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**Navigating the Platform Age: the ‘More
Regulatory Approach’ to Antitrust Law in
the EU and the U.S.**

Marco Cappai & Giuseppe Colangelo

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Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Authors

Marco Cappai is a Research Fellow in EU Competition Law at University of Roma Tre and in Markets, Regulation and Law at LUISS, Italy. He earned a Ph.D. in Economic and Consumer Law at University of Roma Tre.

His primary research interests are related to competition policy, market regulation, administrative law, and public law.

Giuseppe Colangelo is a Jean Monnet Professor of European Innovation Policy and Associate Professor of Law and Economics at University of Basilicata, Italy. He is also Adjunct Professor of Markets, Regulation and Law, and of Legal Issues in Marketing at LUISS and Bocconi University, Italy.

He graduated in Law from LUISS, earned an LL.M. in Competition Law and Economics at the Erasmus University of Rotterdam, Netherlands, and a Ph.D. in Law and Economics at LUISS.

His primary research interests are related to innovation policy, intellectual property, competition policy, market regulation, and economic analysis of law.

Giuseppe has been a TTLF Fellow since 2017.

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Abstract

The economic features of digital markets and the strategic role played by large platforms represent 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. Indeed, several reports recently issued by authorities, policy makers and academics point to the inefficiency of relying solely on *ex post* antitrust enforcement and call for a possible *ex ante* regulatory framework to complement antitrust rules in addressing competition issues in digital contexts. 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 is just an enforcement short-cut: that is, an attempt to address some (alleged) anti-competitive practices by dominant online platforms, avoiding hurdles and burdens of the standard antitrust analysis.

Keywords: Online platforms; Digital markets; Antitrust; Regulation; *Ex ante* prohibitions.

JEL Codes: K20; K21; L40; L50

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1. Introduction.

Digital markets are a crucial issue for competition policy and are at the top of enforcers' agendas, as shown by the flood of reports issued during the past year.¹ Indeed, the distinctive features of these markets apparently require a rethinking of the antitrust regime.

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, 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. Put briefly, their market power is not merely temporary and can be expected to persist at least in the short-medium term. Moreover, digital platforms act as gatekeepers and regulators, and frequently play a dual role, being simultaneously operators for the

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 January 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 10 January 2020); J. Crémer, Y.-A. de Montjoye, and H. Schweitzer, *Competition policy for the digital era*, Report for the European Commission (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (accessed 10 January 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 10 January 2020); 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 10 January 2020); UK Competition and Markets Authority, *Online Platforms and Digital Advertising*, Market Study Interim Report (2019), <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> (accessed 10 January 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).

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 have 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, 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 (or a set of clear-cut prohibitions) to prevent anti-competitive practices by dominant platforms.⁴ 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.

² Stigler Committee, *supra* note 1, 78-79 and 83-92; UK Digital Competition Expert Panel, *supra* note 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. Khan, *The Separation of Platforms and Commerce*, 119 Columbia Law Review 973 (2019); K.S. Rahman, *Regulating informational infrastructure: internet platforms as the new public utilities*, 2 Georgetown Law Technology Review 234 (2018). In October 2019 the Bill “Keep Big Tech out of Finance Act” has been introduced before the House of Representatives (H.R. 4813). If enacted, the Bill would prohibit technology companies (“large platform utilities” predominately engaged in the business of offering to the public an online marketplace, an exchange, or a platform for connecting third parties) that have an annual global revenue of over twenty-five billion dollars from either acting as a financial institution or being affiliated with a financial institution. For a different point of view, see C.S. Wilson and K. Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 Journal of Antitrust Enforcement 10 (2020).

⁴ Belgian Competition Authority, Dutch Authority for Consumers & Markets, and Luxembourg Conseil de la Concurrence, *supra* note 1; German Commission ‘Competition Law 4.0’, *supra* note 1; Stigler Committee, *supra* note 1; UK Competition and Markets Authority, *supra* note 1; UK Digital Competition Expert Panel, *supra* note 1. See also Expert Group on Regulatory Obstacles to Financial Innovation, *Thirty Recommendations on Regulation, Innovation and Finance*, Final Report to the European Commission (2019), 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, 79-80.

In sum, with the rise of digital 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’.

