The Challenge of the Virtual World for Independent Authorities

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This article seeks to examine three important questions: What challenges does the virtual world pose for competition law? In what way does the digital economy change the relationship between economic rights and fundamental freedoms? How does the digital economy affect the division of jurisdiction between independent authorities?

Two responses to these questions are suggested. The first and more radical is to introduce new laws to redesign competition law, jurisdictions, and intertwining rights. The second is a more sophisticated solution, namely, to interpret existing laws in the light of technological changes, coherent with an evolutionary interpretation of national and European Constitutional frameworks. In either case, it must be assumed as a political necessity that Europe's primary purpose is to guide the digital revolution in the direction of equality for citizens in the exercise of economic rights and fundamental freedoms.

Keywords: Regulation, Constitutional framework, Competition law, Fundamental rights, Privacy, Independent Authorities, Digital market, Internet

1 THE TRANSITION FROM MATERIAL TO VIRTUAL WORLD

Although the traditional legal categories, developed in the offline context, have crumbled in the collision with the Internet and its latest product, artificial intelligence,[1] new legal categories have yet to be formulated. Thus, the relationship between public powers and fundamental rights has yet to find a measure of balanced coexistence.

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1 We prefer the definition of the European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM(2021) 206 final, 2021/0106(COD), 21 Apr. 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0206&from=IT (last access 19 Jul. 2023), in particular: *Consideranda* No. 3 and 4. At the moment in which we are writing, its procedure is still ongoing, but *see also* the deliberation of the European Parliament on the amendments to the European Commission's proposal: *DRAFT Compromise Amendments on the Draft Report Proposal for a Regulation of the European Parliament and of the Council on Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM(2021)0206 – C9 0146/2021 – 2021/0106(COD), 9 May 2023.

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With regard to public power, in the offline context, independent authorities operate in a framework already quite well-defined by the sources of law, distributed across domestic and supranational multi-level systems. By contrast, in the online context, these authorities are facilitated by the scarcity of the relevant regulatory framework, but this regulatory regime entails a basic question. Given the gaps in the rules, do independent authorities necessarily have to exhibit a legislative basis of their powers, as they have to do offline, or can they act in the absence of legal authorization when they operate on the Internet?

Another feature, derived immediately from the former, concerns the maintenance of the classical dual-task model assigned to independent authorities. In the offline world, authorities have regulatory and supervisory powers. What happens to these powers in the digital space?

With regard to fundamental rights, in the offline world, each right has its boundaries, whereas in digital space the same rights tend to overlap. It follows that the protection of one right necessarily involves the protection of another fundamental freedom; conversely, violation of one right can be a symptom of violation of another right. For example, some Internet platforms build market dominations by controlling users' data. Such a power prevents netizens from finding better conditions elsewhere, so that they are forced to give their consent to data processing. In this case, there is a tight interconnection between privacy, consumers' rights, and freedom of information. Just as ideas mingle in the Internet, so rights experience an unprecedented sharing of the content of other rights and no longer remain within pre-established boundaries.

This mutual intertwine of rights can no longer be matched by a strict separation of authorities' competences, which is the basic rule offline. The new digital system can no longer ensure the biunivocal pairing of authorities and fundamental rights. Now it may happen that the protection of a right, initially assigned to a competent authority, can be allocated among several public bodies, available to pool information and to cooperate flexibly for a common goal. This is happening in a legal system that is shifting towards co-decision models, or at least co-participation patterns, in which several authorities contribute in their different ways to the final decision, while each was once used to working on its own.

Finally, even the addressees of the regulatory and ordering decisions of independent authorities can no longer be identified as individuals or traditional enterprises, the actors of the offline stage, but as platforms operating on the

Internet. The latter can simultaneously play the roles of media companies and *gatekeepers*.[2]

This paper focuses solely on gatekeepers, but first let us say regarding media companies that the Digital Services Act[3] sets out clear due diligence obligations for them, such as compliance with the notice-and-action procedures aimed at removing illegal content uploaded by users and at moderating content, advertising, and algorithms according to high standards of transparency and accountability. The legal discipline applicable to platforms, such as social media, aims to improve the online safety and protect the fundamental rights of users.

A different regime applies to so-called gatekeepers, i.e., the operators of very large online platforms, whose functions go beyond mere hosting and disseminating information received from third parties. In line with their role as gatekeepers, they are subject to a set of *ad hoc* obligations in the proposal for a regulation complementary to the Digital Services Act: the Digital Markets Act (DMA).[4] Basically, this act imposes two kinds of obligation on the holders of digital platforms: to make their platform available to service providers enabling them to reach final customers (Article 5, para. 1 (c)) and to treat providers requesting access to the platform equally (Article 6, para. 1 (d)).

A synergic relation links the DMA and competition law online, meaning that only if these disciplines work in synchrony can an effectively competitive digital market be created and maintained. That said, competition law may be acknowledging the 'value of the inspiring forces for the drafting of the DMA and of a guiding principle in the years to come, [...] in addition, the flexible approach offered by competition law will eventually help future-proofing and updating the DMA, for instance with respect to new practices that have not yet been proven abusive'.[5]

This role of competition law raises a basic question: does antitrust law apply to the platforms according to its traditional interpretation or does it call for recourse to specially adaptated criteria?

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[2] On this topic *see* Esther Arroyo i Amayuelas et al., *El derecho des las piataformas en la Unión Europea*, *in Servicios en Plataforma. Estrategias regulatorias* (Esther Arroyo Amayuelas et al. eds, Marcial Pons 2021).

[3] *Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act) (Text With EEA Relevance)*, PE/30/2022/REV/1, OJ L 277, *27 Oct. 2022*, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065* (last access 19 Jul. 2023).

[4] *Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text With EEA Relevance)*, PE/17/2022/REV/1, OJ L 265, 12 Oct. 2022, https://eur-lex.europa.eu/eli/reg/2022/1925 (last access 19 Jul. 2023).

[5] European Competition Network, *Joint Paper of the Heads of the National Competition Authorities of the European Union. How National Competition Agencies Can Strengthen the DMA* (22 Jun. 2021), https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf (last access 19 Jul. 2023).

The various questions outlined above are tested with reference to the Italian Authority for Guarantees in Communications (AGCom)[6] and the Italian Competition Authority, Autorit Garante della Concorrenza e del Mercato (AGCM).[7] The Data Protection Authority is also subject to brief consideration. The AGCom and AGCM are discussed separately because of their different regulatory and ordering powers, without neglecting the relevance of the European legal framework. The role of these authorities will be further illustrated below. At this point, we can anticipate that AGCom is endowed with regulatory, consultative, and quasi-jurisdictional tasks related to communications, in particular concerning telecommunications, audiovisual services, and press. AGCM is the Italian market competition authority, in charge of implementing competition law and, secondly, consumer protection law. Concerning the Data Protection Authority, it is obvious that it is involved in privacy issues. However, it is expected to be the Italian Artificial Intelligence authority if the Italian government will choose it according to the proposed Artificial Intelligence Regulation.

2 THE RELUCTANCE OF THE ITALIAN AUTHORITY FOR GUARANTEES IN COMMUNICATIONS TO REGULATE THE INTERNET

In the offline context, AGCom performs primarily regulatory tasks, which concern the implementation of abstract models of conduct envisaged by the law. The law itself entrusts rule-making powers to the Authority, but does not dictate limits and orientations concerning the contents of regulators' conducts. For this reason, we have qualified this kind of rule as a 'blank' one. The intervention of the AGCom aims to fill the gaps of primary provisions, dictating sufficiently prescriptive models of conduct that allow people to know in advance what is prohibited and what is not. Secondarily, AGCom verifies whether private conducts[8] complie with its rules.

Online, by contrast, the authority even lacks a formal attribution of normative powers. This regulatory anarchy has prevented it from dictating binding rules, as has occurred with online election campaigning.

Here it is worth recalling the specificity of the Internet, which is unwilling to be subjected to rules duplicated from a world extraneous to it. As Justice Stevens

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[6] Henceforth 'AGCom'.

