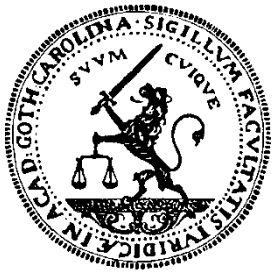

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The influence of digital platforms in competition law: an accepted or imposed violation of the law?

JAEM01 Master Thesis

European Business Law, LL.M

15 higher education credits

Supervisor: Xavier Groussot

Term: Spring 2023

ABSTRACT

The GAFAM (Google, Apple, Facebook, Amazon and Microsoft) play an important role in our daily lives as they are always collecting intangible assets, data, and are competing for consumers attention.

These platforms arose, grew faster than their competitors and strengthened their position to a point where they clearly dominate the market, occupying almost monopolistic positions. Their power and specificity render the appreciation of their position under Competition law and policy, complicated.

The *Big Techs* are increasingly adopting processes that are harmful to competition. This is a significant problem that the European Commission (EC) and National Competition Authorities (NCA) are concerned about. There were successive failures of conviction to regulate their actions and punish the internet giants. Today, we can talk about an undermining of Competition law and policy when it comes to regulating the online platforms, and it is even possible to question the efficiency of the Commission and NCAs. The influence of digital platforms in competition law is such that it raises the question as to whether violations of the law are accepted by the Commission, or imposed by the platforms which tend to become "private regulators".

Finally, it becomes clear that the emergence of new regulations to deal with the problems arising from the digital era is a necessity. There is a multiplication of specific legislation for platforms, such as the entry into force of the Digital Markets Act (DMA). This regulation's objective is to 'ensure fair and open digital markets'[1] in the European Union (EU). However, its suitability as a competition tool and potential solution to the ongoing digital anti-competitive issues can be questioned.

[1] European Commission, 'The Digital Markets Act: ensuring fair and open digital markets' *Europa.eu* < https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en > accessed 5 may 2023.

PREFACE

With these few lines, I wish to thank the people who contributed to the realization of this LLM thesis.

Starting with Mr. Xavier Groussot, my supervisor, who accompanied me throughout its elaboration. I am grateful for his advice, encouragement, and constructive comments.

I would also like to thank the Faculty of Law of Lund for providing me with the necessary resources to carry out my research.

Finally, I would like to express my gratitude to my relatives, who spent time to carefully proofread my work.

Lund, 19th of May 2023

Apollonie Epin

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ABREVIATIONS

ADP	Abuse of dominant position
AI	Artificial intelligence
CA	Court of appeal
CJEU	Court of Justice of European Union
CMA	Competition and Markets Authority
DMA	Digital Markets Act
EC	European Commission
EU	European Union
EUMR	European Union Merger Regulation
GAFAM	Google, Apple, Facebook, Amazon, Microsoft
Ibid.	*Ibidem*, in the same place
MEP	Members of the European Parliament
NCA	National Competition Authority
NCT	New Competition Tool
OECD	Organization for Economic Co-operation and Development
OJ	Official journal (of the European Union)
Op. cit.	*Opus citatum*, work cited
p.	Page
SSNIP	Small but Significant and Non-transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

1.1. Background

According to Christel Schaldemose, leader of the Members of the European Parliament, 'For too long tech giants have benefited from an absence of rules. The digital world has developed into a Wild West, with the biggest and strongest setting the rules. But there is a new sheriff in town – the DMA. Now rules and rights will be strengthened'.[2]

Indeed, a large number of business activities have developed on online platforms in the last few years and there is now a variety of ways to communicate, access information or purchase goods and services. A trend towards the digitalization of activities can therefore be seen, permitting the internet giants to grow so strongly that they now dominate entire market sectors. These include the GAFAM, which now hold a dominant position in the digital economy as well as major market capitalizations.

An online platform is defined by the Commission as 'an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups'.[3] They propose a varied set of online services such as 'marketplaces, search engines, social media and creative content outlets, application distribution platforms […]'.[4] These platforms are characterized by their presence on multi-sided markets, the production of networks effects and the production of significant economies of scale. Similarly, the use of algorithms and the accumulation of data is specific to the digital sector.

However, their monopolistic position and behaviors present some issues in digital markets, in terms of competition. According to the dictionary of legal dictionary Gérard Cornu, competition refers to 'the offering, by several distinct and rival companies, of products or services that tend to satisfy equivalent needs with, for companies, a reciprocal chance of winning or losing the favor of customers'.[5]

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[2] Christel Schaldemose *in* European Parliament, 'EU Digital Markets Act and Digital Services Act explained' [2021] *Europa.eu, News European Parliament* < https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained > accessed 5 May 2023.

[3] European Commission, 'Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy' [2015] *Europa.eu, Shaping Europe's digital future*, p.5 < Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy | Shaping Europe's digital future (europa.eu) > accessed 5 may 2023.

[4] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM(2016) 288 final, p.2.

[5] G. Cornu, Association Henri Capitan, 'Vocabulaire juridique' [2018] *Presses Universitaires de France*, Quadrige, 12ème édition.

New forms of bypassing competition rules arose from the specificities of the biggest numeric firms. One could think of a cartel based on algorithms or the strengthening and abuse of a dominant position (ADP) through the reliance on information resulting from a lead in technology. As a matter of fact, they often manage to lock their position of dominance and establish themselves as guardians of the digital market for their own profit.

If article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[6] prohibit cartels and abuse of dominant positions respectively, they seem to be insufficient to regulate the tech giants. Similarly, the control of concentration provided by the EC Regulation No. 139/2004 is not adequate to capture them. Competition law has therefore seen itself exceeded by the power of internet giants. This leads to question the effectiveness of competition law, and highlights the necessity for new rules, specific to digital markets.

Indeed, as the digital economy is constantly evolving, European legislation must evolve with it to protect competition in the market. It is in this context that on 2 June 2020 the European Commission organized a public consultation and published an impact assessment on a possible *new competition tool* (NCT) aimed at 'addressing the gaps in the EU competition rules in the digital economy'[7]. The Commission then proposed the Digital Markets Act (DMA) in December 2020 which entered into force on November 1st 2022 and is applicable since May 2nd 2023.[8] It aims to apply to large technological companies considered as gatekeepers which will be submitted to a list of obligations meant to control their practice on the digital market, in an *ex-ante* manner.

1.2. Purpose and research question

This thesis aims to analyze the inadequacies of competition law regarding the challenges imposed by digital platforms. Indeed, it seems that competition authorities are not doing enough to regulate the Big Tech. In turn, the latter can impose their violations of competition law and strengthen their 'winner-takes-all' strategy. There are several reasons why this is an important issue.

First, competition law and policy are designed to promote fair competition in markets, including the digital market. The European Commission has referred to consumer welfare as the goal of competition policy for many years.[9] However, if law violations are imposed or accepted, the competition *playing field* risks being

[6] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2007] OJ C326.

[7] European Commission, 'Impact Assessment for a possible New competition tool' COMP A1, Ares (2020)2877634, p.1.

[8] 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 / DMA) [2022] OJ L265.

[9] R. Whish, D. Bailey, 'Competition policy and economics' [2021], *Oxford Competition Law* 10th edition.

unequal. This could result in unfair advantages for some undertaking which would ultimately affect the consumer. The latter would suffer from higher prices, lower quality and a lack of innovation. Thus, if competition authorities fail to effectively address violations of competition law by digital platforms, it may result in harming consumer welfare.

Also, anti-competitive behaviors are not specific to online platforms but are however strongly accentuated in the digital world. As the services offered by undertaking and business models are different than in traditional markets, platforms behaviors are harder to tackle through the existing laws. Ensuring free and effective competition is therefore all the more relevant in this sector. In addition, this issue is very actual with the rapid development of new technologies and artificial intelligence in the digital era, which are at the heart of new anti-competitive practices. This actuality is highlighted by the very recent adoption and applicability of the Digital Markets Act.

Thus, the purpose of this work is also to question the contributions of the DMA, through its content and control of gatekeepers. It will be analyzed whether it is a possible solution to the problems posed by the digital market and as a new tool in competition law, useful to ensure a fair market.

Understanding its suitability is crucial to assess whether it provides an effective regulatory framework to address the unique challenges posed by digital platforms. If the DMA is found to be *revolutionary* in terms of competition law, it can help ensure fair competition, prevent anti-competitive behavior, and mostly, protect consumer welfare.

From these initial observations, the following issue will be the subject of this thesis:

Are competition law violations by digital platforms being imposed to or accepted by competition authorities? And is the DMA suitable to solve the ongoing problems?