Against this background, a remarkable exception is represented by the common position of G7 competition authorities⁵ and, apparently, by the report prepared for the European Commission.⁶ According to G7 competition authorities, the challenging issues raised by digital markets are not beyond the reach of antitrust law. 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. In similar manner, the authors of the report prepared for the European Commission endorse an approach based on a more vigorous competition policy that can be achieved within the general antitrust framework, although they acknowledge the need for a substantial rethinking of the tools of analysis and enforcement.⁷ 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.⁸

From a ‘pure’ antitrust perspective, a cautious approach has been advocated by the Council of Economic Advisers to the U.S. President, which highlighted some downsides of a new, far-reaching regulation.⁹ In particular, the scope of a digital authority would be harder to

⁵ G7 Competition Authorities, *Common Understanding on “Competition and the Digital Economy”*, (2019) https://www.autoritedelaconurrence.fr/sites/default/files/2019-11/g7_common_understanding.pdf (accessed 6 February 2020).

⁶ Crémer, de Montjoye, and Schweitzer, *supra* note 1.

⁷ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 14.

⁸ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 82.

⁹ U.S. Council of Economic Advisers, *Economic Report of the President*, (2020) <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf> (accessed 12 February 2020), 222.

define since digital platforms provide a wide-ranging set of goods and services. Hence, firms in some of the most innovative sectors of the economy would face uncertainty as to which regulation applies to them. Furthermore, concerns about the possibility of regulatory capture need to be taken seriously. In sum, 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 Department of Justice announced that the Antitrust Division is reviewing whether and how online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers;¹⁰ and the Federal Trade Commission has launched an *ex post* evaluation of BigTech acquisitions to evaluate whether large tech companies are making potentially anti-competitive acquisitions of nascent or potential competitors.¹¹

However, despite the common understanding among G7 competition authorities, the European Commission seems ready to embrace the new regulatory approach. Unveiling a new digital strategy, the Commission recently argued that existing laws that govern the behaviour of traditional industries need to be adapted to the specific circumstances under which new digital business models operate. Hence competition rules also need to be fit for a world that is changing fast and is increasingly digital.¹² The Commission highlighted “the

¹⁰ 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 January 2020).

¹¹ 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 12 February 2020).

¹² European Commission, Communication ‘Shaping Europe’s digital future’, COM(2020) 67 final, 8.

systemic role of certain online platforms” which act as “private gatekeepers to markets, customers and information”, emphasising the need to ensure that their market power will not jeopardise the fairness and openness of markets.¹³ Further, 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.¹⁴ To this end, 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.¹⁵

Moreover, *ex ante* regulation will be also considered to address systemic issues related to data, notably market imbalances in relation to access to and use of data.¹⁶ Indeed, according to the Commission, access to data is a major barrier to entry, and the contestability of markets is affected by the ‘data advantage’ achieved by a small number of online platforms which may exploit it to set the rules on the platform, unilaterally impose conditions for access and use of data, and leverage such advantage when developing new services and expanding into new markets. Thus, the accumulation of vast amounts of data by BigTech companies, the role of data in creating or reinforcing imbalances in bargaining power, and how these companies use and share the data across sectors will be analysed in order to evaluate whether additional sector-specific *ex ante* regulatory interventions are needed.

¹³ European Commission, *supra* note 12, 8.

¹⁴ European Commission, *supra* note 12, 9.

¹⁵ European Commission, *supra* note 12, 10.

¹⁶ European Commission, Communication ‘A European strategy for data’, COM(2020) 66 final, 8 and 14.

Moreover, it is worth noting that in recent years European institutions have already tackled some important data-related issues by enacting regulatory interventions to grant users a right to personal data portability,¹⁷ to promote the free flow of non-personal data in the commercial arena¹⁸ and the re-use of public sector information,¹⁹ and to empower individuals by introducing contractual rights when digital services are supplied to consumers who provide access to their data.²⁰ Moreover, sector-specific legislation on data access has been adopted to address identified market failures, such as payment service providers²¹ and smart metering information.²² Finally, the Commission recently announced a legislative action (Data Act) on issues that affect relations between actors in the data-agile economy to provide incentives for horizontal data sharing across sectors.²³

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 recently 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 (alleged) anti-

¹⁷ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, (2016) OJ L 119/1, Article 20.

¹⁸ Regulation (EU) 2018/1807 on a framework for the free-flow of non-personal data in the European Union, (2018) OJ L 303/59.

¹⁹ Directive (EU) 2019/1024 on open data and the re-use of public sector information, (2019) OJ L 172/56.

²⁰ Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, (2019) OJ L 136/1, Article 16.