[7] Henceforth 'AGCM'.

[8] Concerning the regulatory function, *see*: Giovanna De Minico, *Regole. Comando e Consenso* (Giappichelli 2005), Ch. 1st; while on the controlling function of both the AGCM and the AGCom *see Id., Antitrust e Consob. Obiettivi e Funzioni* (Cedam 1997), Ch. 1st. Recently: Matteo Giannelli, *Poteri dell'AGCOM e uso degli algoritmi. Tra innovazioni tecnologiche ed evoluzioni del quadro regolamentare*, 1 Oss. Sulle fonti 859 (2021), for AGCom regulations on the Internet.

explained,[9] extending the same constitutional protection to rights and liberties offline and online does not imply automatic transfer of the offline discipline, as a whole, to the virtual world. If this were to happen, the regulation would not be tailored to the web and would be ineffective and likely to undermine the uniqueness of the Internet.

This approach is illustrated by the challenges posed by the regime for election information campaigns. The previous European elections, for example, were not covered by a binding regulation on the authors, forms, and limits of online advertising.[10] Namely there was a deafening silence of the authority due to Law no. 28/2000. This law did not assign AGCom a task that should reasonably have been entrusted to it, rather compelled it to silence. Thus, unlawful acts such as *fake news*[11] and *filter bubble*[12] took place and were repeated, acts that could not have been imagined at the time of the *par condicio*, and have since become ordinary events on the Internet. By contrast, the genuineness of voter consent, recognized by Supreme Courts as a protected value,[13] was sacrificed to the anarchy of the Internet. Algorithmic artifices multiplied the number of inexistent followers of politicians or shaped the political messages of candidates according to the tastes and preferences of their expected voters, not unlike how one would advertise toothpaste. Not without dangers for democracy, this communication technique split the pictures of candidates into many frames and then recomposed them in an endless game of mirrors. This confused voters because the candidates were presented to them differently from how they would have been without the technological fiction.

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9 For the concurring opinion of John P. Stevens at the United States Supreme Court: *Reno v. ACLU*, 521 U.S. 844 (1997), *see* https://www.law.cornell.edu/supremecourt/text/521/844 (last access 19 Jul. 2023), where he stated that: 'The Internet is "a unique" and wholly new medium of worldwide human communication'.

10 AGCom, *Linee guida per la parità di accesso alle piattaforme online durante la campagna elettorale per le elezioni politiche 2018*, AGCom (1 Feb. 2018), https://www.agcom.it/documents/10179/9478149/Documento+generico+01-02-2018/45429524-3f31-4195-bf46-4f2863af0ff6?version=1.0 (last access 19 Jul. 2023). For the above reasons, these are a disappointing example of self-regulation on electoral information.

11 Petter Toèrnberg, *Echo Chambers and Viral Misinformation: Modeling Fake News as Complex Contagion*, 13(9) PLoS One (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6147442/ (last access 19 Jul. 2023).

12 *See* the Cambridge Dictionary: 'a situation in which someone only hears or sees news and information that supports what they already believe and like, especially a situation created on the internet as a result of algorithms (= sets of rules) that choose the results of people's searches', https://dictionary.cambridge.org/dictionary/english/filter-bubble (last access 19 Jul. 2023).

13 *Ex multis*, *see* Conseil Constitutionnel: *Décision n° 2018-773 DC du 20 décembre 2018*, https://www.conseil-constitutionnel.fr/decision/2018/2018773DC.htm, (last access 19 Jul. 2023), on the *Loi relative à la lutte contre la manipulation de l'information*. Concerning the Italian Corte Costituzionale: *Sentenza n. 1/2014*, https://giurcost.org/decisioni/2014/0001s-14.html (in particular *Considerandum in Law* 5); and *Sentenza n. 35/2017*, https://giurcost.org/decisioni/2017/0035s-17.html?titolo=Sentenza%20n.%2035 (last access 19 Jul. 2023) (*Considerandum in law* 11.2).

Careful observation shows that the code regulating Facebook and the like[14] – the only source of soft law regulating the political campaign – with which candidates should comply to ensure fair play, does not truly protect the right of citizens to be equally informed and the parallel right of candidates to a level playing field. This act, misleadingly self-named *par condicio*, permits the lucky few to advertise lavishly at the expense of the many who cannot afford to. Thus, the Wild West of Internet communication confuses political advertising with commercial advertising, making their aims and fields the same instead of keeping them separate, as they should be because they refer to distinct rights. Regulation of political advertising is intended to ensure that candidates have equal access to electoral competition and therefore refers to the fundamental freedom of the *eligendo* to win votes, which must be the same for all candidates. Commercial advertising serves an economic purpose where lavish advertising is lawful, provided that it does not trespass the limits of deceptive communication.

Faced with the anarchy of digital advertising, where the strongest candidates dominate, the AGCom only uses the language of soft law, limited to indicating what is considered virtuous conduct for candidates and inviting platform managers to comply with electoral fair play.[15] But could AGCom act differently and more effectively?

Law No. 28/00 is peremptory in entrusting only offline regulatory powers to AGCom. Since its provisions cannot easily be extended beyond the limited scope assigned to it, we must look elsewhere. The wide-meshed constitutional fabric may offer an alternative: for example, Article 21 of the Italian Constitution. In referring to 'other media', this provision paves the way for introducing rules for the new media, either *ex novo* or through interpretation.

We used this reasoning[16] when arguing that no constitutional revision was necessary to protect the Internet, which is already covered by Article 21s formula 'or any other form of communication'.[17] This expression enables inclusion of functional innovations in digital information, which would otherwise have been excluded. Can we use this opening clause to expand *par condicio* to put unmentioned types of communication under the regulatory power of the authority?

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[14] *EU Code of Practice on Disinformation*, signed by the online platforms Facebook, Google, Twitter and Mozilla, Bruxelles (Sep. 2018), https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation (last access 19 Jul. 2023) and its updated version: *The Strengthened Code of Practice on Disinformation 2022* (16 Jun. 2022), https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation (last access 19 Jul. 2023).

[15] AGCom, *supra* No. 10.

[16] *See* Giovanna De Minico: *Towards an Internet Bill of Rights*, 37 Loy. L.A. Int'l & Comp. L. Rev. 1 (2015), in particular para. III: '*Why should the constitutionalization of the internet be necessary*'.

[17] Article 21, para. 1, It. Const.: 'Everyone can freely express his own thought by word, writing, and any other media'.

One more consideration may be useful to answer this question. An argument for expanding the authority of AGCom could be the theory of inherent powers, which would indeed have avoided the regulatory anarchy and selfish involution of the information balance at election time. At the same time, however, it would have had a danger more serious than the harm it was intended to prevent: extension of powers to a politically unrepresentative subject, the independent authority, aggravated by the lack of a formal attribution of competence.

In this case, the regulatory political discourse would be initiated and concluded by a *praeter legem* regulation, by virtue of self-appointment, violating many principles: formal legality, hierarchical order of sources and the rule of law.

This situation poses an option: either the authority, exempt from political responsibility, unlawfully takes on politically sensitive tasks, or it correctly leaves political choices to the legislator. We prefer the latter, as we appreciate AGCom's cautious approach and observance of political issues and responsibility.

3 THE ITALIAN COMPETITION AUTHORITY FACED WITH THE VIRTUAL CHALLENGE

At first glance, the above problems might seem easier to solve in relation to AGCM, but that authority would have to proceed in three technology-sensitive steps, concerning: 1) antitrust law; 2) the impact of the data-driven economy on said law; 3*)* the interaction of fundamental freedoms with economic rights in digital markets.

1) Competition law lists negative rules of conduct, i.e., prohibitions that emerged from time to time but are not fully described by the law; their completion is entrusted to a case by case process by the competent authority.[18] The provisions of the TFEU, cascaded into the rules of national legislation, designate competition offences by a teleological method, which has the merit of not crystallizing conduct in models and rather photographing the result, the purpose being to avoid major alteration of competition dynamics.