1.3.Methodology and materials

The thesis uses the methodology of legal doctrinal research, also called "black letter methodology". The purpose of this method is 'to systematize, rectify and clarify the law on any particular topic by a distinctive mode of analysis of authoritative texts that consist of primary and secondary sources'.[10] In other words, it aims to "collect organize and describe the law"[11] but also to identify ambiguities and give criticism of the law[12]. This will be done in part 2 (TITLE I) when assessing that current

[10] M. McConville, W. Hong Chui 'Research Methods for law' [2017] *Edinburgh University press* second edition, p.4.

[11] B. Consultores, "Research methodology in legal studies" [2021] *Online thesis* < https://online-tesis.com/en/research-methodology-in-legal-studies/ > accessed 5 May 2023.

[12] *Ibid*.

competition law isn't adequate to regulate digital platforms but also in part 4 (TITLE III) when analyzing the DMA's provisions and its suitability to solve this problem.

The thesis also aims at describing the specificities of digital markets which allow them to impose their competition law violations. For this purpose, mainly in part 3 (TITLE II), a descriptive methodology is employed. Descriptive research, 'as its name suggests, describes the state of affairs as it exists at present. It merely describes the phenomenon or situation under study and its characteristics'.[13]

Finally, different materials are used to answer the research question. Primary and secondary sources of EU law meaning the Treaties and regulations but also case law of the Court of Justice of the European Union are exploited. The thesis is also based on reports from institutions, articles, and other types of publications due to the fast variations characterizing the digital era.

1.4. Delimitation

The DMA is part of the Digital Services Act Package, which also consists of the Digital Services Act (DSA). In this thesis the focus is on the DMA, and there will be no development on the DSA. Indeed, the DSA is closer to the direct protection of end users, less interesting in terms of competition.

Also, at the time of writing, the Digital Markets Act will only have recently become applicable. Thus, the analysis of its significant effects is not possible. Only a study of its relationship with the law previously in force, and a critique based on supposition will be the subject of this dissertation.

1.5. Outline

This thesis contains five parts including an introduction (1) and conclusion (5).

The second part (2) of this thesis develops that NCAs and the EC are not taking initiatives to sanction the various anti-competitive practices developed in the digital world. Even when they do, the remedies are rarely adequate.

The third part (3) focuses on a study of the existing legal framework and its shortcomings in facing the challenges of digital technology allowing tech giants to impose themselves as private rule-makers.

Finally, the fourth part (5) is devoted to an analysis the Digital Markets Act which objective is to provide a solution to the problems posed by the specificities of the digital market. However, it will be shown that there are deficiencies in this new regulation making it difficult to achieve its objective.

[13] K. Vibhute, F. Aynalem, 'Legal Research Methods' [2009] *Justice and Legal System Research Institute.*

2. TITLE I: A clear lack of platform ex-post control by Competition Authorities – AN ACCEPTED VIOLATION OF THE LAW

Traditionally in competition law, the procedure intervenes *ex-post* to sanction anti-competitive practices such as cartels and abuses of dominant position. This means that the monitoring of compliance with the law takes place after the practices. In the European Union, *ex-post* competition law provisions can be found in the TFEU. Practices which are incompatible with the internal market are prohibited by article 101 and 102 TFEU. Under the Treaty, the European Commission has powers to establish competition rules[14] and to enforce them. Similarly, a behavior producing anti-competitive effect on the national territory leads to the application of national law, enforced by national competition authorities. Also, the latter are obliged to apply European competition rules when the practice refereed to them is likely to affect trade between Member states[15].

However, in the digital era, the efficiency of the EC and NCAs can be questioned as they fail to condemn some anti-competitive practices (2.1) and as the sanctions imposed on tech giants appear to be inadequate (2.2).

2.1.The successive failures of condemnation by Competition Authorities

Digital platforms, and more specifically the GAFAM are taking over entire sectors of the global economy and are at the heart of most anti-competitive practices. However, it is common for these giants not to be sanctioned or even controlled as regulatory authorities and courts only react in rare cases. The Commission appears to be 'relatively passive towards Big Tech'.[16] Authors argue that 'There are many practices related to the digital economy that are likely to be examined by competition authorities and judges […]. However, at this stage, only a small number of them have been examined under the law of anti-competitive practices and, moreover without any litigation'.[17]

This trend is shown by the European Court of Auditors in its special report regarding the Commission's responses to the challenges posed by digital markets. Indeed, this report demonstrates that in terms of anti-competitive practices - meaning cartels and abuse of dominant position – the Commission 'has conducted only four sector inquiries which enabled the detection of infringements of competition rules'.[18]

[14] Art. 3 TFEU.

[15] Art. 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Reg 1/2003) [2002] OJ L001.

[16] B. Braeken, J. Versteeg, T. Hieselaar, 'An overview of Big Tech cases leading up to the Digital Markets Act (DMA)' [2021] *Bureau Brandeis* < An overview of Big Tech cases leading up to the Digital Markets Act (DMA) - Bureau Brandeis > accessed 15 April 2023.

[17] M. Chagny, 'L'adaptation du droit de la concurrence à l'économie numérique' [2015] Lexis 360 *La Semaine Juridique - édition Générale* n° 49, p.2240.

[18] European Court of Auditors, 'The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight' [2020] (special report), p.17.

These so called sector inquiries are investigations carried out by the EC into sectors of the economy where there are reasons to believe that breaches of competition rules might be a factor contributing to the market not working as well as it should.[19] The Court of Auditors report therefore shows that the EC does little to look into violations of competition law.

More specifically, a whistleblowing mechanism has been put in place concerning cartels. It is called the leniency notice, and it encourages participants in cartels to provide to it evidence of their unlawful behavior in return for immunity or a reduction in fines. As a matter of fact, studies reveal that over the 2010 to 2017 period, only two investigations of cartels, out of twenty-five of them, 'resulted from the Commission's own detection work'.[20] This means that the twenty-three other investigations were the result of the leniency applications.[21] Only a very small fraction is the result of the Brussels institution's activity and it is thus, evident that there is an insufficiency in control and action towards repressing cartels, on the part of the Commission.

This phenomenon is also visible in national competition law and can be illustrated by the case law opposing Google and Bottin Cartographes, a company specialized in multimedia mapping. The latter criticized its competitor for providing Google Maps (an online mapping service) free of charge, considering that it constituted predatory pricing falling within the scope of an abuse of a dominant position. Google was condemned by a first judgment of 31 January 2012.[22] However, after an opinion from the french Autorité de la concurrence[23], the Court of Appeal acquitted Google[24], considering that its behavior did not constitute an abuse despite recognizing that it held a pre-eminent position in the geolocation market, in addition to its dominant position in the online advertising market. However, if this behavior doesn't correspond specifically to an abuse of dominant position, it can nonetheless have negative effects on digital markets competition. Therefore, in the digital economy, exists a clear lack of control and law enforcement by the EC and NCAs.

Another NCAs case example is the censure of the Bundeskartellamt's decision concerning Facebook's behavior[25]. Indeed, the German competition authority had

[19] European Commission, 'Ex officio investigations and Sector inquiries' *Europa.eu, Competition policy* < https://competition-policy.ec.europa.eu/antitrust/sector-inquiries_en > accessed 14 April 2023.

[20] European Court of Auditors, *op. cit.*, (reference 18), p.18.

[21] *Ibid.*

[22] Commercial Court of Paris 15th Chamber, judgment of 31 January 2012, *Société Bottin Cartographes / Google Inc., Google France,* RG No. 2009061231.

[23] Autorité de la Concurrence, Opinion 14-A-18 of 16 December 2014.

[24] Paris CA Pole 5 chamber 4, judgment of 20 november 2013, *Google Inc., Google France / Société Bottin Cartographes,* No. 12/02931.

[25] D. Bosco, 'Contentieux Facebook en Allemagne : la décision du Bundeskartellamt censurée' [2019] Lexis 360 *Contrats Concurrence Consommation* n°10, comm. 161.

sanctioned Facebook for its use of personal data based on the qualification of an ADP[26] but the appeal court censored this decision.[27] Once again, this ruling shows the reluctance of national authorities to deal with the real problems posed by digital platforms. It is emphasized by Pr Rupprecht Podszun who reflected on the aforementioned case: 'perhaps, the FCO [Federal Cartel Office] would have done itself a favor […] if it had brought up the courage to say: Yes, […] this is antitrust law for the digital age! And we are now seriously trying to take exploitative abuses to the spotlight after decades of ignorance!'.[28]

Consequently, the Commission and NCAs efficiency to effectively enforce competition law can be questioned, leading to a lack of trust in European and national regulators. Therefore, it is possible to talk about an accepted violation of the law by digital platforms, on the part of competition authorities. As a result, digital platforms are able to maintain their position on the market and use their large market share and power to further their own interests. This can sometimes result in an alteration of competition at the expense of other market players and in the end, at the expense of consumers.

