also H. Schweitzer, 'The New Competition Tool: Its institutional set up and procedural design', ibid.; and R. Wish, 'New Competition Tool: Legal comparative study of existing competition tools aimed at addressing structural competition problems with a particular focus on the UK's market investigation tool', ibid.

[67] U.S. House of Representatives (n 1) 391-399. See also S. Weber Waller, Submission to the U.S. House Judiciary Antitrust Subcommittee Investigation of Digital Platforms, (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567376> accessed 20 May 2020; E.M. Fox, 'Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide', (2019) 98 Nebraska Law Review 297; L.M. Khan and S. Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents', (2017) 11 Harvard Law & Policy Review 235.

[68] U.S. House of Representatives (n 19).

[69] UK Competition and Markets Authority (n 10).

entrenched market power in at least one digital activity, providing the firm with a strategic position (meaning the effects of its market power are likely to be particularly widespread and/or significant)."[70] Therefore, the strategic market status test should be run with respect to a specific digital activity and should involve not only an assessment of market power, but also an assessment of whether a firm's market power in an activity provides it with a strategic position. With regards to the activities, relevant sectors could include online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services.

Along with the activity undertaken, factors that should be considered in prioritising potential firms for designation are: the firm's revenue in that activity; the firm's role as a gateway for a diverse range of other businesses or the fact that the activity is an important input for a diverse range of other businesses; the activity's role in enabling a firm to extend or protect its market power; circumstances when a firm can use an activity to determine the 'rules of the game' within its own ecosystem and also in practice for a wider range of market participants; the activity's effects on socially or culturally important markets; and whether a sector regulator is better placed to address the issues of concern.[71] Accordingly, CMA's expectation is that only a small number of digital firms are likely to meet the strategic market status test.[72]

The key pillar of the UK regime is represented by a legally binding firm-specific regulation, that will help to shape the behaviour of strategic market status firms and govern elements of how they do business with other companies and treat their users.[73] Rather than adopting a sectoral regulation and providing a list of 'one-size-fits-all' rules, the UK approach relies on an enforceable code of conduct which will be tailored to the specific firm with a strategic position, meaning to its activity and business model, and will set out how the firm is expected to behave in relation to the activity motivating its strategic market status designation.[74] Notably, the code will provide a set of enforceable *ex ante* principles for firms with strategic market status to follow, with the aim of preventing them from taking advantage of their positions in the activities that give rise to their designation.

In comparing principles-based and rules-based approaches, the CMA acknowledges that there is a trade-off between providing clarity to firms on the actions they must take in order to comply and providing flexibility such that firms have discretion as to how they comply.[75] However, the CMA notes that, if the rules are applied to a wide range of areas, they tend towards a one-size-fits-all approach which is not tailored to where there is evidence of harm, hence raising risks of over-intervention and unintended consequences such as a reduction of the innovation. Further, rules can be 'tick-box' in nature, leaving them open to circumvention, and will never be exhaustive. Given the pace with which firms' conduct evolves in digital markets, rules are therefore likely to need frequent review and updating to remain effective. For these reasons, according to the CMA, a primarily principles-based approach strikes the right balance between providing clarity and flexibility.

Finally, the Digital Markets Unit should be allowed to impose pro-competitive interventions on firms with strategic market status to address the root cause of their market power, namely remedies that cannot be achieved via the code of conduct.[76] The range of these interventions should include third-party access to data, data mobility, interoperability and common standards, interventions to overcome consumer inertia and default bias, obligations to provide access on fair and reasonable terms, and separation remedies.[77]

#### 3.2.2. *The EU proposal for Digital Markets Act: sector-specific and rules-based regulation*

Differently from the UK regime, the proposal for the DMA unveiled by the European Commission in December 2020 adopts a sector-specific approach.[78]

The DMA aims at ensuring contestable and fair markets in the digital sectors where gatekeepers are present by complementing the enforcement of competition law.[79] The Commission clearly states that the proposal pursues an objective that is "different from that of protecting undistorted competition on any given market, as defined in competition law terms", which is to ensure that markets where gatekeepers are present are and remain contestable and fair, "independently from the actual, likely or presumed effects of the conduct of a given gatekeeper."[80] Indeed, although Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, "their scope is limited" to certain instances of market power (e.g. dominance on specific markets) and of anti-competitive behaviour. Hence, existing antitrust is considered unfit to address effectively the challenges posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.[81] Moreover, competition law "enforcement occurs ex post and requires an extensive investigation of often very complex facts on a case-by-case basis."[82]

Therefore, the Commission does not share the view of the experts appointed to design a competition policy for the digital era.[83] Indeed, the report prepared by Crémer, de Montjoye, and Schweitzer advocates a more vigorous competition policy regime achievable within the general antitrust framework.[84] Admittedly, the report acknowledges that competition rules need to be reshaped and adapted to digital markets' features, promoting a new balance of error costs and the predominance

[70] UK Competition and Markets Authority (n 10) para 12. In order to avoid the creation of an inflexible regime, the CMA recommends that the term 'digital' is interpreted to cover any situation where digital technologies are material to the products and services provided as part of the activity (para 4.16).
[71] UK Competition and Markets Authority (n 10) para 4.23.
[72] UK Competition and Markets Authority (n 10) para 4.23.
[73] UK Competition and Markets Authority (n 10) para 13.
[74] UK Competition and Markets Authority (n 10) para 4.5.
[75] UK Competition and Markets Authority (n 10) Appendix C, paras 19 and 20.
[76] UK Competition and Markets Authority (n 10) para 4.60.
[77] UK Competition and Markets Authority (n 10) para 4.68.
[78] European Commission (n 9).
[79] European Commission (n 9) Recitals 2, 32, 33, 79 and Article 1(1).
[80] European Commission (n 9) Recital 10.
[81] European Commission (n 9) Recital 5.
[82] European Commission (n 9) Recital 5.
[83] Crémer, de Montjoye, and Schweitzer (n 1).
[84] Crémer, de Montjoye, and Schweitzer (n 1) 14.