²¹ Directive (EU) 2015/2366 on payment services in the internal market, (2015) OJ L 337/35.

²² Directive (EU) 2019/944 on common rules for the internal market for electricity, (2019) OJ L 158/125.

²³ European Commission, *supra* note 15, 13.

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 and explains how the emergence of platform business models might shift the current equilibrium. Section 3 evaluates the premises and implications of the more regulatory approach to antitrust law. The fourth section concludes by maintaining that the *raison d'être* of the invoked *ex ante* regulation seems to reside more in enforcers' failures than in market failures.

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 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).²⁴ To this end, antitrust addresses the problem of market power

²⁴ UK Competition and Markets Authority, *Regulation and Competition. A Review of the Evidence*, (2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857024/Regulation_and_Competition_report_-_web_version.pdf (accessed 10 January 2020), paras. 1.3 and 2.4.

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.²⁵

Considering their partial overlap in addressing market power, antitrust and economic regulation are often referred to as part of the same broad family.²⁶ It follows that the choice between antitrust and regulation depends to a great extent on the trade-offs in the specific case concerned.²⁷ 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

²⁵ J. Tirole, *Economics for the Common Good*, Princeton University Press, Princeton - Oxford, 2017, 160.

²⁶ M. Handler, *Regulation versus Competition*, 43 *Antitrust Law Journal* 277 (1973-74); M. Maggiolino, *The Regulatory Breakthrough of Competition Law: Definitions and Worries*, in J. Drexler and F. Di Porto (eds.), *Competition law as regulation*, Edward Elgar Publishing, Cheltenham – Northampton, 2015, 3.

²⁷ N. Dunne, *Competition Law and Economic Regulation. Making and Managing Markets*, Cambridge University Press, Cambridge, 2015, 34-46.

the debate on net neutrality regulation in the U.S.²⁸ Indeed, according to a proportionality test, in a perfect scenario economic regulation should leave as much room as possible for competition law.²⁹ 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.³⁰

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.³¹ However, more recently the U.S. Supreme Court has shifted the balance, suggesting antitrust deference to regulation because of expertise and costs concerns.³² 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

²⁸ See, e.g., A.D. Melamed and A.W. Chang, *What Thinking About Antitrust Law Can Tell Us About Net Neutrality*, 15 Colorado Technology Law Journal 93 (2016); M.K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 Colorado Technology Law Journal 119 (2016).

²⁹ See, e.g., Dunne, *supra* note 27, 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.

³⁰ UK Competition and Markets Authority, *supra* note 24, paras. 1.13, 1.16, 4.63, and 4.65. See also R. Baldwin, M. Cave, and M. Lodge, *Understanding Regulation*, Oxford University Press, New York, 2012.

³¹ 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).

³² 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).

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.³³ The limitations of blind faith in regulatory oversight have been well explained 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.³⁴ Moreover, 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.³⁵

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

³³ See e.g. R.M. Brunnell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 *Antitrust Law Journal* 279 (2012); S.L. Dogan and M.A. Lemley, *Antitrust Law and Regulatory Gaming*, 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*, Statement before the United State House of Representatives (2010), 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 January 2020); H.A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 *Michigan Law Review* 683 (2011).

³⁴ Dogan and Lemley, *supra* note 33.

³⁵ See Crémer, de Montjoye, and Schweitzer, *supra* note 1, 42; Stigler Committee, *supra* note 1, 74.

regulator of a dominant undertaking's pricing practices cannot, as such, absolve that undertaking from responsibility under antitrust rules.³⁶ 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 dominant player may escape liability (so-called 'State action defence').³⁷ 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.³⁸

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,³⁹ 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.⁴⁰

³⁶ 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 EU General Court, 13 December 2018, Case T-851/14, *Slovak Telekom v. European Commission*.

³⁷ CJEU, 9 September 2003, Case C-198/01, *Conorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*, para 53.

³⁸ *Telefónica*, *supra* note 36, para. 128.

³⁹ CJEU, 6 December 2012, Case C-457/10 P, *AstraZeneca v. European Commission*, para. 134.