2.2.The inadequacy of the imposed sanctions

As mentioned before, the control of anti-competitive practices intervenes *ex-post*. However, the competition authorities' approach is not appropriate to the digital world, especially in terms of sanctions. Namely, the procedure comes too late to remedy the damage (2.2.1) and sanctions do not work as a threat because of their weakness compared to the immensity of online operators (2.2.2). Indeed, according to Professors Michal Gal and Nicolas Petit, 'antitrust in digital markets has two perceived problems: it is weak and it is slow'.[29]

2.2.1. A punishment happening too late to remedy the damages

Competitive procedures have been proven to be lengthy and tedious. Sanctions are imposed on tech giants after years of investigations. Notably, in the *Google Shopping* case[30], eleven years have gone by between the beginning of the investigations and the conviction by the General Court of the European Union. The problem is that the market can significantly change during these years of procedure, more specifically in the digital world as it is characterized by a strong dynamism. This is underlined by Nathalie Ellen Nielson: 'it is worth highlighting the paradoxical temporality of the law - with its long and tedious procedures - and of digital technology,

[26] Bundeskartellamt, 7 february 2019, B6-22/16.

[27] Oberlandesgericht Düsseldorf, 6 august 2019, VI-Kart 1/19 (V).

[28] R. Podszun, 'Facebook vs. Bundeskartellamt' [2019] *D'Kart Antitrust Blog* < https://www.d-kart.de/en/blog/2019/08/30/en-facebook-vs-bundeskartellamt/ > accessed 23 april 2023.

[29] M.S. Gal, N. Petit, 'Radical Restorative Remedies for Digital Markets' [2021] *Berkeley Technol. Law Journal* Vol. 37, No. 1, p.629.

[30] T-612/17 *Google Inc. and Alphabet, Inc. v European Commission (Google Shopping),* [2021] ECLI:EU:T:2021:763.

with its unparalleled speed'.[31] The french *Vente-privé* case[32] is evidence of this problem: this judgment confirms that 'when a market has undergone profound technological changes [that] it is no longer possible to identify and assess past consumer behavior retrospectively'.[33] Sanctions may not be effective as they are sometimes based on a market which's state is different than the one on which the wrongdoing was initially carried out. In particular, with the help of algorithms and artificial intelligence, digital platforms can easily conceal evidence of anti-competitive practices. Thus, it is frequent that punishment is not adapted to remedy the harm and to restore competition on the market, since traces of anti-competitive behavior have been erased when it intervenes. This has resulted in a debate over the effectiveness of competition authorities in penalizing online operators.

Another risk associated with delayed punishment is that firms can lock their dominant position and create irreversible situations on the market. For example, one could think of the creation of barriers to entry on the market the foreclosure or elimination of actual and potential competitors immutably. This can be illustrated by the three convictions pronounced against Google from 2017 to 2020 in the *Googles Search (AdSense)*[34], *Google Android*[35] and *Google Shopping*[36] cases which have 'hardly dented Google's dominant position'.[37] The *ex-post* punishment, taking place once the damage is done, is incapable of rectifying the market damage and anti-competitive problems created by the internet giants. This shows the 'inability of antitrust law to remove durable monopoly power attained or sustained by digital firms'.[38] It appear to be impossible to revert to a state of equal competition when corrective measures are imposed too late. Thus, the need for a procedure that intervenes in real time to address this issue, can strongly be felt.

In short, the slow pace of *ex-post* regulation procedures is problematic. Markets can change significantly during investigations, allowing time for large firms to lock-in their dominant positions. By the time the remedy is pronounced, the competitive damage is usually irreversible which leads to questioning the incentive of the European Commission to truly sanction digital operators. Moreover, the sanctions imposed can be seen as ineffective as fines are very weak.

2.2.2. The sanctions being too weak to work as a threat

[31] N. Ellen Nielson, 'Réflexions autour de l'efficacité de la sanction ex post des pratiques anticoncurrentielles' [2022] *Revue Lexsociété*, p.8.

[32] Cass.com., Civile, Ch. commerciale, 6 déc. 2017, nº 15-19.048.

[33] L. Costes, 'L'absence d'abus de position dominante de la société Vente-privée.com confirmée' [2016] Lamyline *Revue Lamy Droit de l'Immatériel* nº 144.

[34] *Google Search (AdSense)* (case AT. 40411) Commission decision C/2019/2173 [2019] OJ C369/6.

[35] T-604/18 *Google LLC and Alphabet, Inc. v European Commission (Google Android),* [2022] ECLI:EU:T:2022:54.

[36] T-612/17 *Google Shopping*.

[37] M.S. Gal, N. Petit, *op. cit*. (reference 29) p.633.

[38] *Ibid*., p.629.

Competition authorities can impose remedies on digital platforms which can take the form of fines. The amount of the penalties seem phenomenal; for example, the French Competition Authority has fined Google €220 million for favoring its own services in the online advertising sector. However, these disproportionate rates at first glance, quickly appear negligible when compared to the colossal turnover of the major platforms. For instance, going back to the case of Google, its turnover in 2021 reached 257.64 billion US dollars. Also, according to the Commission's Guidelines on setting fines[39], the maximum amount of financial penalties cannot exceed 10% of the firm's annual worldwide turnover[40]. This limitation of fines in competition law only reinforces the fact that the sanctions imposed by competition authorities on digital operators are manifestly insufficient. This can also be considered as evidence of a certain acceptance of violations of competition law and policy by online operators.

The issue is that financial snactions no longer have deterrent effects and no longer work as a threat against digital operators. Indeed, their purpose is to punish and prevent anti-competitive behaviors. However, 'competition law remedies applied to digital markets 'have not fulfilled their objectives and have been largely ineffective'.[41] Indeed, remedies are insufficient to prevent the initial practice from being carried out, and they are also insufficient to discourage their recurrence. It is true that 'anecdotal evidence suggests that the impact of antitrust investigations and fines may be weak. Indeed, a large number of firms […] are repeat offenders'.[42] To illustrate this point, it is possible to look at the *Microsoft* case law. The company was convicted by the Court of Justice of the European Union[43] for abusing its dominant position by refusing to supply its competitors and through a practice of tying products. However, in 2012 the firm has been subject to a new condemnation[44]. This case law is testimony that digital platforms own a large degree of liberty and suggests that their law violations are accepted by antitrust authorities.

Consequently, the *ex-post* procedure demonstrates strong shortcomings in punishing and regulating digital companies. Authorities don't seem particularly eager to discover anti-competitive practices. When they do, they rarely impose sufficiently up to date and high sanctions to correct the damage. Therefore, the violation of competition policy by digital platforms can be seen as accepted by the Commission and NCAs. However, it appears that online operators are strongly imposing themselves on the market, rendering the application of the law more difficult by reason of their specificities.

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[39] European Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty' [1998] OJ C9/3.

[40] Art. 23 §2 (c) Council Regulation 1/2003.

[41] M.S. Gal, N. Petit, *op. cit*., (reference 29), p.620.

[42] L. Aguzzoni, G. Langus, M. Motta, 'The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation' [2013] *The Journal of Industrial Economics* volume 61 n°2, p291.

[43] T-201/04 *Microsoft Corp. v Commission* [2007] ECLI:EU:T:2007:289.

[44] T-167/08 *Microsoft Corp. v Commission* [2012] ECLI:EU:T:2012:323.

3. TITLE II: A progressing challenge of Competition Law by digital platforms – AN IMPOSED VIOLATION OF THE LAW

The characteristics of the digital world - such as the multitude of market sides, the production of network effects and economies of scale, free products, or accelerated innovation - allow online operators to impose themselves on the market. Indeed, through new practices, they impose their violations of competition law (3.2) to authorities which find themselves powerless when having to analyze their behaviors (3.1).

3.1. The specificities of platforms rendering authority's analysis difficult

While the methods for characterizing anti-competitive behavior are the same in the physical economy, the specificities linked to digital technologies (3.1.1) make the definition of the relevant market (3.1.2) and appreciation of the platforms position on the market (3.1.3) more complex for competition authorities.