of legal testing over the effect-based approach.[85] However, regulatory interventions are only invoked to ensure access to data in sector-specific situations, in particular where data access opens up to secondary markets for complementary services.[86]

Instead, the DMA constitutes an internal market law which departs from competition law by embracing different objectives and by identifying a set of harmonised obligations that do not require to demonstrate, on a case-by-case basis, the anticompetitive object and effect of a conduct.[87] Its relevant legal basis is represented by Article 114 TFEU, rather than Article 103 TFEU, which is intended for the implementation of antitrust provisions pursuant Articles 101 and 102 TFEU. The DMA prohibits Member States from imposing on gatekeepers further obligations "for the purpose of ensuring contestable and fair markets", however they remain free to impose obligations in order to protect consumers, to fight against acts of unfair competition, and to enforce antitrust rules.[88]

The scope of the DMA is defined according to a two-step process which includes the nature of the services provided by the online platform and the designation of the latter as a gatekeeper.

With regard to the first condition, the concept of "core platform services" is introduced in order to list those digital services in which, because of their economic features, weak contestability and unfair practices are more frequent.[89] These economic features can confer to the provider of these services a gatekeeper position.[90] The list of core platform services includes intermediation services, search engines, social networks, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, and advertising services.[91] However, the European Commission may add new services as a result of a market investigation.[92]

As a second step, an online platform achieves a gatekeeper status on the basis of a cumulative three criteria test, namely if it has a "significant impact" on the internal market, it serves as an "important gateway" for business users to reach end users, and it enjoys an "entrenched and durable position" in its operations or it is foreseeable that it will enjoy such a position in the near future.[93] However, each of these qualitative criteria is presumed to be met when a quantitative threshold is exceeded.[94] Platforms can rebut these presumptions by presenting "sufficiently substantiated arguments" to demonstrate that, in spite of meeting the thresholds, they do not satisfy the three criteria test.[95] At the same time, following a market investigation and taking into account some qualitative elements, the Commission may identify as a gatekeeper any provider of core platform services that does not satisfy each of the thresholds.[96] Finally, with the aim of preventing market tipping, the DMA draft considers also appropriate to designate an emerging gatekeeper when a platform meets the criteria of significant impact and important gateway, while the criteria of entrenched and durable position is foreseeable.[97]

The designation process set forth in the DMA proposal, by and large, adopts a size-threshold approach. Indeed, the qualitative criteria set in Article 3(1) are not combined with the quantitative thresholds defined in Article 3(2).[98] Further, there is a weak causal link between the aforementioned qualitative and quantitative criteria.[99] Therefore, the designation process appears focused more on size than on whether a platform is actually a gatekeeper. In particular, the lack of multi-homing should be the defining characteristic of gatekeeper scenarios, which can lead to significant market power.[100] Indeed, it is

[85] Crémer, de Montjoye, and Schweitzer (n 1) 50-51. See also J. Blockx, 'The Limits of the 'More Economic' Approach to Antitrust', (2019) 42 World Competition 475 arguing that tools other than effects analysis are needed in antitrust enforcement, such as per se rules.

[86] Crémer, de Montjoye, and Schweitzer (n 1) 41-42 and 82.

[87] P. Ibáñez Colomo, 'The Draft Digital Markets Act: a legal and institutional analysis', (2021) 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790276> accessed 25 February 2021.

[88] European Commission (n 9) Article 1(5) and 1(6).

[89] European Commission (n 9) Recital 12.

[90] European Commission (n 9) Recital 2.

[91] European Commission (n 9) Article 2(2).

[92] European Commission (n 9) Article 17(a).

[93] European Commission (n 9) Article 3(1).

[94] European Commission (n 9) Article 3(2). According to European Commission, 'Digital Markets Act – Impact Assessment support study', (2020) para 148, <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-digital-markets-act> accessed 10 February 2021, these thresholds could result in the identification of 10 to 15 gatekeepers.

[95] European Commission (n 9) Article 3(4).

[96] See European Commission (n 9) Article 3(6), listing the following relevant elements: the size; the number of business users depending on the core platform service to reach end users and the number of end users; entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; scale and scope effects the provider benefits from, including with regard to data; business user or end user lock-in; other structural market characteristics.

[97] European Commission (n 9) Article 15(4), Recitals 26 and 63.

[98] See French Minister of State for Digital Transition and Electronic Communications and Dutch Ministry of Economic Affairs and Climate Policy, 'Considerations of France and the Netherlands regarding intervention on platforms with a gatekeeper position', (2020) <https://www.rijksoverheid.nl/documenten/publicaties/2020/10/15/considerations-of-france-and-the-netherlands-regarding-intervention-on-platforms-with-a-gatekeeper-position> accessed 15 January 2021, acknowledging the tradeoff between quantitative and qualitative criteria and concluding that the latter are indispensable to define the scope.

[99] See D. Geradin, 'What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?', (2021) 13-14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788152> accessed 25 February 2021, noting for instance that "[i]t is hard to see how one could infer that a CPS provider "serves as an important gateway" or has an "entrenched" position in its operations from the mere fact that it has a large number of business and end users (in the case of the former) or it has enjoyed many business and individual users for the past three years (in the case of the latter)."

[100] See European Commission, 'Summary of the contributions of the National Competition Authorities to the impact assessment of the new competition tool', (2020) 7 <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html> accessed 10 February 2021. See also L. Cabral, J. Haucap, G. Parker, G. Petropoulos, T. Valletti, and M. Van Alstyne, 'The EU Digital Markets Act', (2021) 9 <https://ec.europa.eu/jrc/en/publication/eu-digital-markets-act> ac-

difficult to imagine how a platform facing multi-homing on its sides could play a gatekeeping function. However, this crucial qualitative indicator is even not included in the list of elements that should be taken into account where the quantitative thresholds are not met.