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

2.1 Antitrust/regulation dilemma in the age of BigTech.

The emergence of large online platforms may shift the current equilibrium between antitrust and regulation. The reports recently released on the topic unanimously share the view that digital markets are affected by serious and structural market failures, often summarized with the metaphor of the “winner-takes-most” dynamic. Indeed, in the digital economy the cost of production is much less than proportional to the number of customers served. While the concept of economy of scale has always been present in mass production industries, digital markets push this phenomenon to the extreme. This aspect is strictly related to the upward discontinuity in demand when the price reaches zero. Moreover, digital platforms have distribution costs that are much lower than those of brick and mortar firms, and they enjoy a global reach. Furthermore, once they manage to achieve a certain critical mass of users, solving the “chicken and egg” problem, digital platforms are able to exploit powerful network effects, which act as significant barriers to entry. Finally, the “data advantage” complements the setting.⁴¹ Indeed, the cross-interrogation of large, constantly updated datasets enables BigTech to achieve significant economies of scope, fostered by machine learning. Because of the non-rivalrous nature of data, digital platforms controlling such input are able to leverage it in downstream or conglomerate markets, attaining significant portfolio effects.⁴² 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

⁴¹ UK Digital Competition Expert Panel, *supra* note 1, para 1.71.

⁴² German Commission ‘Competition Law 4.0’, *supra* note 1, 19.

increasingly a competition among ecosystems.⁴³ 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.⁴⁴

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. Digital 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,

⁴³ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 33-34.

⁴⁴ See Crémer, de Montjoye, and Schweitzer, *supra* note 1, 58-60; German Commission 'Competition Law 4.0', *supra* note 1, 30; Italian Competition Authority, Italian National Regulatory Authority for Electronic Communications, and Italian Data Protection Authority, *Joint Sector Inquiry on Big Data*, (2020) https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf (accessed 20 February 2020), 78; Stigler Committee, *supra* note 1, 40; UK Digital Competition Expert Panel, *supra* note 1, 36.

short-term gratification, salience or impatience.⁴⁵ The ability of BigTech 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. Hence, incumbent platforms appear hard to dislodge.

Moreover, large digital platforms act as gatekeepers and regulators due to their rule-setting role within the ecosystem.⁴⁶ 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,⁴⁷ digital platforms are unavoidable trading partners⁴⁸ in a wide range of contexts, thus exercising an intermediation (or bottleneck) power⁴⁹ even in apparently fragmented marketplaces, i.e. those where the market

⁴⁵ Australian Competition and Consumer Commission, *supra* note 1, 10; Crémer, de Montjoye, and Schweitzer, *supra* note 1, 47-48; Stigler Committee, *supra* note 1, 37; UK Competition and Markets Authority, *supra* note 1, 81; UK Digital Competition Expert Panel, *supra* note 1, 109.

⁴⁶ Australian Competition and Consumer Commission, *supra* note 1, 6; Crémer, de Montjoye, and Schweitzer, *supra* note 1, 48; French Competition Authority, *supra* note 1, 7; German Commission ‘Competition Law 4.0’, *supra* note 1, 47; UK Competition and Markets Authority, *supra* note 1, 169; UK Digital Competition Expert Panel, *supra* note 1, 41.

⁴⁷ French Competition Authority, *supra* note 1, 7; German Commission ‘Competition Law 4.0’, *supra* note 1, 50; UK Digital Competition Expert Panel, *supra* note 1, 55.

⁴⁸ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 49.

⁴⁹ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 70; German Commission ‘Competition Law 4.0’, *supra* note 1, 30; Stigler Committee for the Study of Digital Platforms, *supra* note 1, 84.

share is significantly below 40%.⁵⁰ 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.⁵¹ Indeed, almost all the reports recently issued by authorities, policy makers and academics stress the inefficiency of relying solely on *ex post* antitrust enforcement and call for a possible *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. Moreover, the antitrust toolkit is of general application, so that it is not well-equipped to handle the disruptive business models concerned, whereas BigTech present competition issues that cannot be adequately addressed by rules suitable for all industries. Furthermore, current antitrust remedies can often be ineffective in the digital landscape and, in any case, they lack

⁵⁰ See also 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 February 2020), holding that unilateral conduct which could promote the tipping of the market should be prohibited even below the threshold for dominance.

⁵¹ See A.D. Melamed, *Antitrust Law and its Critics*, *Antitrust Law Journal* (forthcoming), noting that it is surprising that regulation seems to be very much on the minds of members of the mainstream antitrust communities.

the same reach and the degree of legal certainty and predictability associated with *ex ante* regulation.

Notably, the UK Digital Competition Expert Panel recommended establishing a code of conduct for digital platforms with a strategic market status. This code was 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.⁵² A newly-established Digital Markets Unit should monitor and enforce this set of rules (enforced co-regulation).