3.1.1. Describing the specificities of digital markets

Digital markets are characterized, among other things, by platforms which operate on more than one market, often called on two-sided or multi-sided markets. Defined by Rochet and Tirole, two-sided or multi-sided markets are those on which several platforms allow interactions between end-users and try to obtain the buy-in of both (or multiple) parties by charging each side appropriately.[45] For example, Instagram is a social media which can be used by content creators and viewers of this content but also by third-party advertisers. This network can therefore bring together different groups of consumers[46] and act in distinct but yet very close markets. The platform has the 'ability to match value' between different types of consumers.[47]

Linked to the idea of multi-sided markets, products are often offered free of charge by online operators[48] as a company can remunerate itself through other activities or other sides of the market. According to Friso Bostoen 'Consumers may not be paying but the "other" side of the market is'.[49] For example Facebook is a free platform

[45] J.C. Rochet, J. Tirole, 'Two-Sided Markets: A Progress Report' [2006] *The RAND Journal of Economics* Vol. 37, No. 3, p.645-667

[46] OECD, 'OECD Handbook on Competition Policy in the Digital Age' [2022] p.15 < Competition policy in the digital age - OECD > accessed 28th April 2023.

[47] R. Gatautis, 'The Rise of the Platforms: Business Model Innovation Perspectives' [2017] *Inzinerine Ekonomika-Engineering Economics* volume 28 n°5, p.586.

[48] Assemblée Nationale, 'Rapport d'information déposé en application de l'article 145 du Règlement par la Commission des Affaires Economiques sur les plateformes numériques' n° 3127, 2020, p.45-46.

[49] F. Bostoen, 'Online plateforms and pricing: Adapting abuse of dominance assessments to the economic reality of free products' [2019] *Computer Law & Security Review* volume 35 Issue 3, p.1 < https://doi.org/10.1016/j.clsr.2019.02.004 > accessed 3rd may 2023.

for users, however, advertisers pay the platforms 'to acess the consumers' information (to target advertisements) and attention (to show the advertisements)'.[50]

Furthermore, one of the common characteristics of digital platforms is the production of networks effects. The more a platform will have users, the more it will become popular and the more it will be able to offer products of a better value[51]. The problem is that 'firms can derive market power from network effects'[52]. They are dangerous in terms of competition in that they present a risk of market tipping. Namely, a shift of the market[53] to the benefit of large dominant companies, leading to situations of winner-takes-all, in which the platform can be described as a *gatekeeper*. Indeed, network effects 'make it hard for smaller competitors to attract user'.[54]

In addition, platforms have the possibility to produce at very low unit costs, which can further decrease as production increases. Then, they can spread their fixed cost on this production. These are called economies of scale. This phenomenon allows companies to 'scale up and expand their geographic coverage'.[55] Scale economies are thus, a source of market power, often associated with anti-competitive behavior in the digital world. Indeed, 'Economists have long recognized the antitrust dilemma that it is impossible to promote perfect competition when large economies of scale are present'.[56]

Finally, digital platforms often develop business models based on the collection of data. Such data provides advantages to firms as it allows it to gather information on competitors and consumers and therefore to target markets and customers. They can also 'raise the quality of their services'.[57] Indeed, 'By collecting analyzing and aggregating large amounts of data, firms can improve product quality and expand their activities into new areas'.[58] This leads to the fact that short cycles of innovation are very frequent in the digital world. The framework within which GAFAM interact is the one of a changing economy, where products evolve extremely quickly. This is, in part, due to the speed of algorithms and artificial intelligence.

Consequently, barriers to competition law and policy are intensified in the digital world. Indeed, thanks to their specificities, platforms can blur authorities'

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[50] *Ibid*.

[51] OECD, *op. cit.* (reference 46) p.15.

[52] C. Tucker, 'Digital Data, Platforms and the Usual [Antitrust] Suspects: Network Effects, Switching Costs, Essential Facility' [2019] *Review of Industrial Organization 54*, p.1 < https://doi.org/10.1007/s11151-019-09693-7 > accessed 13th may 2023.

[53] Stigler Center 'Stigler Committee on Digital Platforms, Final report' [2019] p.72-73,

[54] C. Tucker, *op. cit.* (reference 52).

[55] OECD, *op. cit.* (reference 46) p.13.

[56] L. Laudati, 'Note: Economies of Scale: Weighing Operating Efficiency when Enforcing Antitrust Law' [1981] *Fordham Law Review* volume 49 Issue 5, p.771 < https://ir.lawnet.fordham.edu/flr/vol49/iss5/13/ > accessed 7th may 2023.

[57] G. Parker, G. Petropoulos, M. Van Alstyne, 'Digital Platforms and Antitrust' [2020] *2021 Winner of Antitrust Writing Award*, p.6 < https://ssrn.com/abstract=3608397 > accessed 8th may 2023.

[58] *Ibid*., p.5.

scrutiny as they render more difficult to appreciate their position on the market and the definition of the relevant market.

3.1.2. The difficulty to define the relevant market

The first step of investigating anti-competitive practices is to establish the framework within which competition policy is applied, meaning, the relevant market. The latter is delimited in terms of product and territory. The product market includes all products or services that the consumer considers to be 'interchangeable by reason of their characteristics, price and intended use'.[59] The geographic market corresponds to the territory in which undertakings are engaged in the supply of goods and services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas.[60] However, in the digital age, the definition of such a market is substantially more complex.

The problem is that 'traditional methods that have been developed for market definition on one-sided markets (such as the so-called SSNIP test) are not always suitable in the contest of two-sided […] platforms'.[61] Indeed, a difficulty arises when using the Small but Significant and Non-transitory Increase in Price (SSNIP) test also called "hypothetical monopolist test" which is the standard tool for determining the relevant market. The question is wheather the customers would switch to readily available substitutes or to suppliers located elsewhere in response to a SSNIP according to the Commission Notice on the definition of relevant market.[62]

Internet giants, which operate on multisided market, make it difficult to apply the SSNIP test as it identifies only one market. Indeed, the test 'is designed to examine the reactions of one set of customers, not two, to changes in price'.[63] The definition of a single market may 'fail to identify the competitive constraints that undertakings […] represents for at least one side of the platform'[64] meaning that operators can escape the supervision of authorities.

The definition of a precise market is all the more difficult in a changing economy when market boundaries 'might not be as clear as in the *old economy*'[65] and 'may

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[59] European Commission, Directorate-General for Competition 'Glossary of terms used in EU competition policy: antitrust and control of concentrations' [2003] *Publications Office*, p.39.

[60] *Ibid*., p.40.

[61] P. Nihoul, P. Van Cleynenbreugel, 'The roles of innovation in competition law analysis' [2018] *Edward Elgar Publishing Limited*, p. 302.

[62] European Commission, 'Commission Notice on the definition of relevant market for the purposes of Community competition law' [1997] n° 97/C 372/03, OJ C 372.

[63] R.B. Hesse, 'Two-sided platform markets and the application of the traditional antitrust analytical framework' [2007] *Competition Policy International* volume 3 number 1, p.192.

[64] M. Eben, V. Robertson, 'The relevant market concept in competition law and its application to digital markets: a comparative analysis of the EU, US and Brazil' [2021] Graz Law working paper series n°01-2021, p13 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3762447 > accessed 17 may 2023.

[65] J. Cremer, Y.-A de Montjtoye,, H. Schweitzer 'Competition policy for the digital era', report submitted to the European Commission [2019] p.3

change very quickly'.[66] The fact that physical boundaries are invisible in the digital world, associated with the constant innovation and change of digital markets, are therefore sources of difficulty for competition authorities when trying to determine the product and geographical market.

Also, as mentioned before, products can be provided free of charge by online platforms. However, the lack of 'monetary exchange between users of services and the undertaking offering them had […] far reaching consequences for market definition'.[67] Price is central to market definition as the SSNIP test is based on an hypothetical increase in price, which is difficult to imagine when the product is free. That's what Geoffrey Parker and Georgios Petropoulos stressed in their report on Digital Platforms and Antitrust: 'Because many online goods are offered for free, without any monetary price attached to them, it is very challenging to apply the […] SSNIP test'.[68]

Finally, in multi-sided markets, 'it may be challenging to distinguish between customers and competitors because customers on one side of the market may also be competitors to the platform'.[69] This can be illustrated by the platform Booking on which travel agents are users, but also compete directly with the company's own services. In this case, it can be complex to assess the market on which booking, or its users, operate.

Thus, by reason of their specificities, some platforms can impose their violations of competition policy to NCAs and to the Commission who cannot appropriately identify the framework in which they operate.