Moreover, as explicitly stated, "[a]ny justification on economic grounds seeking to demonstrate efficiencies deriving from a specific type of behaviour by the provider of core platform services should be discarded, as it is not relevant to the designation as a gatekeeper."[101] Therefore, it is unclear how platforms may rebut the presumptions, in particular whether they may rely on the qualitative criteria listed under Article 3(6).

Finally, the definition of gatekeeper does not recognize the relevance of different business models that platforms employ. However, the choice of a business model has significant consequences for strategies and incentives affecting the way a platform interacts with its users.[102] As a consequence, the business model approach warns against the formulation of rules that are model-independent.[103] Instead, given the mentioned designation process, the DMA applies the very same obligations to all gatekeepers irrespectively of their different business models.[104]

Notably, the draft introduces a fixed set of eighteen *ex ante* obligations split in two lists: a list of self-enforcing obligations (Article 5) and a list of obligations susceptible of further specification (Article 6). The obligations range from a ban of parity clauses, anti-steering clauses, self-preferencing and certain bundling strategies to duties to deal, data portability and interoperability. They seem to reflect essentially three main concerns raised by gatekeepers, namely risks related to the strengthening, the entrenchment, the leveraging, and the exploitation of market power.[105] This is coherent with the description of the phenomenon provided in the Recitals, where gatekeepers are described as a small number of large platforms with the ability to leverage their advantages, exercise control over whole ecosystems, determine imbalances in bargaining power, and benefit from their dual role.

The obligations apparently capture practices subject to past and ongoing antitrust cases, confirming that a key motivation for the EU initiative is to speed up the enforcement and secure the result of prohibiting certain practices.[106] Indeed, the DMA draft does not allow for objective justification or an efficiency defence.[107]

Therefore, unlike the UK approach which revolves around general principles to apply to specific activities of digital platforms according to their business models and characteristics, the DMA proposal opts for detailed, backward-looking and non-individualized rules. However, this regulatory inflexibility seems at odds with the essential features of digital markets, which are fast-changing, innovative and dynamic, hence requiring a regime designed to swiftly adapt to markets evolution.[108] In order to fill the gap, the proposal allows the Commission to update the obligations laid down in Articles 5 and 6, following a market investigation.[109]

Finally, the Commission has apparently decided to abandon the introduction of the new competition tool. The tool has been folded into the DMA and watered down into market investigations that will allow the Commission to qualify com-

cessed 24 February 2021, noting that, in the platform economics literature, entrenched market power is often measured by the extent and the cost of multi-homing.

[101] European Commission (n 9) Recitals 23.

[102] See Nordic Competition Authorities (n 1) 17, arguing that the complexity and variety of business models adopted by digital platforms, together with the high pace of innovation that characterizes this dynamic sector, make the establishment of clear-cut *ex ante* criteria a challenging task; and Swedish Competition Authority (n 1) revealing major differences between the various platforms and digital markets. See also F. Etro, 'Device-funded vs ad-funded platforms', (2021) 75 International Journal of Industrial Organization; C. Caffarra, F. Etro, O. Latham, and F. Scott Morton, 'Designing regulation for digital platforms: Why economists need to work on business models', (2020) <https://voxeu.org/article/designing-regulation-digital-platforms> accessed 20 February 2020.

[103] C. Caffarra and F. Scott Morton, 'The European Commission Digital Markets Act: A translation', (2021) <https://voxeu.org/article/european-commission-digital-markets-act-translation> accessed 18 February 2021.

[104] See J. Delgado, 'Regulating Digital Gatekeepers: Lessons from the Banking Industry', (forthcoming) Competition Policy International, arguing that solving specific competition problems requires specific analysis of the problems and specific remedies adapted to the conducts, to the industry characteristics and to the business models. See also Nordic Competition Authorities (n 1) 17, arguing that regulatory intervention may not ensure the same level of flexibility and adaptability seen in the enforcement of competition law: "In particular, it is doubtful that it would be beneficial to introduce a detailed list of obligations and prohibitions within an ex ante regulatory framework. This is because the same type of conduct can have both pro and anticompetitive effects depending on the market and/or the specific gatekeepers, and because digital markets are fast-moving"; and Spanish Competition Authority, 'Position Paper for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT)', (2020) 8 <https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2020/CNMC%20position%20paper%20on%20DSA%20and%20NCT.pdf> accessed 18 January 2021, suggesting that *ex ante* regulation with a list of prohibited clauses aimed at solving competition problems in so different and dynamic markets can be dangerous for the functioning of markets and economic efficiency.

[105] Colomo (n 87) 6.

[106] See Caffarra and Scott Morton (n 103) providing a useful table linking each obligation to past and ongoing investigations.

[107] The only exceptions are provided by Articles 8 and 9 in case the obligation would endanger the economic viability of the operation of the gatekeeper or for overriding reasons of public interest (regarding morality, health and security), respectively. See Cabral, Haucap, Parker, Petropoulos, Valletti, and Van Alstyne (n 100) 7, considering that one of the main challenges in the implementation of the DMA is how to separate the positive efficiency and welfare gains that platforms generate through network effects from negative anti-competitive and welfare-reducing platform behaviour.

[108] See CERRE, 'The European proposal for a Digital Markets Act: A first assessment', (2021) 21 <https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment/> accessed 24 February 2021; Caffarra and Scott Morton (n 102); M. Schallbruch, H. Schweitzer, and A. Wambach, 'Europa stutzt die Datenmacht der Digitalkonzerne', (2021) Frankfurter Allgemeine <https://zeitung.faz.net/faz/wirtschaft/2021-01-22/f1f1c817e9a2467aeab85414f518ac52/> accessed 24 February 2021.