The UK Competition and Markets Authority (CMA) welcomed the proposal for the development of a pro-competitive regulatory regime for advertising-supported platforms.⁵³

By the same token, the Stigler Committee suggested 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.⁵⁴ Moreover, on the antitrust litigation side, by addressing the risks of underenforcement, the Committee proposed 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.⁵⁵ For instance, rules that

⁵² UK Digital Competition Expert Panel, *supra* note 1, 57 and 61.

⁵³ UK Competition and Markets Authority, *supra* note 1, 231.

⁵⁴ Stigler Committee, *supra* note 1, 78-79 and 83-92.

⁵⁵ Stigler Committee, *supra* note 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.

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 Australian Competition and Consumer Commission (ACCC) shared the view that the business models of digital 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 advocated the adoption of a code of conduct to address the imbalance of bargaining power between digital 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.⁵⁶

The German Commission ‘Competition Law 4.0’ took a position against the creation of a Digital Agency and the underlying idea of establishing a public utilities-style regulation for the digital economy.⁵⁷ However, it proposed a set of new clear-cut prohibitions (rather than standards) for dominant online platforms, with a possibility for them to prove that an exception is justified.⁵⁸ Indeed, since digital markets tend towards rapid concentrations of power, hence requiring speedy intervention against anti-competitive practices, the best

⁵⁶ Australian Competition and Consumer Commission, *supra* note 1, 138-142 and 255-257. See also Australian Government, *Regulating in the digital age*, Government Response and Implementation Roadmap for the Digital Platforms Inquiry (2019), <https://treasury.gov.au/publication/p2019-41708> (accessed 28 February 2020), committing \$27 million over four years for a Digital Platforms Branch within the ACCC.

⁵⁷ German Commission ‘Competition Law 4.0’, *supra* note 1, 25 and 77-81.

⁵⁸ German Commission ‘Competition Law 4.0’, *supra* note 1, 49.

approach is to apply relatively simple rules of conduct.⁵⁹ On the same grounds, the French Competition Authority considered it useful to draw up a list of practices that raise concerns specific to “structuring digital platforms”.⁶⁰ Furthermore, the German Commission proposed 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.⁶¹ The German Ministry for Economics and Energy has recently published a draft for the 10th amendment of the German Competition Act. Section 19a of the Act proposes implementing a competition-oriented regulation for “undertakings with paramount significance for competition across markets”, whose contents are quite similar to the ones tabled by the German Commission 4.0.⁶²

The Benelux joint memorandum called for the introduction of an *ex ante* intervention mechanism to prevent anti-competitive conduct by digital gatekeepers.⁶³ 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.

⁵⁹ German Commission ‘Competition Law 4.0’, *supra* note 1, 24.

⁶⁰ French Competition Authority, *supra* note 1, 7-8.

⁶¹ German Commission ‘Competition Law 4.0’, *supra* note 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.

⁶² An English (unofficial) translation of the proposal is available at <https://www.d-kart.de/en/blog/2020/02/21/draft-bill-the-translation/> (accessed 7 March 2020).

⁶³ Belgian Competition Authority, Dutch Authority for Consumers & Markets, and Luxembourg Conseil de la Concurrence, *supra* note 1, 5-6.

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.⁶⁴

Finally, the European Commission has recently remarked that the rules on competition are currently under revision so that they are better suited to the digital economy.⁶⁵ Indeed, 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.

However, the report previously prepared by Crémer, de Montjoye, and Schweitzer for the Commission seemed to suggest a different approach more in line with the common position expressed by the G7 competition authorities (including the European Commission). Indeed, by advocating a more vigorous competition policy regime achievable within the general antitrust framework,⁶⁶ the report appeared not far from the common understanding among G7 competition authorities that the issues raised by digital markets are not beyond the reach of antitrust law and its toolkit.⁶⁷ Nonetheless, the report acknowledged that competition rules need to be reshaped and adapted to digital markets' features, and this requires a rethinking

⁶⁴ Expert Group on Regulatory Obstacles to Financial Innovation, *supra* note 4, 79-80.

⁶⁵ European Commission, *supra* note 12, 8-10.

⁶⁶ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 14.