To sum up what has been stated, the multitude of market faces, the rapid and frequent transformation of market contours due to innovation and the free products make the definition of the relevant market difficult. If authorities manage to determine the relevant market despite difficulties, it is then complex for them to analyze the market power of the players in that market.

3.1.3. The difficulty to appreciate platforms' position on the market

A pre-requisite to assessing platforms behaviors is to appreciate their position on the market. It is essential when investigating merger control but also 'in abuse cases, and often when appraising the anti-competitive effects of agreements'.[70] To study such position, NCAs and the European Commission use the market power of companies as an index. Market power can be defined as 'the ability of firms to unilaterally raise prices above, or lower quality below, the competitive level'.[71] It is

[66] *Ibid*.

[67] M. Eben, V. Robertson, op. cit. (reference 64) p21.

[68] G. Parker, G. Petropoulos, M. Van Alstyne, *op. cit.* (reference 57) p.4.

[69] K. Collyer, H. Mullan, N. Timan, 'Measuring market power in multi-sided markets', p.71 *in* OECD, 'Rethinking Antitrust Tools for Multi-Sided Platforms' [2018].

[70] J.U. Franck, M. Peitz, 'Market power of digital platforms' [2023] *Oxford Review of Economic Policy* volume 39 issue 1, p.35 < https://doi.org/10.1093/oxrep/grac045 > accessed 28th April 2023.

[71] OECD 'Abuse of dominance in digital markets' [2020] p.15.

commonly agreed that the possession of substantial market power is indication of dominance.[72] Authorities then rely on different factors to appreciate substantial market power, such as the existence of barriers to entry on the market, the position of actual and potential competitors or the countervailing buyer power. Mostly, they rely on market shares which, when they are 'extremely large',[73] constitute 'in themselves, and save in exceptional circumstances, proof of the existence of a dominant position'.[74] This principle comes from the *Hoffman La Roche* case and was recalled in the Cremer report which states that dominance is assumed when market share is above a certain threshold.[75]

However, it is possible to question the accuracy of an analysis based on this factor for several reasons.

First of all, because of the accelerated and accentuated innovation in the digital world. Market shares represent a company's position on the market at particular point in time. However, a dominant company at a given moment will not be so indefinitely, and this observation is accentuated in the fast-changing technology sector. This is what the European Commission acknowledges in the *Google Shopping* case: 'in fast-growing sectors characterized by short innovation cycles, large market shares can sometimes be ephemeral and not necessarily indicate the existence of a dominant position'.[76] The 'race' to dominance can also illustrate this idea: 'For example, search engines that were once popular, such as Yahoo! and Alta Vista, have been eclipsed by Google'.[77] Online services can 'rapidly lose their significance'.[78] Therefore, as digital markets are dynamics and as market shares are temporary, they are not a reliable indicator.

Also, the evaluation of market shares is made more difficult by platforms which operate on multi-sided market. Indeed 'If each side is not an independent market, the assessment of the market power of a platform is likely to be more complex than the assessment of the market power of a firm operating on a traditional market'.[79] The issue is that prices of products and services can differ from one side of the market to another (as aforementioned, Facebook provides its social media for free

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[72] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] (Communication) OJ C 45/02, §10.

[73] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* ECLI:EU:C:1979:36.

[74] *Ibid*.

[75] J. Cremer, Y.-A de Montjtoye,, H. Schweitzer, *op. cit*. (reference 65) p.48.

[76] T-612/17 *Google Shopping*.

[77] Oxera, 'Market power in digital platforms - Prepared for the European Commission' [2018], p.7 < https://www.oxera.com/wp-content/uploads/2018/10/Market-power-in-digital-platforms.pdf > accessed 29th april 2023.

[78] Bundeskartellamt 'Paper on Platform Market Power - Results and Recommendations' [2016] < https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Kurzzusammenfassung_Englisch.pdf?__blob=publicationFile&v=2 > accessed 29 april 2023.

[79] F. Jenny, 'Competition Law Enforcement and Regulation for Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward' [2021] < https://ssrn.com/abstract=3857507 >

to users, but advertisers have to pay to be able to display their ads on the platform for example). In this case, it is difficult to assess the extent of the market covered by the undertaking as the shares 'on one side of a platform do not mean much'.[80] Indeed, if price is weaker on one side, market shares risk not representing the overall market power of the company. This is emphasized by the reporters of the OECD who state that 'multisidedness is a particular challenge – picking one side of the market to measure will give an incomplete picture'.[81]

This matter is accentuated when platforms provide products for free as 'there is not monetary measure of value'.[82] In price-zero markets, the share held by a platform doesn't 'adequately capture the realities in a market'.[83] Therefore, the fact that free offers don't represent any market shares 'provides only limited information about market power'.[84] This is notably what the European Commission has stressed in its *Microsoft Skype* merger decision: 'Market shares only provide a limited indication of competitive strength […]. As explained […] services are a nascent and dynamic sector and market shares can change quickly within a short period of time. Furthermore, almost all communications services are offered free of charge'.[85]

As a result, market shares are not a good indicator of a digital firm's market power, and of its position on the market. The problem stemming from the impossibility to assess platforms market power due to their specificities is that they can therefore bypass the law without being considered in a dominant or – simply - important position. For example, it is impossible to sanction an abuse if there is no dominant position under article 102 TFEU. The same reasoning works for merger control: a merger might be allowed if companies are not considered to hold a position too important in the market. Therefore, platforms can behave in a way which produces negative effects on effective competition without being captured by authorities.

As a conclusion trough their specificities, digital platforms find ways to render competition authorities' analysis difficult when it comes to defining the relevant market and assessing market power. It is even possible to say that they impose themselves in digital markets by bypassing competition law.

3.2.The frequent bypassing of Competition law by digital platforms

Digital platforms have developed new ways, new practices, to gain favors of consumers, to become the most dominant on the market and most importantly to 'win'

[80] J.U. Franck, M. Peitz, *op. cit.* (reference 70) p.36.

[81] OECD, 'The evolving concept of market power in the digital economy' [2022] *OECD Competition Policy Roundtable Background Note*, p.8 < www.oecd.org/daf/competition/the-evolving-concept-ofmarket-power-in-the-digital-economy-2022.pdf. >

[82] D. S. Evans, 'Multisided platforms, dynamic competition, and the assessment of market power for internet-based firms' [2016] *University of Chicago Coase-sandor institute for law and economics* working paper n°753, p.1.

[83] OECD, *op. cit.* (reference 81) p.7.

[84] J.U. Franck, M. Peitz, *op. cit.* (reference 70) p.36.

[85] Case *Microsoft/Skype* C(2011)7279, European Commission decision COMP/M.6281 [2011].

competition on the market. These behaviors can take the form of original anti-competitive practices but 'the specificity of digital platforms is that they have new tools that allow [these] old practices to move into a new dimension'.[86]

Indeed, digital firms can rely on new technologies to bypass competition law (3.2.1). Also, platforms found new ways of avoiding the Commission's scrutiny when it comes to mergers (3.2.2).

3.2.1. The development of practices based on new technologies

The use of algorithms to bypass the law, becomes more and more common. There is a tendency towards the use of 'digital technologies to capture consumers' attention and develop long-lasting relations'[87]. Indeed, they are 'increasingly employed by businesses as an integral part of their business models given the availability of big data and breakthroughs in artificial intelligence technology and application'.[88]

Algorithms can be used in many ways such as trough *IP tacking* which consists in 'following the activities of a user by his IP address'.[89] The artificial intelligence is then able to analyze the consumers interest in a product and adapt its price or product recommendation accordingly. Anecdotal evidence of this practice is the case of Google which favored its own products to the ones of competitors through its search engine.[90] This reduces the consumer choices and make competitors' products less attractive, therefore harming them. Thus, platforms are able to gain competitive advantage through the use of IA which can amount to a discriminatory[91] or even an exclusionary[92] abuse of dominant position.

Also, a major benefit of big data and algorithms is that analysis methods are easier to perform, which in turn makes market coordination easier[93]. Therefore, algorithm can support collusion practices, usually sanctioned under article 101 TFEU. Parties can agree to a price-fixing strategy, as the Trod Ltd and GB eye Ltd[94] firms did: they used an 'automated repricing software which […] adjusted their prices to make

[86] J. Beuve, M. Bourreau, M. Péron, A. Perrot, 'Plateformes numériques et pratiques anti-concurrentielles et déloyales' [2020] *Conseil d'analyse économique* focus n°050-2020, p.2.

[87] R. Gatautis, op. cit. (reference 47) p.585.