Thus, the abstract paradigms of the cases have the features of a partly blank rule as an escape valve for a legal system that claims to be 'reflexive'[19] in its fixed literal wording, i.e., flexible when necessary and modifiable as economic and social conditions change. This escape valve is designed for an evolving market.

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[18] We cannot but refer to Stephen Breyer, *Regulation and Its Reform* 157 et seq. (Harvard University Press 1982); *Id.*, *Antitrust, Deregulation and the Newly Liberated Marketplace*, 75(7) Cal. L. Rev. 1005, 1007 et seq. (1987), doi: 10.2307/3480665.

[19] Regarding the reflexivity of legal systems *see* Gunther Teubner, *Constitutional Fragments. Social Constitutionalism and Globalization* 66 et seq. (Oxford University Press 2012).

Initially, the system of values coincided with free market: a place where people, goods, capitals, and services circulate undisturbed, protected against state barriers and the misbehaviour of firms[20] so as to ensure perfect competition, or, more realistically, a workable market.[21] Later, competition law discarded its atomistic view of the marketplace, embracing consumer well-being, which in the Lisbon Treaty evolved into the 'sustainable development of Europe, based on balanced economic growth and price stability' that 'shall promote scientific and technological progress' (Article 3, para. 3, TEU).[22] Reference to the 'social market economy' substantiates the European pact, which otherwise risked remaining on paper. Today, the functional market economy is different again from how it was conceived at the time of Lisbon. The Recovery and Resilience Facility (RRF)[23] promotes it as the keystone of the new economic and social architecture of Europe,[24] which shapes the post-pandemic recovery of individual states, largely with asymmetrical rules. In fact, the Facility envisages that the flow of economic energy should go primarily to those who have less – young people, women and the South – in order to align them with those ahead in the social race.[25]

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20 *Court of Justice of the European Union*: Joined Cases 56 and 58–64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41, 518 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0056; (last access 19 Jul. 2023); and *Id.*: Cases 6–72, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* [1973] ECLI:EU:C:1973:22, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61972CJ0006&from=IT (last access 19 Jul. 2023).

21 Inevitable reference to economic authors, e.g.: Stephen H. Sosnick, *A Critique of Concepts of Workable Competition*, 72 Quart. L. Jour. 380 (1958), doi: 10.2307/1882232; Charles E. Ferguson, *A Macroeconomic Theory of Workable Competition* (Duke University Press 1964).

22 Floris de Witte, *The Architecture of a Social Market Economy,* LSE Law, Society and Economy Working Paper no. 13/2015; Alfred Müller-Armack, *The Social Market Economy as an Economic and Social Order*, 36(3) Rev. Soc. Econ. 325 (1978), doi: 10.1080/00346767800000020. Anna Gerbrandy, Willem Janssen & Lyndsey Thomsin, 2019. *Shaping the Social Market Economy After the Lisbon Treaty: How 'Social' Is Public Economic Law?*, 15(2) Utrecht L. Rev. 32 (2009), doi: 10.18352/ulr.509.

23 *Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility*, OJ L 57, 18 Feb. 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0241&from=EN (last access 19 Jul. 2023).
For a discussion of its impact on domestic constitutional order, *see* Giovanna De Minico, *Il piano nazionale di ripresa e resilienza. Una terra promessa*, 2 Costituzionalismo.it 113 (2021), https://www.costituzionalismo.it/il-piano-nazionale-di-ripresa-e-resilienza-una-terra-promessa/ (last access 19 Jul. 2023); for a critic examination of the RRF, *see* Guglielmo Forges Davanzati, *Le debolezze del Piano Nazionale di Ripresa e Resilienza,* 75(297) Moneta e credito, 77 (2022).

24 Audio of the Press Conference on the *Recovery and Resilience Facility* by David Sassoli, EP President, Ursula von der Leyen, President of the EC, and Antonio Costa, Portuguese Prime Minister, on behalf of the Presidency of the Council: *Questions and Answers*, europarl.europa.eu (12 Feb. 2021), https://multimedia.europarl.europa.eu/fi/video/joint-press-conference-on-recovery-and-resilience-facility-statements-by-david-sassoli-ep-president-ursula-von-der-leyen-president-of-the-ec-and-antonio-costa-portuguese-prime-minister-on-behalf-of-the-presidency-of-the-council_I202155.

25 Lucas Guttenberg & Thu Nguyen, *How to Spend It Right. More Democratic Governance for the EU Recovery and Resilience Facility*, Hertie School – Jacques Delors Centre (11 Jun. 2020), https://www.delorscentre.eu/en/publications/detail/publication/how-to-spend-it-right-a-more-democratic-governance-for-the-eu-recovery-and-resilience-facility (last access 19 Jul. 2023); Francesco Costamagna & Matthias Goldmann, *Constitutional Innovation, Democratic Stagnation? The EU Recovery Plan*,

The Recovery is structured to downgrade the free-market philosophy from what from the start was its ultimate goal, to a means for achieving substantial equality.[26]

We observe, however, that if the European Commission aimed high when it promoted post-Covid economic recovery, it failed to do so when it began to regulate the field of algorithms and artificial intelligence. Its focus on social asymmetries suffered a drastic setback in this new field, as if technology alone could compensate for inequalities arising from the absence of the human guiding hand. Later we explain our dissatisfaction with European regulation of artificial intelligence in the market economy.

2) The above issues must be tackled with awareness that today's market is not yesterday's: online marketplaces are not just a copy of offline ones for three fundamental reasons.

a) The first is due to the presence on online markets of a new entity: Big Data. This term refers to those growing masses of data, universal in their object and subject, variable in their self-generative capacity, fast in the formation *in itinere* of information assets of inestimable economic value, going under the US definition of the five v's (velocity, volume, value, variety, and veracity).[27]

b) Secondly, these markets are double-sided.[28] The first (upstream) market is where digital goods and services are offered ostensibly free, but the consumer actually pays for them with his or her data. The contractual relationship continues to be synallagmatic, except that the digital service is not paid for in money, but in transfer of bulk data to the provider of the digital service. In the second (onerous, downstream) market, Big Tech companies sell advertising space at higher prices than they could if they did not profile potential buyers, which they do by trawling other people's data elaborated by algorithms. It is not by chance that we emphasize

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Verfassungsblog (30 May 2020), https://verfassungsblog.de/constitutional-innovation-democratic-stagnation/ (last access 19 Jul. 2023).

[26] The EU Commission conceived these massive post-pandemic investments as a remedy against unemployment, poverty, and inequality: European Papers, *Neither Representation nor Taxation? Or, 'Europe's Moment' – Part I, Editorial*, 5(2) European Papers 703, 704 (2020); Stella Ladi & Dimitris Tsarouhas, *EU Economic Governance and Covid-19: Policy Learning and Windows of Opportunity*, 42(8) J. Eur. Integr. 1041, 1052 (2020), doi: 10.1080/07036337.2020.1852231. For a more skeptical view on the RRF's inclusive potential *see* Fiammetta Salmoni, *Piano Marshall, Recovery Fund e il containment americano verso la Cina. Condizionalità, debito e potere*, 2 Costituzionalismo.it 51, 81 (2021).

[27] With regard to the American literature and the successful expression 'five v's' *see* Viktor Mayer-Schönberger & Kenneth Cukier, *Big Data* (Hartcourt publishing company 2013), Ch. 6. For a discussion on the impact of Big Data on legal categories, *see* Giovanna De Minico, *Big data e la debole resistenza delle categorie giuridiche*, 1 Dir. Pubbl. 89, 90 et seq. (2019).

[28] Mariateresa Maggiolino, *I big data e il diritto antitrust* (EGEA 2018), n. 2, 2.

dependence of the onerous market on the free one. The latter is only apparently free, because the data is the price, as well as what makes the advertising space attractive. This in turn makes the downstream segment onerous, in that perfect vicious circle illustrated by economists: the more clicks the ad receives, the higher its price and the greater the volume of data hoarded by the entrepreneur controlling the two marketplaces.[29] In brief, Big Data gives significant competitive advantages for companies active in targeted online advertising, online search, social networking, software services, software products, and so forth.[30] In the language of antitrust law it implies the existence of technological barriers inhibiting access to new entrants. Without the necessary data, the latter can only watch others playing the game.

c) Another characteristic of these marketplaces is the trial-and-error method: the players improve their performance by learning by their mistakes, thus more effectively excluding third parties.