⁶⁷ G7 Competition Authorities, *supra* note 5.

of the tools of analysis and enforcement. The main change of paradigm should reside in the new balance of error costs and in the predominance of legal testing over the effect-based approach.⁶⁸ Under-enforcement in the digital era would be of particular concern, especially because, considering the stickiness of market power, the harm would presumably last longer than in traditional markets. Therefore, even if consumer harm cannot be precisely measured, strategies employed by dominant platforms to reduce the competitive pressure on them should be forbidden in the absence of clearly documented consumer welfare gains.⁶⁹ Such a shift should impact on the allocation of the burden of proof as well as on the definition of the standard of proof itself, the rationale being that, when certain conditions are met, it is up to the defendant to demonstrate the pro-competitiveness of the conduct.

3. 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, BigTech enjoy a brand-new type of market power which implies greater responsibilities and justifies specific responses. Indeed, large digital 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

⁶⁸ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 50-51.

⁶⁹ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 41-42.

as both gatekeepers and rule-setters, BigTech 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 digital platforms play a dual role, competing with their business customers operational on the platform.

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.

Admittedly, some proposals seem characterized by a genuinely regulatory approach. At least from a methodological standpoint, the ACCC inquiry and the CMA report on digital advertising can be mentioned as prominent examples.⁷⁰ Following careful market analysis, defects affecting the markets for search engines, social networks and digital advertising are identified, and sector-specific (structural and behavioural) measures are considered.

Conversely, in most of the reports, the revival of regulation seems supported more by an antitrust enforcers' failure than by a market failure. First, differently from the mainstream prototype of economic regulation, the *ex ante* intervention framed in these proposals is cross-sectoral. It is therefore general in scope and applicable to any business performed via a digital platform, exactly like antitrust laws. Since the data-driven economy is pushing a platformization process in many industries, it is possible to argue that, in the near future, this

⁷⁰ Australian Competition and Consumer Commission, *supra* note 1; UK Competition and Markets Authority, *supra* note 1.

“special” set of *ex ante* provisions will represent the ordinary statute of the economy. Moreover, in most cases the list of *ex ante* prohibitions in whatsoever form envisaged (i.e. as clear-cut prohibitions of a new EU platform regulation, or a non-exhaustive list of practices with heightened anticompetitive effects, or a code of conduct) is not rigid and absolute, leaving space for an efficiency defence and for demonstration that a given conduct is justified in the specific circumstances concerned. Therefore, even though *de facto* this approach would likely disincentivize digital platforms from engaging in certain conduct,⁷¹ from a theoretical standpoint the underlying rationale appears more familiar to antitrust. Finally, the proposed lists of *prima facie* unlawful behaviours address hypotheses that standard antitrust analysis would strive to tackle.

The case of self-preferencing appears paradigmatic. On the one hand, it represents the main concern related to the dual role enjoyed by digital platforms. Acting as regulators and being at the same time participants in the market, BigTech may leverage their power giving preferential treatment to their own products and services with respect to those provided by other entities. Hence, it comes as no surprise that self-preferencing is the paramount *ex ante* prohibition in almost all the mentioned reports and inquiries.⁷² On the other hand, despite the European Commission’s decision in *Google Shopping*,⁷³ it is contentious whether a dominant

⁷¹ See A. Lamadrid de Pablo, *Shortcuts and Courts in the Era of Digitization*, CPI Antitrust Chronicle (2019), 6, noting that in over 60 cases of EU competition enforcement no unilateral practice or merger has ever been cleared on the basis of a successful objective justification/efficiencies defense.

⁷² Australian Competition and Consumer Commission, *supra* note 1, 134-136; French Competition Authority, *supra* note 1, 7-8; German Commission ‘Competition Law 4.0’, *supra* note 1, 50-51; UK Competition and Markets Authority, *supra* note 1, 238-239; UK Digital Competition Expert Panel, *supra* note 1, 62. See also Expert Group on Regulatory Obstacles to Financial Innovation, *supra* note 4, 79-80, recommending the Commission to introduce *ex ante* rules to prevent large, vertically integrated platforms from discriminating against product and service provision by third parties.

⁷³ European Commission, Case AT.39740 (2017), *Google Search (shopping)*.

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. Indeed, 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. Therefore, antitrust provisions do not impose a general prohibition on self-favoring by dominant firms, so that such conduct is not unlawful *per se*.

Notably, after a seven years-long investigation, 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. According to the Commission, by artificially diverting traffic from rival comparison-shopping services, Google's self-favoring aims at leveraging its market power on search engine to the market of comparison shopping sites. While awaiting the General Court (GC) judgement,⁷⁴ a lively debate has taken place on the possibility to assess such conduct under one of the established categories of abuse. Indeed, the types of abuse closest to the challenged practice (i.e. essential facilities doctrine, discrimination, and tying) do not appear suitable to address cases of self-preferencing.⁷⁵

⁷⁴ GC, Case T-612/17, *Google and Alphabet v. Commission*.