[109] European Commission (n 9) Articles 10 and 17.

panies as gatekeepers, dynamically update the obligations on gatekeepers when necessary, and design remedies to tackle systematic infringements of the DMA rules.

According to its original version, the planned tool would justify an intervention not only in case of a structural market failure, but also in a scenario of structural risks for competition.[110] The latter case applies to tipping markets which require an early intervention to prevent the emergence of risks for competition that can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position. However, doubts have emerged about the definition of markets that have not yet tipped but are prone to tipping.[111] Moreover, it is not clear how the new competition tool should interact with existing regulations, antitrust provisions and the new *ex ante* regulatory framework for gatekeeping platforms envisaged in the DMA.[112] The coexistence of overlapping enforcement tools would inevitably undermine legal certainty and predictability by potentially justifying an intervention in any circumstances.

#### 3.2.3. *The German reform of the Competition Act: new antitrust enforcement tools*

A third approach is represented by the new Section 19a of the German Competition Act (GWB), which sets specific standards of behaviour for undertakings of "paramount significance for competition across markets."[113]

In January 2021 the German legislature has adopted the Tenth Amendment to the German antitrust law implementing a competition-oriented regulation for large digital platforms, whose contents are quite similar to the ones tabled by the German Commission 4.0 and are aimed at granting new powers to the Bundeskartellamt. The Section 19a contains a list of seven types of abusive practices the Bundeskartellamt may prohibit, unless the undertakings are able to demonstrate that the conducts at stake are objectively justified.

Notably, the German Competition Authority may prohibit undertakings of paramount significance for competition across markets from: a) treating the offers of competitors differently from their own offers when providing access to supply and sales markets (in particular, giving preference to their own offers in the presentation or pre-installing exclusively its own offers on devices); b) hindering other companies in their business activities on procurement or sales markets (in particular, taking measures which lead to an exclusive preinstallation or integration of the undertaking's offers or preventing other companies to advertise their own offers also via other access points than those provided or mediated by the company); c) hindering competitors on markets where the firm can rapidly expand its position, even without being dominant (in particular, combining the use of an offer with an automatic use of another offer of the company, without granting sufficient possibilities of choice, or making the use of an offer of the company dependent on the use of another offer of the company); d) processing competitively sensitive data collected to create or raise market entry barriers or to require terms and conditions for such use; e) impeding the interoperability of products/services or the portability of data; f) providing other companies with insufficient information about the scope, quality or success of the service provided or commissioned; g) demanding advantages for the treatment of another company's offers which are disproportionate to the reason for the demand.

The relevant factors in determining the paramount significance of an undertaking for competition across markets are its dominant position on one or more markets, its financial strength or its access to other resources, its vertical integration and its activities on otherwise related markets, its access to data relevant for competition, and the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities.

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[110] European Commission (n 8).

[111] Conversely, see N. Petit, *Big Tech and The Digital Economy* (Oxford University Press, 2020), focusing on tipped markets by proposing a stricter antitrust regime toward them and a moderate antitrust regime toward the leveraging of market power in untipped markets. Indeed, as noted by the UK Competition and Markets Authority, 'Response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool', (2020) paras. 65 and 68 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/917455/CMA-response_to_DSA_and_NCT_consultations.pdf> accessed 12 January 2021, whose investigating powers have inspired the European Commission, "identifying when a market might tip is very difficult. There are real risks and difficulties of intervening pre-emptively without significant investigation and strong information gathering powers to determine in which markets and what type of intervention may be warranted and effective. … even if one could accurately identify when tipping may occur and could identify and act swiftly enough to implement a suitable remedy, there remain questions as to the benefits of intervening. Intervening where unwarranted would have significant negative consequences in the market in which intervention occurs but could also deter procompetitive innovation across all markets."

[112] Spanish Competition Authority (n 104) 7. See also Nordic Competition Authorities (n 1) 19, stressing that the new competition tool would require adequate safeguards and proportionality checks. With regards to the substantive and the institutional implications of this policy proposal, see G. Monti, 'Attention Intermediaries: Regulatory Options and their Institutional Implications', (2020) TILEC Discussion Paper No. 18, <https://ssrn.com/abstract=2956308> accessed 25 July 2020, noting that there is considerable potential in the existing rules (including consumer law and data protection law) that should be explored before adding additional layers of regulation and that the Commission will need to identify a procedure to determine when the new tool will be deployed in parallel or as an alternative to antitrust provisions. However, see also Fletcher (n 66) and M. Motta and M. Peitz, 'Intervention triggers and underlying theories of harm', (2020) <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html> accessed 15 January 2021, considering the new competition tool a valuable addition to the standard competition law toolkit and a valuable complementary tool alongside new *ex ante* regulation.

[113] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz), 18 January 2021. For a comment, see Jens-Uwe Franck and Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act', (2021) EPoS Discussion Paper No. 297 <https://www.crctr224.de/en/research-output/discussion-papers/archive/2021/DP297> accessed 3 May 2021.

The conducts addressed by the German Section 19a are substantially similar to several practices prohibited by the EU proposal for the DMA. The main difference is related to the fact that the German list is exhaustive, whereas in the European draft new practices may be identified and added. Nonetheless, in general, the German initiative is meant to be functionally equivalent of the DMA, hence it will be interesting to evaluate the interaction with the final version of the DMA.

