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Big Tech strategies across markets: the role of self-preferencing in Digital Antitrust

Advisor: Mariateresa Maggiolino

Co-Advisor: Federico Ghezzi

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Giulia Ferrari

ID number: 1258177

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ABSTRACT

The ongoing debate about antitrust law and digital economy has led antitrust authorities, commentators and scholars of all around the world to ask themselves the same questions, namely should the objectives, rules and tools of antitrust law be modified to deal with digital economy?

The present work makes no exemption, and that question drove the research activity that led to this thesis. In particular, after reaffirming the centrality of consumer welfare for antitrust law and analysis, the present thesis analyses if, and at what conditions, self-preferencing as a new theory of harm could represent a new tool at the disposal of antitrust enforcers to effectively tackle the specific features of competitive dynamics in digital markets. To this end it also considers the ban of self-preferencing envisaged in the recent proposal for the Digital Markets Act (DMA) published by the Commission in December 2020.

With this aim, the thesis first provides an overview of some of the main features which characterize digital markets, including zero marginal costs, network and lock-in effects, market concentration and tipping as well as of the entities operating on such markets, i.e. multi-sided platforms, often identified also as ecosystems or conglomerates, and even gatekeepers, whose peculiar business model is that of "network orchestrators". All such features outline fluid and interdependent markets whose boundaries are subject to drastic changes, and competitive dynamics often taking place across markets, in a constant "race" towards new products and services. They also allow to identify envelopment – i.e. the strategy whereby a platform operating in a multi-sided market enters a second multi-sided market by leveraging shared user relationships, common components and data it disposes – as a key factor of competition in digital markets. Dominant digital firms have incentives to extend their position in other markets, often leveraging on the dominant position they already hold in their core market. It is through such strategy – which can either take the form of bundling or self-preferencing – that platforms are able to negatively affect competition on the target market given their unique position to curve their origin rules to provide a better outcome for its own products or services.

In light of these premises, the work argues that specific attention should be paid to those concepts and categories in the antitrust analysis that by their very nature are designed to "capture" leveraging strategies between (or across) two or more markets. In particular, as self-preferencing has emerged as a potential new theory of harm and form of abuse of a dominant position on digital markets following the Commission's decision on the *Google Shopping* case, the thesis provides an in-depth analysis of the facts of the case, the approach taken by the Commission and of the many scholarly criticisms and comments directed through that decision, as well as self-preferencing as a legal category of abuse.

Building on such analysis, an attempt is made to provide a narrow definition of self-preferencing and to better articulate on the legal test that such type of conducts is subject to, while stressing the reasons why the detachment from the case law on refusal to deal (and mainly the indispensability requirement) should not be regarded as problematic. Those theoretical considerations are then tested though the analysis of two ongoing cases before the Italian Competition Authority, respectively, against Amazon and Google. The thesis concludes that self-preferencing represents a new tool which allows to "adjust" traditional rules and concepts of antitrust law and analysis so as to affectively address the new dynamics posed by the digital economy and the anticompetitive effects stemming from envelopment strategies, while strongly relying on established competition rules and principles. The analysis (and specially the narrow definition of self-preferencing) proves useful also in the new regulatory context of the DMA.

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CONTENTS

INTRODUCTION

COMPETITION IN THE DIGITAL ECONOMY: SHOULD ANTITRUST LAW REINVENT ITSELF?

The ongoing debate about antitrust law and digital economy has led antitrust authorities, commentators and scholars of all around the world to ask themselves the same questions, i.e. should the *objectives*, *rules* and *tools* of antitrust law be modified to deal with digital economy?

The question stems from the peculiar features and dynamics characterizing the so called "digital revolution"[1] and that have casted doubts about the ability and effectiveness of antitrust law and analysis to deal with the digital sector leading to a widespread perception of an enforcement gap in the area of antitrust law.