3) The last feature of digital markets is the intertwining of fundamental freedoms and economic rights. They merge into a tangled skein, destroying the safety distance that separated them in offline markets, which were very careful not to allow contact between the two classes of rights. Today, the overlapping of such rights is an ordinary occurrence, where protection of one depends on protection of the other, and violation of a fundamental freedom can be a symptom of infringement of an economic right. We examine this when we discuss the assessment of multi-offence tort, which unlike the old antitrust law, requires the intervention of at least two authorities to fully qualify the conduct. If at least two authorities need to interact, they will have to come up with new sanctioning measures commensurate with the multiple offence.

4 CAN TECHNOLOGICAL INNOVATION LEAD TO A NEW INTERPRETATION OF COMPETITION LAW?

Here a central question arises: is it possible to simply transfer the antitrust rules from offline to online marketplaces? If not, under certain conditions the rules should be revised.

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[29] Ariel Ezrachi, *EU Competition Law Goals and the Digital Economy, Report Commissioned by BEUC*, 7–12 (2018), https://www.beuc.eu/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf (last access 19 Jul. 2023).

[30] Maurice E. Stucke & Allen P. Grunes, *Big Data and Competition Policy* 37 (OUP 2016).

The first condition is also the purpose of the antitrust law: defence of competition, not of the *status quo*, which would only benefit existing competitors. The objective value of the common good, measured with the benchmarks of competitive growth and social equality, should be upheld instead of granting privileges to a single category of subjects, namely existing players.

The second condition is that attention be paid to a new danger and its antidote: reduction of the common good in favour of one-way technological prosperity reserved for private oligopolists. A solution could be to subordinate innovation to the principles of common constitutionalism, making it a lever to remedy socio-economic asymmetries. If technology is left to itself, it becomes a dangerous instrument, capable of 'producing revenue and market control' in the economy, and of eroding democracy.[31]

The third condition entails hermeneutic openness to technological innovation, promoting an interpretation of the Constitution sensitive to historical changes.[32] The Constitution and history influence each other, the latter being what gives impetus to every constituent process, which in turn must not overlook history in order to ensure its effectiveness. Economic history also suggests a parallel: in the last century, monopolies enjoyed that special protection accorded by politics to large business groups, receiving privileges and a blind eye to illicit trafficking in exchange for support of the political and institutional establishment.

Even if proposed regulatory initiatives were adopted, the situation of online markets would remain unchanged: a few corporations continue to enjoy absolute control of Big Data, leaving no possibility for third parties to contest their position in a situation of anarchy of technological regulation.

5 THE BASIC ARGUMENTS ON ABUSE OF DOMINANCE

Since the market is data driven, we need an interpretation[33] of Article 102 TFEU,[34] in coherence with a technologically-oriented line of reasoning.[35] This

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[31] Shoshanna Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books Ltd 2019), passim; more recently *see* John Laidler, *High Tech Is Watching You*, News.Harvard (4 Mar. 2019), https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/ (last access 19 Jul. 2023).

[32] An enlightening guide is the way of thinking of Giorgio Berti, *Interpretazione costituzionale* 24 et seq. (Cedam 2001).

[33] European Commission, *Antitrust procedures in Abuse of Dominance (Article 102 TFEU Cases)*, https://ec.europa.eu/competition-policy/antitrust/antitrust-overview_en (last access 19 Jul. 2023).

[34] Richard Wish & David Baiely, *Competition Law* (OUP 2018), Chs 17–18; Renato Nazzini, *The Foundations of European Union of Competition Law: The Objective and Principles of article 102* (OUP 2011, passim; *Abuse of Dominance under art. 102 TFEU* (F. E. Gonzàles-Diaz ed., Claeys & Casteels 2013).

[35] Stucke & Grunes, *supra* n. 30, part. III, Ch. 9; recently: *Competition Law Enforcement in Digital Markets* (Valeria Falce ed., Giappichelli 2021), where lights and shadows of the transition from the old to the

provision regulates abuse of market dominance and at the same time has emblematic value, since with appropriate adaptations it can also be applied to restrictive practices and mergers. So here we briefly recall the structural elements of abuse-[36] – the reference market, dominance and its unfair use – and then place them in an online economic context driven by artificial intelligence.

The first step is the choice of a method to identify the reference market, which may no longer be the classical parameter of substitutability of goods when the entrepreneur has become a digital platform. This parameter could still be used to designate Google's advertising market or Facebook's virtual meeting market, but the important thing is the common virtual marketplace in the background, a market fed by data. This is the reference market, despite the Commission's reluctance to consider it as such, because it cannot be identified according to the criterion of product fungibility. Faced with European conservatism,[37] one can object that if one prefers Google to the others, it is not because of one specific service (Gmail or data storage with Google Drive) but because it offers the whole bundle of services,[38] in the same space-time unit. Those who are part of the Google community are therefore unwilling to exchange it for others, at least while Google remains the only operator capable of providing multi-articulated performance, sealed in a box and portable with us wherever we go. The concept of irreplaceable products returns, but revised for the global context, where the whole package, no longer the individual good, is now irreplaceable.

The second element of abuse, market power, can still be identified on the basis of turnover, but other indexes are also useful due to the natural porosity of the antitrust rules, sensitive to inputs from below, i.e., to the habits of an ever-changing economic-entrepreneurial world. For instance, the dominance of a 4.0 company is also based on the commercial attitudes of new users, who follow the choice already made by those who preceded them.[39] Obviously people do not

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data driven economy are underlined by many authors (*see* e.g., the essays of: Cristoforo Osti; Antonio Capobianco, Gabriele Carovano).

[36] In the manuals for an overview of this topic consult: *The EU Law of Competition* (Jonathan Faull & Ali Nikpay, OUP, 3d ed. 2014); Joanna Goyder & Alberina Albors-Llorens, *Goyder's EC Competition Law* (OUP, 5th ed. 2009); more recently, *EU Competition Law Handbook* (Cristopher Jones & Marc Van der Woude eds, Sweet & Maxwell 2022).

[37] A caution opening in the direction indicated can be read in: Jacques Crémer et al., *Competition Policy for Digital era. Final Report for the European Commission,* 18 et seq. (2019), https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en (last access 19 Jul. 2023).

[38] AGCom, *Indagine conoscitiva concernente lo sviluppo delle piattaforme digitali e dei servizi di comunicazione elettronica. Allegato A alla delibera n. 165/16/CONS*, https://www.agcom.it/documents/10179/5054337/Allegato+29-6-2016/9d7168c6-6205-47e7-a2d9-23cccdc1df59?version=1.0 (last access 19 Jul. 2023).

[39] The European Commission's position appears more comprehensive regarding this last element, *see* Case M.8788, *Apple/Shazam*, 6 Sep. 2018, para. 162: 'Market shares may not be a perfect proxy for

meet in almost deserted places; they all gather in virtual squares, where the chances of meeting are greater. Thus, the lock-in between Google and its customers is an indisputable trait of Google's market power, absent in offline economies, and cannot be measured by the age-old criterion of turnover.

The last requisite for perfecting the case of Article 102 TFEU is abusive conduct, since antitrust law does not punish dominance in itself, but its misuse that harms consumers and competitors by exploitation and exclusion, respectively. In a nutshell, exploitation – for example, a significant price increase that leaves demand unchanged – occurs when the unilateral behaviour of the digital platform is detrimental to consumers, who are forced to bear it because they cannot find better contractual conditions elsewhere. Exclusion – for example, imposition of conditional prices or particularly vexatious exclusivity – is detrimental to other competitors, who are unable to prevent it. In both cases, the conduct is that of a monopolist by a non-monopolist who can afford to ignore the reactions of consumers and competitors.