[88] Lee, Kenji, 'Algorithmic Collusion & Its Implications for Competition Law and Policy' [2018] < https://ssrn.com/abstract=3213296 or http://dx.doi.org/10.2139/ssrn.3213296 > accessed 2 may 2023.

[89] J. Beuve, M. Bourreau, M. Péron, A. Perrot, *op. cit*. (reference 86) p.3.

[90] Case AT. 40411*Google Search.*

[91] Article 102 (2)(c) TFEU

[92] Strategy and behavior designed to eliminate a competitor which is sanctioned by article 102 TFEU.

[93] L. Arcelin, 'Le droit de la concurrence mis à l'épreuve par le numérique' [2019] *LexisNexis La Semaine Juridique Entreprise et Affaires* n° 45, p.5.

[94] Competition and Markets Authority, 'Press release - CMA issues final decision in online cartel case' [2016] < CMA issues final decision in online cartel case - GOV.UK (www.gov.uk) > accessed 16th may 201.

sure neither was undercutting the other'.[95] This was clearly an explicit collusion on prices amounting to a cartel.[96] In addition to 'facilitating explicit collusion, […] pricing algorithms could lead to tacit coordination'.[97] One type of collusion is called *Hub and Spoke*. It consists for competitors to 'use the same algorithm to determine the market price or react to market changes'[98] which leads to horizontal alignment.[99]

The problem with practices based on algorithms is that competition authorities struggle to prove intention. Indeed, 'only a parallelism of behavior appears but it is difficult to qualify it alone as anti-competitive... especially since there is no material element providing proof of an agreement of wills'.[100] Therefore, through new technologies, platforms manage to circumvent the law and to avoid authorities' inspection.

Furthermore, platforms can rely on their specificities to become more dominant. For example, their action on 'several horizontal markets open the door to tied-selling strategies'.[101] The latter is the practice of a supplier of one product (the tying product), requiring a buyer to also buy a second product (the tied product).[102] This is for instance what Microsoft[103] was accused of for providing its 'Media Player and web browser […] together with Windows OS'.[104] In this case, the company leveraged its market power from a dominated market, in another market. The company was sanctioned for its behavior, but it must be noted that 'the digital world can make certain practices […] *cloudier*, and therefore more difficult to detect for authorities'.[105] This is accentuated by the fact that proofs can be erased quickly thanks to AI and rapid innovation. Thus, although some behaviors of large networks have anti-competitive effects, they are not always captured by law. This is because platforms are developing practices that can "take new, complex and almost instantaneous forms and escape the control of the authorities".[106]

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[95] CMA, 'Pricing algorithms Economic working paper on the use of algorithms to facilitate collusion and personalised pricing' [2018] CMA94, p.22 < *Pricing algorithms (publishing.service.gov.uk) > accessed 17th may 2023.

[96] Article 101 TFEU.

[97] CMA, *op. cit.* (reference 95) p.25.

[98] A. Ezrachi, M. Stucke, 'Artificial Intelligence & Collusion: when Computers Inhibit Competition' [2017] *University of Illinois Law Review* volume 2017, p.1787 < *Microsoft Word - Ezrachi & Stucke.docx (illinoislawreview.org) > accessed 15th may 2023.

[99] *Ibid*.

[100] F. Marty, 'La concentration des marchés numériques : caractérisation d'un problème concurrentiel et discussion des propositions de remèdes' [2021] *Gazette du Palais* hors-série n°2, 425g5, p.48.

[101] J. Beuve, M. Bourreau, M. Péron, A. Perrot, *op. cit*. (reference 86) p.6.

[102] R. Whish, D. Bailey *Op. cit*. (reference 9).

[103] T-201/04 Microsoft Corp v Commission ECLI:EU:T:2007:289.

[104] D. Mandrescu, 'Tying and bundling by online platforms – Distinguishing between lawful expansion strategies and anti-competitive practices' [2021] Computer Law and Security Review 40, p.16 < https://doi.org/10.1016/j.clsr.2020.105499 > accessed 24th April 2023.

[105] J. Beuve, M. Bourreau, M. Péron, A. Perrot, *op. cit*. (reference 86) p.6.

[106] Direction Générale du Trésor, 'Plateformes numériques et concurrence' [2019] *Trésor-Éco* n° 250, p.6.

Thus, the Big Tech used their business model's specificities and new technologies such as algorithms to develop new practices which can be imposed to the European regulator. The latter cannot always assess such practices because of their concealment. Through *killer* and *consolidating acquisitions*, online platforms also escape the EC control.

3.2.2. The development of mergers escaping authorities' scrutiny

Platforms also developed new ways of escaping competition authorities' scrutiny when they wish to merge with another entity. Merger control intervene ex-ante, meaning before the transaction happens. It is regulated by the European Union Merger Regulation (EUMR)[107] according to which the Commission is competent to review the merger proposal if the parties' turnover reach a certain threshold.

Indeed, the turnover index 'does not make it possible to control all sensitive operations carried out by structuring digital platforms'[108] because many of them are not subject to the notification obligation. For example, very important transactions such as those between Facebook and Instagram, Amazon and Whole Fund or Google and Waze have escaped any control by the European Commission.[109] Some mergers which could have negative effects of competition are thus likely to escape merger control. However, it is not because the criteria for the application of the law are not met that competition is effective and sustainable.

In particular, *killer acquisitions* are sources of competitive problems. This phenomenon is not specific to the digital world but is more common in it. Such transactions have been defined as the strategy of the acquiring 'innovative targets solely to discontinue the target's innovation projects and preempt future competition'.[110] The fear of a new competitor gives rise to the intention to kill the potential threat. Also exists *consolidating acquisitions*[111] for which the dominant platform's intention is rather to fortify itself, by developing the product of a start-up. These nascent companies very often have great potential for innovation and their absorption then makes it possible, not only to eliminate a threat, but also to benefit personally from it.

The problem with these predatory and consolidating acquisitions is that they rarely reach the thresholds triggering an obligation of notification to the Commission. Their value and the possible anti-competitive effects of the transaction are not reflected by their turnovers. Thus, online operators manage to not attract the attention of authorities, by intentionally organizing their mergers to be below thresholds. For instance, Google was able to acquire up to one hundred and sixty-eight companies

[107] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation – EUMR) OJ L024.

[108] Assemblée Nationale, *op. cit.*, (reference 48) p.9.

[109] P. Corruble, 'Le contrôle européen des concentrations à l'épreuve de l'Economie numérique' [2022] *Revue Interdisciplinaire Droit et Organisation*, p.25.

[110] C. Cunningham, F. Ederer, M. Song, 'Killer acquisitions' [2021] *Journal of Political Economy* volume 129 n°3, p. 1.

[111] F. Marty, *op. cit.* (reference 100).

between 2008 and 2018, among which many were its potential competitors.[112] Another illustration of this problem is presented by the OECD, which uses the data analyzed by Cunningham & al in 2018: start-ups whose turnover was 5% below the threshold of the US Federal Trade Commission were actually 11.3% more likely to be anti-competitive than those whose turnover reached the thresholds and exceeded it by 5%.[113] Therefore, it is particularly common for mergers between an already dominant undertaking and a start-up to not be subject to the obligation to notify the competition authorities, which presents many risks of impeding competition.

Consequently, digital firms tend to abuse their business model to maintain their market power and through this, they usually circumvent their responsibilities. However, they have found ways to impose their violations of competition law by making the analysis of their behaviors difficult. The need for a procedure adapted to the digital era can be felt and it is in this context that the DMA was adopted.

4. TITLE III: The necessary development of a new competition tool – the Digital Markets Act and its questionable suitability to solve the ongoing problems

Through the Digital Markets Act (the Regulation or DMA), the traditional competition law methods are being revisited in the hope of better regulating online platforms and stopping them from 'imposing unfair conditions on businesses and consumers'.[114] After presenting the DMA (4.1) it will be shown that this Regulation constitutes a step forward in regulating digital operators (4.2). However, a closer look of its content can reveal some shortcomings (4.3).

4.1. Presentation of the Digital Markets Act

The DMA is a new regulation proposed by the European Commission in December 2020. It intervenes in response to growing concerns about the competitive damage imposed by large platforms - in particular the GAFAM - and aims to regulate them. Indeed, the purpose of these rules is to stimulate 'innovation, growth, and competitiveness'[115] and to help small companies 'compete with very large players'.[116] The DMA was published in the Official Journal of the European Union on October 12, 2022, after being adopted by the Council and Commission as well as signed by their

[112] E. Argentesi and others, 'Ex-post Assessment of Merger Control Decisions in Digital Markets', [2019] final report, p. ii.