The consolidated principles of antitrust law are requested to face a new economic context where the untraditional business models adopted by technology companies – including digital platforms, often involving "zero-price" services (at least on one side of the platform) and large amount of data (the so-called big data) as a crucial input to many online services production processes and logistics, algorithms and apps (etc. etc.) – have dramatically changed the economic and social context. These phenomena which have flourished and strengthened due to some peculiar structural characteristics of information technology markets, such as economies of scale and scope, strong network effects and switching costs inherent into these business models - in turn often lead to a market structure dominated by a few large companies and thus high levels of market concentration[2]. At the same time, rapid technological change and the way tech-companies and competition operate in this non-traditional market context give rise to recurrent effects which in the current debate are referred to as the winner-takes-all outcome (also known as tipping effect), competition for the market and oligopoly competition[3]. The attention to these themes is also reinforced by the

[1] See chapter 1.

[2] Platforms providing digital services have also created many positive welfare implications, such as better quality of products and services, the exploitation of new business opportunities, reduced costs for targeted advertisement and, generally, more target-oriented business models, data synergies, economies of scope, network externalities etc.

[3] The topics have been addressed also in the many reports and studies issued and/or commissioned by antitrust enforcers in Europe. See, *ex multis*, J. Crémer, Y.A. de Montjoye , H. Schweitzer, (2019), *Competition Policy for the Digital Era*, Final Report for the European Commission (also referred to as the "Crémer Report"); J. Furman, J. and others (2019*), Unlocking digital competition*, Report of the Digital Competition Expert Panel, http://www.gov.uk/government/publications (also referred to as the "Furman Report"); Autorité de la concurrence, *Contribution de l'Autorité de la concurrence au débat sur la politique de concurrence et les enjeux numériques*, 19 February 2020, https://www.autoritedelaconcurrence.fr/en/press-release/autorite-publishes-its-contribution-debate-competition-policy-and-challenges-raised; Italian Competition Authority, Communications Authority and the Authority for the protection of personal data, *Final report of the Big Data survey*, 10 February

incredibly big size (and economic power) that tech companies have acquired – in not only in a single dominated market but also across-markets - in recent years. Reference is made particularly to Google, Apple, Facebook, Amazon and Microsoft, also referred to as GAFAM, FAANGs (which includes Netflix), FAAMG-companies (where the M stands for Microsoft), Big Tech or Fab Five[4].

The present work makes no exception and the same questions originated and drove the research activities whose results are discussed in these pages.

Starting from the *objectives*, the present work is based on the key assumption that they should not be revised. They are perfectly designed to meet the challenges of the digital age[5] and to

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2020, https://www.agcm.it/dotcmsdoc/allegati-news/IC_Big%20data_imp.pdf; M. Schallbruch, H. Schweitzer, A. Wambach (2019), *Competition Law 4.0*, Report carried out on behalf of the German Federal Ministry for Economy Affairs and Industry. Many contributions about antitrust and the digital economy are published on the Bundeskartellamt's webpage at the following link: https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html.
Germany, one of the most proactive jurisdictions in the field of antitrust law in digital markets, has also published in October 2019 a draft German "digital antitrust" bill (German draft Ministerial bill on the 10th amendment to the German Act Against Restraints of Competition, so-called "GWB-Digitalisierungsgesetz"); on this topic, see for instance, C. Ritz, F. Schöning (2019), *Digital Avant-garde: Germany's proposed "Digital Antitrust Law"*, *Competition Policy International Antitrust Chronicle*, December 2019.
With regards to the U.S. see George J. Stigler Center for the Study of the Economy and the State (2019), *Report of Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee*, The University of Chicago Booth School of Business ("Stigler Report"). See also United Nations Conference on Trade and Development - UNCTAD (2019), *Competition issues in the digital economy*, Note by the UNCTAD secretariat, 1 May 2019, https://unctad.org/meetings/en/SessionalDocuments/ciclpd54_en.pdf; OECD (2018), *Rethinking Antitrust Tools for Multi-Sided Platforms*, 6 April 2018, https://www.oecd.org/daf/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