6 ABUSE OF DOMINANCE IN THE VIRTUAL ECONOMY

If we try to transfer these issues to double-sided markets, they lack an essential element according to the model of Article 102, namely an appreciable increase in price. This flaw is due to the fact that, once abuse is done, the goods continue to be sold at the previous price (i.e., free of charge to users). Thus, the symptom of misuse of market power is lacking by definition, unless one accepts the novelty that unlawful conduct in the digital environment has modes of expression different from those of the offline economy.[40] Evidence of this is the fact that on the strength of its data package, the dominant player, the big platform, weakens its privacy policy without causing an appreciable drop in demand, due to lock-in and same-for-all contractual conditions. Can this be qualified as abuse by exploitation because the dominant player has altered the contractual conditions (privacy policy) against the legitimate expectations of consumers?

If we consider privacy policy an element of contractual discipline, weakening it affects the quality of the service, even if the Commission persists in not seeing this. One could then advocate adoption of alternative criteria for assessing abuse: no longer the minimum stable increase in price, but the minimum and stable

measuring market power in recent and fast-growing sectors characterized by frequent market entry and short innovation cycles'.

[40] In this direction, Commission Decision 27 Jun. 2017 relating the proceeding under Art. 102 of the Treaty on the Functioning of the European Union and Art. 54 of the Agreement on the European Economic Act: Commission Decision C(2017) 4444 final of 27 Jun. 2017 on AT.39740 – Google Search (Shopping), https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 (last access 19 Jul. 2023).

reduction in service quality.[41] This new parameter would not be without uncertainties: how can a qualitative element be calculated on an intangible value such as privacy? Should the yardstick be the same for all parties, or should it be measured according to customer trends and their varying sensitivity to data protection?

If we look briefly at US antitrust policy, subject to the US Antitrust Guidelines,[42] even its authorities have not prohibited market-damaging mergers in cases of injury in the form of lower quality of performance, narrower product variety or poorer innovation, i.e., when the injury has not resulted in a mere price increase. In other words, these dynamic elements have not been taken into consideration, either because they are difficult to quantify, or out of faithful adherence to the price-based approach of antitrust law, which excludes considering qualitative profiles of contractual relationships, like innovation, fundamental rights, and the democratic nature of the system.

Let us now return to Europe and assess the current situation. It is disappointing that the Commission[43] persists in denying that infringement of Article 102 TFEU – *sub species* of exploitation – can occur when privacy is violated, even with damage to the market. The Commission is entrenched behind the formal argument of the strict separation of competences. According to the Commission's reasoning, privacy must remain the sphere of the European Data Protection Supervisor, while competition should remain in its own competence. This approach ruled out the possibility of annulling privacy-infringing concentrations, precisely because the Commission considered that privacy concerns 'fall[ing] out of the aim of antitrust law',[44] falling instead 'within the scope of the EC data protection rules'.[45]

Let us ask whether this duty of the Commission is defined in a law and whether it is in any way enforceable. We believe that this obligation is defined in rules other than the special disciplines of privacy and competition. Article 8 of the EU Charter of Fundamental Rights, a European source prevailing over the sectoral

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41 In this regard, *see* the detailed study of Stucke and Grunes, rich in case studies: Stucke & Grunes, *supra* No. 30, 115 et seq.

42 American Bar Association Section of Antitrust law, *Merger and Acquisition: Understanding the Antitrust Issues,* 134–135 (II: American Bar Association, 4th ed. 2015). 'It is rare for a complaint alleging harm only in an innovation market, and no court has invalidated a transaction solely because it reduced competition in an innovation market'.

43 European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on Competition Policy 2017,* COM (2018) 482 final, 18 Jun. 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0482&from=IT (last access 19 Jul. 2023).

44 Margrethe Vestager, *Competition in a Big Data World* (18 Jan. 2016), https://www.youtube.com/watch?v=I3eb036cYNY (last access 19 Jul. 2023).

45 Bertold Bär-Bouyssière & Daniel Colgan, *Competition Law, Big Data and Data Protection – are Competition Authorities Becoming Jacks of all Trades?*, Lexology (18 Jul. 2016), https://www.lexology.com/library/detail.aspx?g=f9b02fe5-b8e1-4396-8efa-a24fffce9daf (last access 19 Jul. 2023).

ones mentioned above, is the source of the duty in question. Besides this first consideration, there are others that could contribute to the foundation of a new obligation of the Commission: for example, the binding force of the Charter, a title constituting new rights and duties *ex se*. This includes the obligation of the Commission to also take violations of privacy into account, even without any act of legislative intermediation, either internal or supranational, to make this obligation prescriptive. The direct effect of the Charter's provisions, not only towards citizens, but first and foremost towards institutional subjects, restores a primary role to the Commission as the subject obliged to fulfil the duty in question, to which a new right corresponds.

In this regard it is worth remembering that direct access of citizens to the Court of Justice has become an exception due to the stringent legal standing requirements; it follows that in order to protect a fundamental right, the judicial route cannot be the only one. This makes the Commission's obligation to act *ex officio* an effective remedy to defend a right, privacy, otherwise violated with impunity.

Building on this hypothesis, it is reasonable to assert the illegitimacy of a Commission resolution not to proceed, despite infringement of privacy, likewise for a resolution imposing remedies not tailored to privacy. These kinds of resolutions would be illegitimate due to violation of a primary norm: Article 8 of the Charter.[46]

The Commission has preferred the old method, thus allowing Google to persevere in its illegal practice. Instead of being obliged[47] to reduce its unjustified dominance, Google has only been fined.

The same absolving approach was taken with Facebook,[48] which, having purchased WhatsApp, was only sanctioned by the Commission for false declarations, instead of the more serious offence of stealing WhatsApp customers' telephone data, thus consolidating its already disproportionate power in the data market.

Let us clarify that we do not endorse any automatic procedure, since the lesion of privacy is only a symptom that should sound an alarm, until it is ascertained that the symptom has actually damaged competition. In other words, a causal link

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[46] Orla Lynskey, *A Brave New World. The Potential Intersection of Competition Law and Data Protection Regulation*, Chillin' Competition (21 Apr. 2014), https://chillingcompetition.com/2014/04/21/; (last access 19 Jul. 2023); then her way of thinking echoed, with detailed discussion, in *Id.*, *The Foundation of EU Data Protection Law* (OUP 2015), in particular Ch. 4.

[47] Commission Decision, *supra* n. 40, relating to proceedings under Art. 102 of the Treaty on the Functioning of the European Union and Art. 54 of the Agreement on the European Economic Area. *See* Giovanna De Minico, *New Horizons for the Policymaker After the Commission's Decision on Google?* IACL (27 Aug. 2017) https://iaclaidc.wordpress.com/2017/08/27/new-horizons-for-the-policy maker-after-the-commissions-decision-on-google/ (last access 19 Jul. 2023).

[48] Commission Decision 2017/C 286/06 of 18 May 2017 on M.8228 – Facebook/WhatsApp (Art. 14(1) proc.), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017M8228(03) &from=EN (last access 19 Jul. 2023).

between the conduct infringing privacy and harm to the market cannot be assumed, but must be proved. We are not advocating the easier German thesis[49] of 'normative presumption',[50] according to which injury to privacy *per se* causes harm to competition, which does not admit proof to the contrary. Nor do we wish to exclude the need for assessing the abuse, as the European Commission claims. Rather, we assume the existence of a relative presumption: the injury gives rise to a presumption of harm, unless the company perpetrating the abuse proves that, despite harm to privacy, there is no harm to competition.

This compromise saves the suggested novelty, which assumes that lesion of privacy is a symptom of anti-competitive conduct, and protects the right to defence, which allows the entrepreneur contested to demonstrate insignificance of the symptom.