Indeed, strictly speaking, the new German antitrust rules cannot be considered in conflict with the DMA. As argued in the Impact Assessment of the DMA, "[a]lthough some national administrations such as those in France and Germany, have taken steps to implement national measures, these may be seen as supportive of and potentially complementary to EU solutions."[114] As already mentioned, the relevant legal basis for the DMA initiative is represented by Article 114 TFEU, rather than Article 103 TFEU. From this viewpoint, although Article 1(5) of the DMA prohibits Member States from imposing on gatekeepers further obligations, the German reform is a mere extension of the national competition law. However, the DMA is justified with the risk of regulatory fragmentation, hence the new German provisions may frustrate its attempt of harmonization opening the door to other national initiatives, which may enter into force well before the DMA and may undermine its goals and scope.[115]For instance, in a recent report providing the Government with pro-competitive reform proposals in view of the forthcoming annual Competition Act, the Italian Competition Authority has explicitly referred to the German approach suggesting the introduction of a similar provision.[143] Austria is set to update its Competition Law to digital markets as well, although the proposal does not include specific abuse provisions for gatekeepers.[144] Finally, the Hellenic Competition Commission has supported the idea to include a new provision in the Greek Competition Act, under which the Commission could exert an *ex post* control over abusive conduct by an undertaking holding a dominant position in "an ecosystem of paramount importance for competition."[145]

## 4. The 'more regulatory approach' to antitrust law

The ongoing shift towards a more regulatory approach is driven by two main arguments. First, digital markets move too fast to be supervised *ex post*. Antitrust enforcers would often intervene once the tipping point had already been reached. Furthermore, a point of no return might be reached during the long period which to date has proven necessary to carry out investigations. Second, BigTechs enjoy a brand-new type of market power which implies greater responsibilities and justifies specific responses. Indeed, large online platforms manage to combine a gatekeeping or bottleneck position in the digital ecosystem with a parallel role of rule-setting or regulation within the established digital environment. By acting as both gatekeepers and rule-setters, BigTechs perform a systemic role in markets, thereby increasing the risk of not ensuring contestability and a level playing field for and within the established arena. This concern is perceived as particularly strong whenever online platforms play a dual role, competing with their business customers operational on the platform.[116]

The need for timely intervention in fast-moving markets and the role played by online platforms would, therefore, support *ex ante* regulatory intervention as the most viable policy option to tackle antitrust concerns.

Against this background, it is worth investigating whether this regulatory approach truly reflects the distinctive features of digital markets or is instead an enforcement short-cut. Indeed, in the proposals and the initiatives previously analysed, the revival of regulation seems supported more by an alleged antitrust enforcement failure than by a market failure. As explicitly stated by the European Commission launching the proposal for a new competition tool, the aim is to fill enforcement gaps in the current antitrust rules by expanding the toolkit in order to address anti-competitive behaviours that standard antitrust analysis would strive to tackle.[117] Fur-

[114] European Commission, 'Digital Markets Act – Impact Assessment support study' (n 94) 47.

[115] After just nine days the new law entered into force, the Bundeskartellamt launched its first proceeding assessing the linkage between Oculus and the Facebook network according to the new rules for undertakings of paramount significance for competition across markets: Bundeskartellamt, 'First proceeding based on new rules for digital companies', (2021) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.pdf;jsessionid=3D29B3E2305A2F1784176EB905022CE1.2_cid371?__blob=publicationFile&v=2> accessed 26 February 2021.

[143] Italian Competition Authority, 'Proposals for pro-competitive reforms (Annual Competition Law proposal) have been sent to Palazzo Chigi', (2021) <https://en.agcm.it/en/media/press-releases/2021/3/ICA-proposals-for-pro-competitive-reforms-Annual-Competition-Law-proposal-have-been-sent-to-Palazzo-Chigi> accessed 25 March 2021.

[144] Kartell- und Wettbewerbsrechts-Änderungsgesetz (KaWeRÄG) 2021, <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Begut&Dokumentnummer=BEGUT_COO_2026_100_2_185138> accessed 24 April 2021.

[145] Michael G. Jacobides and Ioannis Lianos, 'Ecosystems and competition law in theory and practice', (2021) UCL Centre for Law, Economics and Society, Research Paper Series 1/2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3772366> accessed 25 March 2021.

[116] According to the baseball analogy used by US Senator Warren during a presidential debate, "you get to be the umpire or you get to have a team in the game—but you don't get to do both at the same time", <https://twitter.com/TeamWarren/status/1184295385562599424> accessed 10 July 2020. See also M. Vestager, Statement before the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law, (2020) 2 <https://www.euractiv.com/wp-content/uploads/sites/2/2020/07/Statement-EVP-Vestager-House-SubCommittee-30-July.pdf> accessed 31 July 2020, adopting another sporting analogy to underline the relevance of the dual role and stating that the platform is both a player on the downstream market against rivals, and at the same time is the referee which determines the conditions of that competition on the upstream platform.

[117] European Commission (n 8). See also Austrian Competition Authority (n 1) 10 stating that "[i]t seems justified to use the device of the reversal of the burden of proof … in particular where there appears to be an abusive or unfair pattern of behaviour, it is difficult for an applicant to reconstruct what has been going on within an undertaking, or official investigations rapidly come up against natural or technical limits"; and Philip

ther, the DMA draft notes that antitrust law enforcement requires an extensive investigation of very complex facts.[118] From this viewpoint, antitrust litigation and enforcement are protracted and expensive, hence the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, and privileges incumbents.[119] In a similar vein, the U.S. House Judiciary Committee's Antitrust Subcommittee acknowledged that some of the anticompetitive business practices uncovered by its investigation could be difficult to challenge under current antitrust law, therefore specific legislative reforms would help renew and rehabilitate the antitrust laws in the context of digital markets.[120]

Therefore, despite their different features and approaches, the initiatives undertaken share the goal of dispensing the enforcers from the need to deal with the constraints of the antitrust law regime.[121] The UK code of conduct, for instance, will impose a regulation tailored to the activities of each specific firm with a strategic position. On the European side, by introducing lists of several *ex ante* duties, the DMA proposal does not require the proof neither of the dominance nor of the effects on the market. Firms designated as gatekeepers are not even allowed for an efficiency defence. Finally, although the German reform is within the antitrust framework, it embraces a regulatory (rather than an economics-based) approach, since the solution is still represented by a list of abusive practices and a reversal of the burden of proof.