⁷⁵ See N. Dunne, *Dispensing with Indispensability*, *Journal of Competition Law & Economics* (forthcoming); I. Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 *Yearbook of European Law* 448 (2019); P. Ibáñez Colomo, *Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping*, 10 *Journal of European Competition Law & Practice* 532 (2019); P. Akman, *The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law*, 2 *University of Illinois Journal of Law, Technology and Policy* 301 (2017); B. Vesterdorf, *Theories of self-preferencing and duty to deal – two sides of the same coin?* 1 *Competition Law & Policy Debate* 4 (2015); N. Petit, *Theories of Self-Preferencing Under Article 102 TFEU*:

Interestingly, in their report for the European Commission, Crémer, de Montjoye and Schweitzer proposed that self-preferencing by a vertically integrated dominant digital platform should be considered unlawful not only under the preconditions set out by the essential facility doctrine, but also below this threshold, wherever it is likely to result in a leveraging of market power and is not justified by a pro-competitive rationale.⁷⁶ Therefore, on their view, in cases of vertically integrated dominant digital platforms in markets with particularly high barriers to entry, and where the platform serves as an intermediation infrastructure of particular significance, to the extent that the platform performs a regulatory function, it should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets.

However, caution is recommended before following this path. Indeed, while the assumption that the challenges posed by digital platforms are unique deserves deeper analysis,⁷⁷ there is little doubt that implementation of the policy responses under examination would be (truly) disruptive.

Far from being limited to a reshaping of competition rules, tailored to specific, narrow scenarios, the proposals at stake imply a major re-orientation of competition policy in an increasingly wide area of the economy. Notably, it is not clear how the regulatory responsibility of digital platforms should be reconciled with the concept of special

A Reply to Bo Vesterdorf, (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253 (accessed 10 March 2020).

⁷⁶ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 66.

⁷⁷ See P. Ibáñez Colomo, *A contribution to 'Shaping competition policy in the era of digitisation'*, (2018) 2, https://ec.europa.eu/competition/information/digitisation_2018/contributions/pablo_ibanez_colomo.pdf (accessed 23 March 2020), arguing that the phenomena that have been identified in digital markets are in no way unique to them.

responsibility of dominant firms. In certain cases, the explicit reference to the telecommunications regulatory model, which is solely addressed to “designated” firms, implies that this new form of market power can exist even in the absence of dominance.⁷⁸ In other cases, the policy option is formally linked to the concept of dominance.⁷⁹ However, a revision of the concept of dominance is in the meantime endorsed. Indeed, by referring to platforms’ gatekeeping position, such proposals aim at introducing a new legal threshold for intervention which would entail the expansion of the special responsibility that dominant players have under antitrust provisions, even where platforms cannot be considered dominant because their market share is significantly below 40%.⁸⁰ Furthermore, by attaching this new special responsibility to the rule-setting position within the ecosystem and the dual role played by platforms, the proposals are challenging the platforms’ business models and their multi-sided nature. In short, their status.

As a consequence, a revival of abuses of structure may soon occur. Indeed, 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. However, vertical integration provides substantial scope for efficiencies and generally increases consumer welfare.⁸¹ Namely, integration may

⁷⁸ UK Digital Competition Expert Panel, *supra* note 1, 81. The European Electronic Communications Code established by the Directive (EU) 2018/1972, (2018) OJ L 321/36, addresses asymmetrical regulatory constraints to players designated as having “significant market power” (Articles 63 and 67). Notably, non-discrimination and access duties are included among those obligations (Articles 70 and 73).

⁷⁹ German Commission ‘Competition Law 4.0’, *supra* note 1, 50.

⁸⁰ Crémer, de Montjoye, and Schweitzer, *supra* note 1, 49.

⁸¹ See e.g. 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; U.S. Department of Justice, *Non-Horizontal Merger Guidelines*, (1984) para 4.24. See also U.S. Department of Justice and Federal Trade Commission, *Draft Vertical Mergers Guidelines*, (2020) para. 8,

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, the real focus of the ongoing debate is not whether in the digital economy *ex ante* regulation may be favoured to antitrust enforcement; rather, it is whether well-established economic standards of antitrust analysis should leave room for a tailored set of *ex ante* provisions which, on closer scrutiny, reveal the attempt to move from an effect-based approach to a system centred on legal presumptions and legal testing. Against this background, the circumstance that several reports have proposed establishment of a digital authority,⁸² or a digital unit,⁸³ appears of little importance.