Repetition of unlawful acts in almost identical ways proves that this anachronistic interpretation of antitrust law is inadequate.[51] *See* for example the recent merger of Facebook and Instagram[52] and the fine imposed by the Italian AGCM on Amazon for repeated abuse of its dominant position.[53] This unfortunate choice makes competition law lag behind the times, dressing it in a straitjacket, and

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[49] *Contra* Bundeskartellamt, *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources, Background Information on the Bundeskartellamt's Facebook Proceeding* (7 Feb. 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5 (last access 19 Jul. 2023).

[50] In this regard, *see* Bundesgerichtshof (Federal Court of Justice): Decision KVR 69/19, 23 Jun. 2020 (its *press release* titled: *The Federal Court of Justice provisionally confirms the allegation of abuse of a dominant market position by Facebook* (23 Jun. 2020), https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html) (last access 19 Jul. 2023), where the Federal Court, in contrast to the Court of Appeal, held that under s. 19(1) of the Federal Competition Act a 'normative causal link' could be established on the basis of the mere conduct increasing the market power of the dominant actor. Therefore, there was no need to demonstrate an unlawful conduct made possible solely by virtue of the dominant party's position of pre-eminence, https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2020-6&Seite=4&nr=109506&pos=121&anz=279 (last access 19 Jul. 2023). For its English translation, provided by Bundeskartellamt, *see* its website: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/BGH-KVR-69-19.html;jsessionid=B67E0ED4B26FDCD51094BE01130FC468.1_cid362?nn=4136442 (last access 19 Jul. 2023).

[51] *See* the noteworthy alternative interpretation of Elia Cremona, *L'erompere dei poteri privati nei mercati digitali e le incertezze della regolazione antitrust*, 2 Oss. Sulle Fonti 879 (2021), https://www.osservatoriosullefonti.it/mobile-saggi/speciali/speciale-autorita-amministrative-indipendenti-e-regolazione-delle-decisioni-algoritmiche-2-2021/1659-l-erompere-dei-poteri-privati-nei-mercati-digitali-e-le-incertezze-della-regolazione-antitrust (last access 19 Jul. 2023).

[52] *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, NYT (26 Jan. 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html (last access 19 Jul. 2023).

[53] In short, the AGCM objected to Amazon – *Provv. A528*, 30 Nov. 2021, https://www.agcm.it/media/comunicati-stampa/2021/12/A528-chiusura (last access 19 Jul. 2023)– that holds a dominant position on the brokerage market, for favouring its own logistics divisions to the detriment of third-party sellers on the same platform. Indeed, Amazon granted the former additional services, such as Prime, which were denied to their competitors; this conduct prevented the latter from presenting themselves as service providers of comparable quality to Amazon's logistics.

demonstrates an incapacity to grasp the real conduct of digital platforms, detrimental to the market, thus leaving them unregulated.

An attempt to adapt Italian law No. 287/90[54] to the virtual dimension of markets is being made with the Italian Competition Bill 2021.[55] Article 29 envisages a hypothesis of relative abuse of economic dependence when the owner of a platform exercises superior bargaining power over its customers, putting them in a condition of subservience to itself. Amazon and Apple Stores come to mind, but also search engines, where platforms allow their wholesale market customers to provide services to retail market consumers. The case stems from an authoritative German precedent, which included this special case of abuse in its annual antitrust law.[56] It is special because exploitation of dominance, in the form of imposing vexatious clauses on the business customer alone, does not affect the entire market, but is limited to a specific negotiating relationship. The novelty of the Italian Bill resolves itself in a typical legal evaluation that comes out of abstract schemes, assuming that a contractual asymmetry is given *per se* by a 'determining' role of the platform owner, while proof to the contrary is required by the would-be incumbent.[57] The latter has to prove that its business customer is not in a situation of economic subservience, because at any moment the customer is free to find access providers on better terms. This possibility of migrating elsewhere, according to economists, assumes that the dominant player has the books of others, because it must be able to prove that the customer would spend less by changing platform.[58] This is an impracticable factual proof, which makes the relative presumption an absolute one, while in any case permitting the dominant party to be a 'bad entrepreneur'. German pragmatism, without presumptions and with ascertainment of effective imbalance, case by case, would have been preferable to this Italian novelty. It is worth remembering that on other occasions the German Courts have succumbed to the allure of automatism when endorsing the theory of normative causality, as mentioned above.

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[54] *Legge 10 ottobre 1990, n. 287, recante Norme per la tutela della concorrenza e del mercato*, G.U. No. 240 of 13 Oct. 1990.

[55] *LEGGE 5 agosto 2022, n. 118 Legge annuale per il mercato e la concorrenza 2021*, https://www.gazzettaufficiale.it/eli/id/2022/08/12/22G00126/sg (last access 19 Jul. 2023).

[56] German yearly law on competition *Getsetz gegen Wettbewerbsbeschränkungen*, GWB, in *021 Law of 06.24.2021* (*Federal Gazette I,* at 1858), in particular *see* Art. 12, titled in the English version, *Prohibited Conduct by Companies With Relative or Superior Market Power.*

[57] On this subject, *see* the hearing of Pr. Giuseppe Colangelo at the 10th Commission of the Senate of the Republic, session no. 202, 12 Jan. 2021, https://www.senato.it/leg/18/BGT/Schede/Ddliter/documenti/54618_documenti.htm (last access 19 Jul. 2023).

[58] In this regard, read the AGCM's detailed criticism of the draft law at *Segnalazione ai sensi degli artt. 21 e 22 della legge 10 ottobre 1990, n. 287, in merito alla proposta di riforma concorrenziale ai fini della Legge Annuale per il Mercato e la Concorrenza anno 2021*, rif. n. S4143, https://www.agcm.it/dotcmsdoc/allegati-news/S4143%20-%20LEGGE%20ANNUALE%20CONCORRENZA.pdf (last access 19 Jul. 2023).

The German antitrust approach marks a significant innovation since *ex ante* measures are here imposed to equalize the market, without first ascertaining that antitrust remedies are unable to dynamize it; whereas previously the European legislator had introduced asymmetrical rules with the packages of Telecommunications (TLC) Directives[59] to be applied if the antitrust discipline should prove to be insufficient to restore a competitive market.

Thus if the Italian Bill remains as it is, we can use the metaphor of the tightrope walker. Article 29 of the Bill would increase the uncertainty of trade because it uses indeterminate expressions (quantitative and qualitative) to define these new cases of abuse and because it inverts the trajectory of competition law. The flexibility of its provisions, to be ascertained on a case-by-case basis, is converted into a typical legal assessment, becoming an absolute presumption of dominance for the reasons set forth above.

Lastly, if this article of the Bill were to pass without amendment, Italian antitrust law would be stricter than what Europe already has in the pipeline with the DMA,[60] an asymmetrical law applicable to platform operators but less severe and with greater adherence to the facts. The resulting contrast would not resolve in favour of the Italian law. The latter could not take advantage of the clause of the DMA which saves different laws of Member States, because harmonization of the markets is an insurmountable obstacle for the saving clause.

If Article 29 were to pass in its present form, our market would not be in harmony with other European markets but excessively strict, and if this regulatory autonomy were granted, it would put our entrepreneurs at a competitive disadvantage, charging them with greater burdens than German entrepreneurs. This clash of laws should be avoided while there is still time. Otherwise it will be resolved *ex post* in court, giving priority to the European law.

We therefore prefer the novelties of positive antitrust law, provided we can keep them away from typical legal assessments.[61] We have demonstrated the uniqueness and exclusivity of a hermeneutic criterion in line with technological innovation. This allows us to replace the price-based parameter with a privacy-based one, tailored to the dynamics of the digital economy.

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[59] For an approach comparing asymmetric regulation with antitrust regulation, *see* Giovanna De Minico, *Codice delle comunicazioni elettroniche,* in *I 'tre codici' della società dell'informazione,* 169 et seq. (Pasquale Costanzo et al. eds, Giappichelli 2006).

[60] Digital Markets Act, *supra* n. 4.

[61] Just to offer an example, the European Commission is increasingly open towards interpreting the concept of abuse in the direction indicated above: *Antitrust: Commission Opens Investigation into Possible Anticompetitive Conduct by Google in the Online Advertising Technology Sector*, Press release (22 Jun. 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143 (last access 19 Jul. 2023).