[113] Cunningham & al, 'The intensity of project discontinuation around FTC review threshold', table 9, p.58 *in* OCDE, 'Start-ups, acquisitions prédatrices et seuils de contrôle des fusion' [2020] (note de référence du Secrétariat), DAF/COMP(2020)5, p.10.

[114] European Parliament, 'EU Digital Markets Act and Digital Services Act explained' [2021] (News European Parliament, Society) < https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained > accessed 27th April 2023.

[115] *Ibid*.

[116] *Ibid*.

presidents. It entered into force on November 1st, 2022 to become applicable six months later, meaning the 2nd of May, 2023.

This regulation targets 'core platform services provided or offered by gatekeepers'[117] and establishes precise criteria for designating them. They are defined based on three cumulative criteria. First of all, the company must have a significant impact in the internal market.[118] It must also provide an essential platform service that is an important access point for business users to reach end consumers.[119] Finally, the gatekeeper is a firm which occupies – or it is foreseeable that it will - occupy an entrenched and durable position it its operations.[120]

These criteria are based on presumptions. For example, when the targeted undertaking offers an essential service (a list of which is provided by article 2 §2 DMA) in at least three Member States and its annual turnovers during the last three exercises exceed 7.5 billion euros with the EU, it is presumed having a significant impact on the internal market.[121] Besides, the undertaking is presumed to be an 'important gateway' when its service registers more than ten thousand business users and forty-five million end-users, both of whom are established in the Union.[122] Finally, the strength and durability of the position is assumed if the previous thresholds have been reached in each of the last three financial years.[123]

Undertaking which reach the presumption thresholds must inform the EC 'which will formally designate them as gatekeepers'.[124] Once qualified, they have six months to ensure compliance with the obligations set out in the Regulation. Among the obligations imposed to them, exists the obligation to promote their offers free of charge to end users, allow an easy subscription and un-subscription, or allow the uninstallation of pre-installed applications in an easy way.[125] They are also prohibited from favoring their products and services over sellers who use their platform and from imposing default software when installing their operating system.[126] Therefore, the DMA consists in a list of *do's* and *don'ts* which apply in an *ex-ante* manner.

Finally, the Regulation also proposes penalties for the undertakings targeted if they breach the obligations to which they are subject. The financial penalty can go up to 10%,[127] similarly as traditional competition law. However, the novelty is that 'for

[117] Article 1 §2 DMA
[118] Article 3 §1 (a) DMA
[119] Article 3 §1 (b) DMA
[120] Article 3 §1 (c) DMA
[121] Article 3 §2 (a) DMA
[122] Article 3 §2 (b) DMA
[123] Article 3 §2 (c) DMA
[124] Article 3 §3 DMA
[125] Article 5 DMA
[126] *Ibid*.
[127] Article 30 §1 DMA

repeat offenses, the European Commission can impose fines of up to 20% of a company's worldwide revenue'[128] according to article 30 DMA.

4.2.The DMA: a bold step forward

The DMA is a' bold step forward'[129] which will have many virtues for competition law and policy.

First of all, it constitutes a step towards a greater regulation of digital sectors. Indeed, 'this Regulation aims to complement the enforcement of competition law' according to its recital (10). It is also possible to understand that ensuring effective competition in the digital age is at the heart of the Regulation when the Commission and the Council highlight that 'the objective of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector'.[130] The European Union therefore wishes to give itself the legal means to combat the competition law violations by large virtual platforms.

This will be done through the harmonization of national competition rules that exists throughout the European Union. Indeed, the DMA was established on the basis of Article 114 TFEU which provides that 'the European Parliament and the Council […] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.[131] It is therefore used for harmonizing national regulations and avoid the fragmentation of the law. This is in particular one of the DMA's aims: its first article provides that 'The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonized rules'.[132] The European legislator confirms this objective in recitals (8) and (9) of the DMA. Thus, the new regulation stems from the EU Member States collaboration and will be applicable to all of them. As a result, it will have the advantage of harmonizing all the rules on regulating digital markets. GAFAMs will be treated in a single, standard, and uniform manner without suffering from the inconsistencies in different national law. For this reason, the Regulation should be able to stop online operators from imposing themselves as private rule-makers.

Furthermore, by intervening *ex-ante*, the DMA permits gaining time. Indeed, it adopts a 'one-step' approach by automatically imposing obligations on digital operators, whether or not an anti-competitive behavior is proven. It therefore skips the

[128] F. Garvey, 'Understanding the Digital Markets Act (DMA) – FAQ Sheet' [2022] < https://www.foster.com/newsroom-alerts-digital-markets-act-faq-sheet#:~:text=The%20European%20Commission%20will%20enforce,of%20a%20company's%20worldwide%20revenue. > accessed 15th may 2023.

[129] R. Podszun, P. Bongartz, S. Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' [2021] *EuCML* Issue 2/2021, p.67.

[130] Recital (7) DMA

[131] Article 114 TFEU

[132] Article 1 §1 DMA

usual *ex-post* steps such as the definition of the relevant market, the appreciation of market power, the assessment of the anti-competitive effects and the possibility to rely on an objective justification. Thus, it will be able to 'engender speedier changes in business conduct than competition law enforcement proceedings by avoiding the numerous lengthy stages of such interventions'.[133] Thanks to its speed, the DMA can exceed the internet giants in the competition race and regulate them better.

Thus, the Digital Markets Act will permit to harmonize national legislation and to regulate digital operators before they impose any damage on the market. At first glance, the DMA appears to be a revolution in ensuring effective competition in digital markets. However, a closer look reveals certain shortcomings in the content of the Regulation, which are the subject of much criticism.

4.3.The shortcomings of the new regulation

The DMA is seen as lacking clarity and accuracy in the drafting of its definitions (4.2.1) and obligations (4.3.2). It is also criticized for not being able to solve the ongoing problems concerning merger control (4.3.3).

4.3.1. The lack of clarity of the DMA's definitions

Regarding definitions, they have been criticized by the doctrine for their vagueness. For example, the criteria used to designate gatekeepers, such as the 'entrenched and durable position' provided by article 3 §1 (c), are difficult to apply. One could ask himself: when does a position becomes entrenched and durable?[134] are these characteristics similar to the ones of a dominant position? how long should such a position be maintained? In addition, the Commission may classify as a gatekeeper an undertaking which does not yet enjoy a solid and sustainable position, but which will in all likelihood, enjoy such a position in the near future. Again, doubts may be raised as to real meaning of these terms. For instance, how to measure the probability of a company to acquire such a position? Similarly, the terms 'significant impact'[135] in the internal market and 'important gateway for business users'[136] can be difficult to interpret uniformly.
Therefore, these indicators are vague and may have different meanings for different regulatory authorities. A problem would then arise if this led to divergences in the application of the definitions and rules of this legislation. At this time, there is no case law to clarify these questions, thus it remains to be seen whether these ambiguous terms will be explained in the future in judgements, jurists' publication or by the Commission itself through an amendment of the Regulation.

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[133] P. Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' [2022] *European Law Review* 85 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625 > accessed 5th may 2023.

[134] L. Arcelin, 'La régulation des gatekeepers par la proposition de Digital Markets Act (DMA)' [2021] *Revue Lamy de la concurrence* No 104.

[135] Article 3 §1 (a) DMA

[136] Article 3 §1 (b) DMA

Besides, the thresholds leading to the presumption of a gatekeeper status are not representative of corporate power. In particular, the turnovers do not systematically reflect the potential of a company (as aforementioned). As a result, some digital players might be able to escape the designation as a market access controller, which would considerably reduce the impact of the Regulation. As the text currently stands, the criteria 'should lead to the designation of a verry small subset of platforms'[137] as only the largest companies can reach these thresholds. The legal literature considers that 'the thresholds of the objectively fixed criteria for identifying these gatekeepers [...] are placed extremely high! In practice, and even if it is still too early to say with certainty, the GAFA are indeed mainly targeted'.[138] Thus, it appears that presumption thresholds are too broad to capture all online operators which are capable of hindering the market by their behaviors.

Linked to this idea, the definitions seem to target the GAFAM (i.e., Microsoft included) and a few others such as TikTok, Samsung and Snapchat. It would even be possible to imagine that the text has been *tailor-made* to capture the latter. This is in particular visible because the DMA repeatedly refers to certain characteristics of essential platform services, including economies of scale, network effects, connecting business users with end-users (related to the idea of multi-sided markets), or the collection of a significant amount of data. The problem is that some companies claim that they are being discriminated against. Indeed, the White House National Security Council considers that the Regulation covers "only the five largest American companies'.[139] Similarly, the manager of Facebook, Mark Zuckerberg is concerned about a break in equality before the law[140] between large American companies and other firms in the digital market.