By advocating an overhaul of the antitrust toolkit with the introduction of *ex ante* prohibitions, these initiatives blur the line between regulation and antitrust and mix their respective features and goals with the aim of making antitrust assessment faster and simper. Indeed, the proposed corrective tools would lower legal standards and evidentiary burdens replacing the flexible, effects-based, and technology-neutral framework granted by antitrust law enforcement with a formalistic and structural approach based on *ex ante* measures expressly crafted to deal with companies of a specific type and size. Moreover, differently from the mainstream prototype of economic regulation, *ex ante* interventions framed in these proposals are potentially cross-sectoral. They are therefore general in scope and applicable to any business performed via an online platform, exactly like antitrust laws. Since the data-driven economy is pushing a platformization process in many industries, it is reasonable to argue that, in the near future, this "special" set of *ex ante* provisions will represent the ordinary statute of the economy. For this reason, it seems appropriate to label it as the 'more regulatory' approach to antitrust law in order to describe a shift of antitrust enforcement from the law enforcement model toward the regulatory model.[122]

Against this background, the circumstance that some proposals suggest the appointment of a digital authority,[123] or a digital unit,[124] appears of little importance.

By *de facto* amounting to the introduction of a platform neutrality regime, the policy options under evaluation seem to reflect the challenges faced in achieving a comprehensive understanding of platform business models.[125] Indeed, two/multi-sided platforms show a natural dualism[126]: the first aspect relates to the reason itself for the platform and the interactions that occur on it among different groups of users; the second one relates to the ambiguity that, because of network externalities, characterizes conducts that occur in this context. Thus, the circumstances in which a practice within a multi-sided platform can determine a restriction of the market are exactly the same as those in which it can generate pro-competitive effects.

The case of self-preferencing appears paradigmatic as it is the paramount *ex ante* prohibition in almost all the mentioned initiatives. In particular, the practice represents the main concern related to the dual role enjoyed by online platforms. Indeed, acting as regulators and being at the same time participants in the market, BigTechs may leverage their power giving preferential treatment to their own products and services with respect to those provided by other entities.

In *Google Shopping* the European Commission found that a discriminatory treatment of rivals by a vertically integrated search engine may amount to an abuse of dominant position if the search engine gives an illegal advantage to its own comparison shopping service by systematically ensuring a prominent placement for it and demoting rival comparison shopping services in its search results.[127] Similarly, Amazon is suspected to have taken advantage of its dual role. In particular, the European Commission is investigating whether Amazon is using sensitive data about marketplace sellers, their products, and transactions from independent retailers who sell on its marketplace to affect competition, and whether it is artificially favoring its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery ser-

Marsden and Rupprecht Podszun, 'Restoring Balance to Digital Competition – Sensible Rules, Effective Enforcement', (2020) 15-16 <https://www.kas.de/en/single-title/-/content/restoring-balance-to-digital-competition-sensible-rules-effective-enforcement> accessed 15 January 2021, referring to deficits of enforcement, namely the difficulties faced by competition agencies relying on the traditional application of competition law.

[118] European Commission (n 9) Recital 5.

[119] R. Chopra and L.M. Khan, 'The Case for "Unfair Methods of Competition" Rulemaking', (2020) 87 The University of Chicago Law Review 357, 368.

[120] U.S. House of Representatives (n 1) 392.

[121] Colomo (n 87) 14-15.

[122] See A.D. Melamed, 'Antitrust: The New Regulation', (1995-1996) 10 Antitrust 13.

[123] Stigler Committee (n 1) 83.

[124] UK Competition and Markets Authority (n 1) 22; UK Digital Competition Expert Panel (n 1) 55 and 62; Australian Competition and Consumer Commission (n 1) 138-142.

[125] G.A. Manne, 'Correcting Common Misperceptions About the State of Antitrust Law and Enforcement', (2020) 8, Invited Statement on House Judiciary Investigation into Competition in Digital Markets <https://laweconcenter.org/wp-content/uploads/2020/04/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf> accessed 10 May 2020. See also N. Dunne, 'Public Interest and EU Competition Law', (2020) 65 The Antitrust Bulletin 256, arguing that the notion that dominant platforms have a positive duty to ensure "fair" outcomes for rivals has inescapable parallels to more traditional forms of utilities regulation.

[126] A. Lamadrid de Pablo, The Double Duality of Two-Sided Markets, (2015) 64 Competition Law 5.

[127] European Commission, Case AT.39740 (2017), *Google Search (shopping)*.

vices.[128] The Canadian Competition Bureau is also investigating Amazon's trade practices, in particular looking at: i) any policies which may impact third-party sellers' willingness to offer their products for sale at a lower price on other retail channels, such as their own websites or other online marketplaces; ii) the ability of third-party sellers to succeed on Amazon's marketplace without advertising on its website or using its fulfilment service; and iii) any efforts or strategies by Amazon that may influence consumers to purchase products it offers for sale over those offered by competing sellers.[129] Finally, the European Commission is evaluating the antitrust complaint filed by Spotify alleging that Apple has unfairly limited competitors in their access to the Apple Music streaming service and, by imposing a 30% fee on subscriptions, has been using its App Store to impede Spotify's competitive potential to the advantage of Apple Music.[130]