7 FROM ISOLATED TO INTERTWINED SANCTIONS

It is now time to reflect on sanctions for illegal conduct. As we have seen above, infringement of privacy can be a symptom of abuse of dominance; this intertwining of privacy and competition makes typical antitrust sanctions unsuitable for digital anticompetitive offences, for two basic reasons.

Promptness, a feature of networked economic processes, requires that measures act as soon as possible, whereas protracted public assessments of wrongdoing may irreversibly damage competition and privacy. Hence the European legislator's favour for negotiating instruments, such as commitments undertaken by platforms (Article 9 European Commission (EC) Regulation 1/2003),[62] commendable for their rapidity in defining cases, unlike ascertainment of offences by an official act.

Alongside the time factor, another consideration concurs to make commitments a good remedy in the data-driven economy[63]: the value of privacy. Since privacy can be harmed, the classical order to cease the harmful conduct, a typical device against unlawful agreements and abuse, does not allow privacy to regain its *ante-delictum* status. Even if data is returned to its owners, it has already been passed on to third parties and as such is no longer confidential. The impossibility of turning the clock back grants an indisputable advantage to commitments over authoritative sanctions (Articles 101 and 102 TFEU).

The above reflections on the osmosis of legal rules from the material to the virtual world make it possible to extend Article 9 from commitments concluded offline to those proposed by digital market platforms. Rather, we wonder what the prescriptive content of the act and the Commission's yardstick should be in deciding whether to approve it.

Just a few words to recall the content and purpose of the commitment.[64] This is a party proposal aimed at restoring competitive efficiency to the market in order to avoid authoritative assessment of alleged antitrust infringements and the ensuing consequences. The entrepreneur will have to offer conduct capable of remedying the two types of abuse examined above: exploitation and exclusion. With regard to the former, the remedy will consist in giving consumers adequate space for the exercise of their privacy rights, violated by the abuse.

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62 *Council Regulation (EC) No 1/2003 of 16 December 2002 on Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Text with EEA Relevance)*, OJ L 001, 4 Jan. 2003, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R0001&from=IT (last access 19 Jul. 2023).

63 Marco Botta & Klaus Wiedemann, *EU Competition Law Enforcement Vis-à-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita*, Max Planck Institute for Innovation & Competition Research Paper No. 18 (2018), 1–89.

64 Niamh Dunne, *Commitment Decisions in EU Competition law*, 10(2) J. Competition L. Econ., 399 et seq. (2014), doi: 10.1093/joclec/nht047.

It is neither possible nor useful to list the types of commitment, as their content must be modelled according to their intended purpose: to restore not necessarily market *status quo ante*, but rather market competitive efficiency altered by the abuse. What matters is that the cost-benefit assessment parameter, which the measure must obey, respects the specificity required by the new playing field. This excludes any automatism, necessitating adjustments due to an atypical playfield, in moving the procedural rules from their original context to the new one. Thus, the commitment must take at least two circumstances into account: the type of injury inflicted on privacy and the collective dimension of this right, since it no longer concerns the individual but a wide community of users.

The next part of this study examines actual and invented cases, since a pragmatic approach has to produce a prescriptive model capable of meeting consumers' privacy concerns and competitive needs.[65]

1) Regarding injury from exploitative abuse, let us consider the case of an information prospect so gloomy for the consumer as to exclude awareness of his consent, because he does not understand what data he has surrendered or for what purposes. If this asymmetry of information were to constitute unfair conduct, because the abuser provided an unintelligible prospectus on the strength of the fact that his customers would not turn to another competitor in the absence of better conditions elsewhere, the commitment would also have to deal with this opacity. So a comprehensible disclosure would restore the dignity of consent as a free and informed volitional act, since European law has reinforced precisely these requirements, albeit with some contradictions.
2) Let us now consider exploitation that harms third-party competitors, forcing them out of the market or preventing them from entering it.[66] A typical example is the conduct of companies that have prevented their competitors from accessing data by acting as if they were undisputed owners of this growing mass of information. Here the remedy must necessarily envisage sharing the asset, because this structural measure is the only suitable way to remove technological barriers to market entry. This solution will encounter the following objections: it would

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[65] A significant US study by the NYU School of Law and American Bar Association addresses this issue with a pragmatic approach: *Next Generation of Antitrust, Data Privacy and Data Protection Scholars Conference* (28–29 Jan. 2022), https://www.law.nyu.edu/conferences/2022-NextGen-Antitrust-Conference (last access 19 Jul. 2023).

[66] Vikas Kathuria & Jure Globocnik, *Exclusionary Conduct in Data-driven Markets: Limitations of Data Sharing Remedy*, Max Planck Institute for Innovation and Competition Research, Paper No. 19–04 (2004).

disincentivize investment and it would be difficult to implement, requiring evaluation of the asset and distinction between data to be shared or otherwise.[67] This structural remedy recalls Reg. 1/2003 (Article 7),[68] which contemplates sharing and regulates it regardless of whether it is imposed *ab initio* or self-proposed by the company and only validated by the Commission. What matters for the legitimacy of the undertaking is that the structural measure be the *extrema ratio*, namely the commitment may only go towards asset sharing when behavioural measures prove to be ineffective or more costly, since a structural remedy is more intrusive for the company than a behavioural one.

In this case we can recall the reasoning applied to telecommunications operators, owners of the network but also providers of services to end-users.[69] Their innate conflict of interests with respect to other licensed operators may be solved radically by removing the network from the incumbents and giving it to a third neutral operator. The latter then treats requests for access to the infrastructure equally, having no interest in the downstream trade, while the ex-network owner provides the service fairly to end-users, like other providers. This comparative hypothesis, which in its extreme form leads to splitting the network, is significantly different from the case of data-sharing between data-driven companies, discussed here.

In Over-the-Top cases (OTTs), the data never belonged to those who collected, aggregated, and monetized it to make a profit. They cannot claim any dominant title over the data, which actually belongs to an undifferentiated community of users who provided their information. It follows that the Commission, in ordering separation of data from the OTTs, needs to use less caution and discretion than if it were ordering separation of a telecommunication company's fixed network. The compensation measure of the commitment should therefore consist in granting any operator free access to the data-asset. This would create widespread circulation of data, serving two objectives: to increase the contestability of markets, which arose as walled gardens due to technological barriers to entry, and to increase the democratic nature of the economic system and the political process.

[67] Botta & Wiedemann, *supra* n. 63, passim; more recently, *Id.*, *The Interaction of EU Competition, Consumer, and Data Protection. Law in the Digital Economy: the Regulatory Dilemma in the Facebook Odyssey*, 64(3) The Antitrust Bulletin 428, 428–446 (2019), doi: 10.1177/0003603X19863590.

[68] For a broad perspective with case law *see* Gian Luigi Tosato, *The Reform Process, in EU Competition Law,* 40–46 (Gian Luigi Tosato & Leonardo Bellodi eds, Claeys & Casteels, 2d ed. 2015).

[69] Giovanna De Minico, *Tecnica e diritti sociali nella* regulation *della banda larga*, in *Dalla tecnologia ai diritti,* (G. De Minico ed., Jovene 2010), 3 et seq.

Clearly, our example defines the content of an act of competition law that could simultaneously restore a workable market and privacy. Care should be taken not to repropose the Commission's carelessness regarding privacy implications in the assessment of the antitrust breaches, and on the other hand not to consider any privacy-based remedy *ipso jure* suitable to repair an infringement of competition. Rather, our proposed path is to proceed case by case, without standard legal evaluations or abstract presumptions, to ascertain whether a remedy directed at protecting privacy is also tailored to restore the market. In the data economy, a privacy-based remedy does not satisfy competition concerns in any case, whereas damage to privacy is often also a symptom of violation of market balance, though this symptom has to be completed by the other elements of the anticompetitive abstract model.