For instance, the most powerful Chinese firms such as Xiaomi, WeChat, or Tencent do not appear reach the thresholds set by the Regulation (at least for now, noting that the Commission hasn't published the list of designated gatekeepers yet). They are then able to escape the DMA, and its obligations. Thus, it is conceivable to express doubts about the effectivity of the DMA as even some firms with a potential

[137] D. Geradin, 'What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?' [2021] < https://ssrn.com/abstract=3788152 > accessed 4th may 2023.

[138] R. Chemain, 'La relation juridique des GAFA avec l'Union européenne' [2023] *Dalloz revue de l'Union Européenne 2023* n°665, p.90.

[139] S. Le Calme, 'Les Etats Unis mettent l'UE en garde contre une politique technologique qu'ils estiment antiaméricaine' [2021] < https://www.developpez.com/actu/316015/Les-Etats-Unis-mettent-l-UE-en-garde-contre-une-politique-technologique-qu-ils-estiment-antiamericaine-estimant-que-Digital-Markets-Act-ne-vise-que-les-cinq-plus-grosses-entreprises-US/ > accessed 12th may 2023.

[140] R. Balenieri, S. Dumoulin, 'Facebook orchestre sa riposte contre les DSA et DMA européens' [2021] *Les Echos* < https://www.lesechos.fr/tech-medias/hightech/facebook-orchestre-sa-riposte-contre-les-dsa-et-dma-europeens-1325553 > accessed 16th april 2023.

real impact on competition in the European and global digital market can continue their activity without supervision.[141]

Consequently, the lack of clarity stemming from the DMA's definitions constitutes an issue in assuring its effectiveness. The obligations to which gatekeepers are subject are also subject to criticism.

4.3.2. The lack of clarity of the DMA's obligations

Concerning the obligations, some authors and companies are concerned that the DMA is not sufficiently clear in its requirements and that it 'does not present a coherent picture'.[142] On this matter, the French National Assembly in its information report on the Digital Markets Act proposal pointed out that 'the wording is sometimes so general and abstract that it is difficult to understand'.[143] Moreover, obligations are not fixed: the European Commission is empowered to update the obligations of Articles 5, 6 and 7 of the DMA. That is provided for in Article 12 of the Regulation, entitled 'Updating the obligations of gatekeepers'[144]. This possible modification of the obligations is questionable from a legal point of view in that it increases the legal uncertainty surrounding the DMA. Thus, due to the confusion resulting from the drafting of the obligation and prohibitions, some companies might be able to escape submitting to those.

Also, it is apparent that some obligations reflect specific practices previously alleged against some of the GAFAM. It reflects a 'random best of competition law cases'[145] or a 'catalogue derived from past and current antitrust cases involving the usual set of big tech platforms'[146] as some authors points out. For example, point (a) of Article 5 recalls the behavior of Amazon, which was accused of using the non-public commercial data of sellers active on its marketplace for just its retail offers.[147] Indeed, gatekeepers are prohibited from retrieving data generated by the activity of business users in order to develop their own competitive activity. Therefore, the list of obligations and prohibitions does not sufficiently take into account the different business models developed by each of the different platforms.[148] This means that some companies might be able to circumvent the Regulation, arguing that their behaviors doesn't exactly amount to a breach of on of the obligation.

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[141] M. Broadbent, 'The Digital Services Act, the Digital Markets Act and the New competition Tool - European Initiatives to Hobbles U.S. Tech Companies' [2020] *Center for strategic and international studies.*

[142] R. Podszun, P. Bongartz, S. Langenstein, *op. cit.* (reference 129) p.65.

[143] Assemblée nationale, *op. cit.*, (reference 48) p.12.

[144] Article 12 DMA

[145] R. Podszun, P. Bongartz, S. Langenstein, *op. cit.* (reference 129) p.65.

[146] F. Scott Morton, C. Caffarra, 'The European Commission Digital Markets Act: a transaltion' [2021] *VOX eu CEPR* < https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation > accessed 18th may 2023.

[147] European Commission, 'Antitrust: Commission accepts commitments by Amazon' [2022] (Press release) < https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777 >

[148] F. Scott Morton, C. Caffarra, *op. cit.* (reference 146).

To sum up what has been stated in this part, the DMA isn't clear enough to properly catch and regulate online operators. Indeed, the drafting of its definitions, obligations and prohibition is ambiguous. Moreover, the issue which arose in classic competition law, regarding merger control, cannot be solved by the DMA.

4.3.3. The failure of the DMA to solve the merger control issues

Article 14 of the Digital Markets Act provides that gatekeepers shall inform the Commission of any proposed concentration within the meaning of Article 3 of Regulation (EC) No 139/2004. This notification obligation arises when the merging entities, or when the target of the acquisition, provide a core platform services. As in the case of the European Union Merger Regulation, the control takes place *ex-ante*, i.e. before any obstacles to effective competition on the market. The DMA has the specificity of constraining specifically designated entities to notify their merger plans whether the transaction reaches the EUMR thresholds or not.

However, this new system has no real consequences: indeed, article 22 EURM already provides for the control of operations which do not exceed the notification thresholds at National and European level. The Regulation doesn't bring any *revolution*. Also, itt can be regretted that 'the Union has not proposed the adoption of a mechanism expressly focused on the case of killer acquisitions or consolidating acquisitions'.[149] A specific mechanism would have surely been more effective in protecting competition, by allowing the capture of a greater number of transactions. For example, such mechanism could have been implemented through the adoption of a presumption that the merger would be anti-competitive; presumption that the undertakings could have rebutted by evidence of the contrary.[150]

In addition, in the event of non-compliance with the notification obligation of the DMA, the sanction can only go up to 1% of the undertaking's turnover.[151] As aforementioned, the amount of fines in traditional competition law is too weak to work as a threat against digital giants. Thus, with the 1% maximum, it is possible to assume that the fine will not have real consequences.

For these reasons, the DMA does not complete traditional competition law in the field of merger control. It seems that the issue is not resolved by the introduction of the Digital Markets Act, which fails to achieve its objective of strengthening the law in force.

[149] J. Ancelin, « La proposition de digital market act : rétablir la concurrence pour préserver la souveraineté numérique de l'Union ? », Dalloz, Revue Trimestrielle de Droit Européen, n°3, 28 octobre 2021, p. 545.

[150] J. Cremer, Y.-A de Montjtoye,, H. Schweitzer, *op. cit*. (reference 65).

[151] Article 30 §3 (c) DMA.

5. CONCLUSION

It has been observed throughout this thesis that virtual platforms have acquired a preponderant place in society and developed ecosystems allowing them to combine a multitude of essential - or *core*, to state the DMA - services. With the new forms of conduct, new anti-competitive behaviors have emerged in the digital world.

In fact, the competition authorities show a laissez-faire attitude and fail to condemn the so called GAFAM. By this passive control, the Commission and National Competition Authorities seem to be accepting the digital giants' violations of traditional competition law and policy. This is accentuated by the fact that when they impose sanctions, the financial remedy is too weak to discourage online operators from having anti-competitive practices.

However, a more in-depth look on the platforms behaviors and specificities revealed the latter is actually imposing its violation of the law. Indeed, characterized by multi-sided markets, strong network effects, economies of scale and free products, the digital market is a place which is sensitive to anti-competitive conduct. By reason of these specificities, the Big Tech have developed new forms of misconduct, which are not always captured by traditional competition law. Also, the definition of the relevant market and the appreciation of an undertaking's position on such market represent a real challenge for national and European competition authorities.

The Digital Markets Act was designed to fill the gaps in traditional competition law, and revisit certain principles in order to better regulate platforms present on the digital market. This will be achieved through the harmonization of national laws that the DMA permits. Also, thanks to the ex-ante control imposed on specific gatekeepers, it will be easier for authorities to stop strong digital markets players from acting as private regulators. However, the DMA also suffers from some shortcomings in its content, stemming from the redaction of its obligations and definitions. Finally, it seems unable to solve the ongoing issue concerning merger control.

Therefore, to answer the research question of this thesis, it seems that violations of competition law is in part accepted by competition authorities, but it's mostly because traditional competition law isn't adapted to the specificities of digital platforms who, as a result, impose their behaviors. The Digital Markets Act is a step towards a better regulation of the Big Tech, even though it is clear that some improvements would be welcome.

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