However, despite the European Commission's decision in *Google Shopping*, it is contentious whether a dominant undertaking is required to treat rivals in the same way as its own business (ensuring a form of search neutrality in the case concerned) under antitrust rules.[131] Indeed, antitrust provisions do not impose a general prohibition on self-favoring by dominant firms, so that such conduct is not unlawful *per se*. Differentiated treatment is not inherently problematic under competition law because dominant players are not subject to a duty to keep their rivals in the market or to ensure a level playing field. Therefore, while awaiting the General Court (GC) judgment,[132] a lively debate has taken place on the possibility to assess such conduct under one of the established categories of abuse (i.e. essential facilities doctrine, discrimination, and tying).[133]

As a result, the new German Competition Act prohibits undertakings of paramount significance for competition from treating the offers of competitors differently from their own offers when providing access to supply and sales markets, and the DMA draft captures certain types of self-preferencing subject to past and ongoing antitrust investigations. In particular, Article 6(1)(a) tackles the so-called sherlocking, which is under investigation in the *Amazon Marketplace* case, by requiring gatekepeers to refrain from using any data not publicly available generated through activities by business users of their core platform services. Instead, Article 6(1)(d) takes inspiration from *Google Shopping* and *Amazon Buy Box* cases by imposing to refrain from treating more favourably in ranking services and products offered by the gatekeeper itself.

However, on considering the prohibition of self-preferencing as the main *ex ante* measure with which to ensure a level playing field, competitive risks do not appear significantly different from those common in any scenario of vertical integration.[134] Vertical integration provides substan-

[128] European Commission, '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', (2020) Press release IP/20/2077 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 10 January 2021. Furthermore, several European national antitrust authorities (Austria, Germany, Italy, Luxembourg) weighed in opening proceedings against Amazon on similar grounds. See R.C. Picker, Statement before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law, (2020) 20-25 <https://picker.uchicago.edu/PickerHouseStatement.100.pdf> accessed 20 May 2020, addressing antitrust concerns and remedies about Amazon's dual role.

[129] Canadian Competition Bureau, (2020) Press release, <https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-seeks-input-from-market-participants-to-inform-an-ongoing-investigation-of-amazon.html> accessed 16 August 2020.

[130] European Commission, 'Commission opens investigations into Apple's App Store rules', (2020) Press release IP/20/1073 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 20 June 2020. Further, the European Commission has opened an antitrust investigation concerning Apple's terms, conditions and other measures for integrating Apple Pay in merchant apps and websites on iPhones and iPads, Apple's limitation of access to the near-field communication (NFC) functionality ("tap and go") on iPhones for payments in stores, and alleged refusals of access to Apple Pay for specific products of rivals on iOS and iPadOS smart mobile devices (European Commission, 'Commission opens investigation into Apple practices regarding Apple Pay', (2020) Press release IP/20/1075 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075> accessed 20 June 2020. In the U.S., the recent lawsuit filed by Epic Games against Apple and Google resemble the European investigations. Notably, in August 2020, Epic added a discount direct payment option for the successful videogame Fortnite alongside the iOS App Store and Google Play payment options, in violation of those stores' policies and bypassing Apple's 30 percent fee. As a result, *Fortnite* has been removed from both platforms and Epic filed lawsuits complaining that Apple and Google stand as unavoidable middlemen for app developers and in every in-app transaction and alleging restraints in the app distribution market and in the in-app payment processing market.

[131] See P. Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles', (2020) 43 World Competition 417, noting that there is little support in the case law for the idea that self-preferencing is presumptively problematic under antitrust rules since there is no such thing as a general duty on the part of integrated firms to create a level playing field and, similarly, firms are not under an obligation to share their competitive advantages with rivals.

[132] GC, Case T-612/17, *Google and Alphabet v. Commission*.

[133] See N. Dunne, 'Dispensing with Indispensability', (2020) 16 Journal of Competition Law & Economics 74; I. Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence', (2019) 38 Yearbook of European Law 448; P. Ibáñez Colomo, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping', (2019) 10 Journal of European Competition Law & Practice 532; P. Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law', (2017) 2 University of Illinois Journal of Law, Technology and Policy 301; B. Vesterdorf, 'Theories of self-preferencing and duty to deal – two sides of the same coin?', (2015) 1 Competition Law & Policy Debate 4; N. Petit, 'Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf', (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253> accessed 10 March 2020. See also Colomo (n 129), suggesting that self-preferencing, as a legal category, may be misleading because the various manifestations of the phenomenon are far from identical, ranging from hypothesis that raise issues similar to those at stake in traditional tying cases to others that raise issues similar to those considered as a refusal to deal.

[134] See also Colomo (n 131), arguing that self-preferencing is a manifestation of competition on the merits and often inseparable

tial scope for efficiencies and generally increases consumer welfare.[135] Namely, integration may decrease transaction costs and enable better coordination in terms of product design, organisation of the production process, and the way in which the products are sold.

In sum, by lowering evidentiary standards, enforcement short-cuts, such as *ex ante* prohibitions, may be useful to tackle self-preferencing but will not help authorities to fully and readily understand the digital economy dynamics. As acknowledged in the special advisers' report for the European Commission, the efficiencies of certain practices in the platform economy are "not yet well understood and our knowledge and understanding still needs to evolve step by step."[136] Hence, intervening by picking and choosing conducts that harm competition irrespective of their effects would not be appropriate and could irreversibly compromise the platform's very existence. In order to consider a practice, by its very nature, harmful to competition, without an analysis of its effects, there must be sufficiently reliable and robust experience. Further, an approach based on blacklisted practices is at odds with the speed and the unpredictability of technological evolution in fast-moving industries.

Similarly, by attaching a special responsibility to online platforms due to their rule-setting role, the reform proposals are challenging their business models and their multi-sided nature, or in other words, their status. However, platforms employ different business models and this choice inevitably affects their incentives, determining how they react to the evolution of the ecosystem and how strategies for interacting with third party complementors affect consumers. Therefore, it is problematic to design a single regulatory framework which encompasses heterogeneous players on the only premise that they exert gatekeeper power.