Such a departure from antitrust standards of analysis goes far beyond a simple fine-tuning of its legal instruments: it implies a radical change of perspective. In this regard, the fact that a more regulatory approach of this kind is advocated by many antitrust enforcers should not be underestimated. As already noted, the proposals put forward seem designed to address enforcers' failures more than market failures. Indeed, it has been argued that 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.⁸⁴ On this view, identifying *ex ante* what types

<https://www.justice.gov/opa/pr/doj-and-ftc-announce-draft-vertical-merger-guidelines-public-comment> (accessed 23 March 2020).

⁸² Stigler Committee, *supra* note 1, 83.

⁸³ UK Digital Competition Expert Panel, *supra* note 1, 55 and 62; Australian Competition and Consumer Commission, *supra* note 1, 138-142. According to UK Competition and Markets Authority, *supra* note 1, 232, the establishment of a "body" is necessary, irrespective of the form selected, which may be either a digital unit or a digital authority.

⁸⁴ R. Chopra and L.M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 *The University of Chicago Law Review* 357, 368 (2020).

of conduct are anticompetitive, and reversing the burden of proof would save time and alleviate risks of underenforcement.

4. 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 new economy. Addressing this topic, Richard Posner warned that there was a problem with the application of antitrust law, but that it was not a doctrinal problem.⁸⁵ 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.”⁸⁶

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.⁸⁷ 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

⁸⁵ R.A. Posner, *Antitrust in the New Economy*, 68 *Antitrust Law Journal* 925 (2001).

⁸⁶ Posner, *supra* note 85, 925.

⁸⁷ 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 March 2020).

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.”⁸⁸

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 enforcers' failures than in market failures. 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 introducing a blend of corrective tools such as *ex ante* prohibitions, non-punitive remedies, per se rules, legal presumptions, and shifts of the burden of proof.

Rather than adapting competition rules to the speed of digitization, the envisaged proposals imply a radical change of perspective replacing the flexible, effects-based, and technology-neutral framework granted by antitrust law enforcement with a formalistic and structural approach based on a list of *ex ante* prohibitions expressly crafted to deal with companies of

⁸⁸ Kovacic, *supra* note 87.

a specific type.⁸⁹ By *de facto* amounting to the introduction of a platform neutrality regime, this policy option seems to reflect the challenges faced in achieving a comprehensive understanding of platform business models. Indeed, two/multi-sided platforms show a natural dualism⁹⁰: 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. However, short-cuts such as a list of prohibitions and the shift of the burden of proof will not help enforcers to fully and readily understand the digital economy dynamics. A transition from an infringement by effect to an infringement by object rule will not support authorities in conducting accurate investigations. Instead, this change of paradigm resembles the precautionary principle: once conducts falling within the scope of tabled lists of economic activities are qualified as dangerous, as a rule the legal order will block them, unless the interested party manages to prove that, in the specific case, no substantial risks are faced.⁹¹

No one contends that competition authorities have under-enforced antitrust rules in the digital scenario. However, it has happened mainly with respect to mergers.⁹² Additionally, whether the concern is about the timeliness of the intervention, i.e. whether antitrust is considered

⁸⁹ For a recent critique of the more economic approach, see Jan Blockx, *The Limits of the 'More Economic' Approach to Antitrust*, 42 *World Competition* 475 (2019) arguing that tools other than effects analysis are needed in antitrust enforcement, such as *per se* rules.

⁹⁰ A. Lamadrid de Pablo, *The Double Duality of Two-Sided Markets*, 64 *Competition Law* 5 (2015).

⁹¹ European Commission, Communication 'on the precautionary principle', COM(2000) 1 final, para. 6.4.

⁹² M. Walker, *Competition policy and digital platforms: six uncontroversial propositions*, *European Competition Journal* (forthcoming).

unable to keep up with fast-moving markets, enforcers can use interim measures to prevent imminent damage to the functioning of competition in the market.⁹³ By their nature, interim measures do not lessen the substantial standard of the analysis that the antitrust enforcer is required to meet in its final decision, but provide a useful tool to “stop the clock” while the analysis is being conducted.

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.

⁹³ European Commission, *Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets*, Press release IP/19/6109 (2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109 (accessed 28 March 2020).