This intermingling of privacy and competition is the natural consequence of a different way of understanding the law, no longer divisible into the classical public/private dichotomy, at least in recourse to negotiated remedies and with subjects of mixed nature in charge of a public mission. The levels, once separate, are now intermingled; the goods, formerly distant and assailable by distinct conduct, are now exposed to progressive injury and one is protected as a consequence of the other.

8 FROM ISOLATED TO INTERTWINED JURISDICTIONS

We have observed that interests, initially distant and challengeable separately, are now gradually overlapping; the elements of one abstractly prohibited conduct can include illegal fragments of another; the separate levels of protection of market and privacy are progressively blending. What happens if we move these considerations from a substantive to a procedural level?

The authorities, which once operated in isolation, are presumably called upon to make an effort in communication: exchanging information, designing best practices, and speaking a common language. The interweaving of substantive values entails an interweaving of powers with profitable 'confusion' of procedures, the only way to completely restore legality; otherwise, one side of the wrongdoing is always uncompensated.

Applying this reasoning on future scenarios, we can expect, in regard of offences affecting personal data, that the primary competence should remain with the AGCM, whereas the Privacy Protection Authority should be duly and promptly consulted to ascertain whether there has been an infringement of privacy and, if so, to what extent. This cautious division of labour would not change the AGCM's competence to evaluate agreements, abuses and concentrations, nor would the authority be left alone when it undertakes to assess the extent and

significance of a breach of privacy. In this way, the risk of undesirable automatisms is avoided, a danger that is always possible if the offence consists of several conducts belonging to different disciplines.

For similar concerns, we cannot appreciate the European Commission's proposal to create a European Artificial Intelligence Board. Our opposition is explained by the fact that the European sectoral authorities, for example, Antitrust and Privacy, are already sufficient to regulate artificial intelligence. From our perspective, the problem is not an institutional vacuum, but a lack of coordination between the existing bodies. Their respective procedures should be articulated in such a way that single and separate procedures should evolve into complex ones involving different authorities with different powers.

Moreover, the setting up of a future Board, which is required to monitor high-risk artificial intelligence *ex ante* and *ex post*, poses significant problems concerning the impact of its decisions on both European and national authorities, raising delicate issues left undefined by the European legislator.[70]

It is reasonable to wonder whether this Board can draw the attention of national authorities to particular risk situations and, if so, what the authorities' reactions to such alerts might be. Will they have to comply, or will they be able to avoid doing so? We cannot imagine what kind of relationship could be established between the future Board and the pre-existing European sectoral authorities: equiordination with separate competences or with coordinated powers? Yet one cannot exclude *a priori* the hypothesis of superordination of the Board to the sectoral authorities for reasons of specialization. All these profiles, currently left in the shadow by the voluminous regulation, will have to be solved by the Board as soon as it begins its advisory activity to the Commission, even if it lacks the necessary title to do so.[71]

This scarce coordination between the Board and the supranational authorities is matched by weak interaction in the national circuit. At monitoring level, the national market surveillance authority[72] is not allowed to take part in a fruitful dialogue with the sectoral independent authorities. Thus, the European legislator

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[70] Bernd C. Stahl et al., *A European Agency for Artificial Intelligence: Protecting Fundamental Rights and Ethical Values*, 45 Com. Law Sec. Rev. 1, 6 et seq. (2022), doi: 10.1016/j.clsr.2022.105661. The authors criticise the Board for its relative dependence on the Commission.

[71] Many Italian scholars have appreciated its the merits rather than underline its shortcomings, *see* Carlo Casonato & Barbara Marchetti, *Prime osservazioni sulla proposta di regolamento dell'Unione europea in materia di intelligenza artificiale*, 3 BioLaw J. 415 et seq. (2021); Giovanni Guiglia, *L'Intelligenza Artificiale e la tutela dei diritti umani nella prospettiva del diritto europeo*, in *Diritto costituzionale e nuove tecnologie,* 285 et seq. (Giampietro Ferri ed., ESI 2022).

[72] In particular Art. 59 of the *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence*, above.

seems unaware that artificial intelligence hits the entire bundle of fundamental rights, not only privacy, making permanent two-way interaction necessary.

It is useful to reread the opinion of the European Central Bank (ECB), which glimpsed unsolved tangling of competences, and called on the Commission to observe the 'same activity, same risks, same supervision' principle.[73] This opinion of the ECB has been ignored, because the text of the proposed regulation remained unchanged.

Our approach has the merit of holding together a technologically-oriented model of antitrust tort and a reasonable tribute to separation of powers, which has now become an 'orderly confusion' of attributions rather than rigid incommunicability of competences.

9 TOWARDS A NEW SCENARIO

In this work, we have sought to provide an innovative interpretation of antitrust regulation, which changes quite radically in its constituent elements and in the guarantees for fundamental rights once moved from the material to the virtual sphere. In the scenario thus determined, antitrust regulation sheds the archetype of competition at the exclusive service of the free market and the model of consumer-based competition, reaching a reasonable compromise between workable competition and fundamental rights, ultimately social solidarity. To sum up, we have proposed a reading of the competition law sensitive to substantive equality, which is indispensable for completion of the Union's democratic process, as requested by the recent Recovery and Resilience Facility.[74]

What we suggest is only one interpretation, but there is a different one, that takes an entirely selfish drift. Such interpretation will not even benefit the free market because, in the long run, an equilibrium in which the welfare of the few is based on exclusion of the many is not sustainable. Moreover, this atomistic and stifling view of economic processes, incapable of seeing that abuses of digital power harm not only the economic initiative of competitors, but also the fundamental freedoms of citizens, risks jeopardizing the political ambition of a Europe that is finally willing to defend fundamental rights over financial concerns.

On the other hand, if our technologically-oriented reading of antitrust law is accepted, the market fulfils its role as an essential lever at the service of the common good.[75] This functional conception of market matches the political

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[73] Opinion of the European Central Bank, *29 December 2021, on a Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence,* CON/2021/40, OJ C 115, 11 Mar.. 2022, in particular Consid. No. 1.7.

[74] Regulation (EU) 2021/241, *supra* n. 23.

[75] On the relation between the common good and technology in the *Consultation on Artificial Intelligence see* Giovanna De Minico, *Hearing before Leg. XVIII, Senate of the Republic, 8th and 10th Joint Commissions*, session No. 7 (3 Dec. 2020), https://www.senato.it/japp/bgt/showdoc/18/

context well. The latter tends to grant additional protection to fundamental freedoms, compared to that accorded to the same rights when exercised offline. This surplus of protection could be achieved by the competition law, provided that the roles of the antitrust and privacy authorities were revised.

How could this be achieved? A more radical solution is based on matching new economic contexts with new institutional bodies, hence a total rethinking of the artificial intelligence system. But this path is difficult to implement, because politically it is preferred to adjust the *status quo*, not overturn it.

Another solution reshapes the existing materials according to the needs of the digital economic environment. Here it will be up to the legislator, not to the spontaneity of the authorities, to make a shift from strict correspondence of authority and rights to shared (or at least participatory) decisions of several public bodies, intervening in different capacities on subjects involving different rights.

While the terrains of positive law become confused and the competences of the authorities blend, in the substantive field economic and fundamental rights come together to give individuals the full dimension of economic person and global citizen. This scenario can substantially change the role of *netizens*, no longer just critical consumers of digital goods, but persons aware of their fundamental rights in the constantly changing digital context.[76]

SommComm/0/1185392/index.html?part=doc_dc (last access 19 Jul. 2023). Recently, Paul Nemitz, *Constitutional Democracy and Technology in the Age of Artificial Intelligence*, 376 Phil. Trans. R. Soc. AI, https://royalsocietypublishing.org/doi/10.1098/rsta.2018.0089, doi: 10.1098/rsta.2018.0089.

[76] We propose this as a possible answer to the question of how to strengthen democratic processes governing the European Union, one of the nine themes posed by the inter-institutional declaration: European Parliament et al., *Conference on the Future of Europe, Report on the Final Outcome*, May 2021, https://futureu.europa.eu/pages/reporting (last access 19 Jul. 2023).