## 5. Concluding remarks

A couple of decades ago, concerns were expressed that antitrust law was not well-equipped to harness the "new economy." Rules and doctrines developed to deal with competition in the brick-and-mortar age were deemed ill-suited to facing the dynamism of the e-commerce. Addressing this topic, Richard Posner warned that there was a problem with the application of antitrust law, but it was not a doctrinal problem.[137] Indeed, "antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy. The real problem lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly."[138]

In similar vein, William Kovacic has recently noted that the current digital revolution is simply the latest iteration of a longstanding process of innovation-driven upheaval that has tested the capacity of competition agencies.[139] The latter have always struggled to adapt their programs to meet the demands imposed by intense commercial dynamism, and today, as well as yesterday, antitrust law is often considered not smart enough, not fast enough, and not effective enough. That is, it is ill-suited to identifying, correcting, and deterring misconduct in fast-changing markets. "By this view, competition agencies peddle earnestly on bicycles in futile pursuit of industries that move with the speed of race cars."[140]

Thus, it comes as no surprise that the widespread temptation to embrace a more regulatory approach stems from the hurdles experienced by antitrust enforcers in the digital economy. Indeed, although digital markets move at a very high speed and exhibit distinctive economic features, the *raison d'être* of the invoked *ex ante* perspective seems to reside more in an enforcement failure than in market failures. The goal is to fill alleged enforcement gaps in the current antitrust rules by introducing tools aimed at lowering legal standards and evidentiary burdens in order to address anti-competitive practices that standard antitrust analysis would strive to tackle. The 7-years long *Google Shopping* European investigation provides a good example of how complex and burdensome the competitive assessment can be when it comes to behaviours such as self-preferencing practices performed by vertically integrated platforms acting in a dual role of intermediary and trader operational on the platform.

The regulatory proposals framed to date go exactly in the direction of making this assessment faster and simpler, by in-

from the pro-competitive benefits that come with product integration.

[135] See e.g. U.S. Department of Justice and Federal Trade Commission, 'Vertical Mergers Guidelines', (2020) 11-12 <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers> accessed 2 July 2020; European Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings', (2008) OJ C 265/6, para. 13; and European Commission, 'Guidelines for the assessment of vertical restraints', OJ C 130/1, para. 213, about the efficiencies of category management agreements. However, see U.S. FTC Commissioners Rohit Chopra, 'Dissenting Statement Regarding the Publication of Vertical Merger Guidelines', (2020) <https://www.ftc.gov/public-statements/2020/06/dissenting-statement-commissioner-rohit-chopra-regarding-publication> accessed 2 July 2020, and Rebecca Kelly Slaughter, 'Dissenting Statement Regarding the Publication of Vertical Merger Guidelines', (2020) <https://www.ftc.gov/public-statements/2020/06/dissenting-statement-commissioner-rebecca-kelly-slaughter-re-ftc-doj> accessed 2 July 2020, questioning the over-emphasis on the benefits of vertical mergers and disapproving the newly released Vertical Merger Guidelines for supporting the belief that vertical mergers are presumptively benign.

[136] Crémer, de Montjoye, and Schweitzer (n 1) 70. See also Spanish Competition Authority (n 104) 8, arguing that prohibitions *per se* in very heterogeneous and dynamic markets, where knowledge about the theory of damage and efficiencies is still inconclusive, are not advisable.

[137] R.A. Posner, Antitrust in the New Economy, (2001) 68 Antitrust Law Journal 925. See also D.D. Sokol, 'Antitrust's "Curse of Bigness" Problem', (2020) 118 Michigan Law Review 1, 22-23, arguing that the phenomena that have been identified in digital markets are in no way unique to them.

[138] Posner (n 137) 925.

[139] W.E. Kovacic, 'The CMA in the 2020s: a dynamic regulator for a dynamic environment', (2020) <https://www.gov.uk/government/speeches/the-cma-in-the-2020s-a-dynamic-regulator-for-a-dynamic-environment> accessed 1 May 2020.

[140] Kovacic (n 139).

troducing a blend of corrective tools such as *ex ante* prohibitions, market investigations, legal presumptions, and shifts of the burden of proof. However, most of the regulatory regimes proposed by competition authorities represent a significant departure from the common position they expressed in a G7 meeting less than two years ago.[141] According to the document signed by G7 competition authorities, the challenging issues raised by digital markets are not beyond the reach of antitrust law. Rather, many of the features of 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.

Far from being limited to a reshaping of competition rules, tailored to specific, narrow scenarios, these proposals imply a major re-orientation of the entire competition policy. As noted by Pablo Ibáñez Colomo, the rise of new concepts and analytical frameworks aimed at taming digital gatekeepers signals the move away from the more economics-based approach[142]: "[E]conomic analysis is no longer a filter guiding action and advising against certain outcomes. … Achieving certain outcomes is now deemed more important than following the right framework, irrespective of where it leads. By the same token, the framework is deemed legitimate so long as it supports the desired results."

Technological change has always shaped market dynamics, unlocking new opportunities for companies and posing new challenges for authorities, policy makers and academics. Against the emergence of platform business models and the progressive platformization of several industries, a return to the past is unlikely to be the optimal policy option.

## Declaration of Competing Interest

As confirmed with the Editor in Chief

## Data Availability

No data was used for the research described in the article.

[141] G7 Competition Authorities, 'Common Understanding on "Competition and the Digital Economy", (2019) <https://www.autoritedelaconcurrence.fr/sites/default/files/2019-11/g7_common_understanding.pdf> accessed 6 April 2020.

[142] P. Ibáñez Colomo, 'Whatever Happened to the 'More Economics-Based Approach'?', (2020) 11 Journal of European Competition Law & Practice 473.