[4] Those companies are indeed the five most valuable companies in the world, according to S&P. See A. Levy and L. Konish (2020), *The five biggest tech companies now make up 17.5% of the S&P 500 — here's how to protect yourself*, CNBC, 28 January 2020, https://www.cnbc.com/2020/01/28/sp-500-dominated-by-apple-microsoft-alphabet-amazon-facebook.html. While market evaluation is only one of the parameters to assess "size" of tech companies, it is worth noting that at the beginning of the year 2020, the five companies were worth collectively more than $5 trillion. On 16 January 2020, Alphabet (Google parent company) became the fourth US company to reach a $1 trillion market valuation. Apple was the first US company to reach that figure in 2018, while Amazon reached a $1 trillion market cap for the first time in September 2018 and then again in January 2020 (the value could not hold up to that figure in between). Microsoft was the third US company to pass a market cap of $1 trillion in April 2019. Facebook sits at the lowest valuation among the group of five with a market cap of about $630 billion. See the articles published on Market Insiders, CNBC and the Verge: B. Winck (2020), *The 5 most valuable US tech companies are now worth more than $5 trillion after Alphabet's record close,* Market Insiders, 17 January, https://markets.businessinsider.com/news/stocks/most-valuable-tech-companies-total-worth-trillions-alphabet-stock-record-2020-1-1028826533; A. Palmer (2020), *Amazon joins the trillion-dollar club again after knockout earnings report*, CNBC, 31 January 2020, https://www.cnbc.com/2020/01/31/amazon-amzn-reaches-1-trillion-market-cap.html, and T. Warren (2019), *Microsoft is now a $1 trillion company*, the Verge, 25 April, https://www.theverge.com/2019/4/25/18515623/microsoft-worth-1-trillion-dollars-stock-price-value. To put those figures in context, Apple's $1.3 market cap in 2018 represented 1.5% of global GDP. Only 14 countries have annual GDP figures greater than Apple's market cap, which is just below the $1.4 trillion GDPs each for Australia and Spain. The nations with GDP figures immediately below $1.3 trillion are Mexico, Indonesia, The Netherlands, Saudi Arabia, Turkey, and Switzerland. See M. Kolakowski (2020), At $1.3 Trillion, Apple Is Bigger Than These Things, Investopedia, 6 January 2020, https://www.investopedia.com/news/apple-now-bigger-these-5-things/.

[5] According to the literature, the fourth industrial revolution coincides with the development of the Internet and, above all, with the affirmation of the connection between individuals and between objects, be they industrial machinery or devices that populate people's daily lives. M. Maggiolino (2018), *I Big Data e il Diritto Antitrust*, Milano, Egea, p.6.

ensure a sound enforcement. While the objectives of competition law[6] do not constitute the core subject matter of this work, it is worth recalling some of the main reasons why the market well-functioning and the consumer welfare standard should not be questioned – even in the challenging new context, despite the many criticisms that occupy the ongoing debate about the need for a drastic reform of antitrust law[7]. A brief discussion of the topic is indeed essential to provide the context for the analysis that will be developed in the following chapters and that relies on a clear understanding of the concept of consumer welfare and the importance to keep preserving market well-functioning – even in the digital context.

1. The goals of antitrust law: the importance of consumer welfare to assess market well-functioning

Nowadays, it is widely recognized that (European) competition law primarily protects the well-functioning of the market, as it is inferred from changes in consumer welfare, thereby relying on the economic theory to detect a (potential) alteration and degradation of market dynamics[8]. A general consensus has consolidated over the years in contemporary antitrust law on consumer welfare being the index that allows to appreciate whether the market is functioning well, so that today it is agreed that a conduct is anticompetitive when it *harms* market well-functioning and competition, i.e. when it produces (or can produce) a reduction in consumer welfare, over both the short and long run - that is, the practices that may increase market price, reduce market output, worsen product quality or product variety and lower innovation rate[9].

In recent years, however, many within the antitrust community – especially in the U.S. – have suggested that antitrust law objectives should be revised – some even proposing to forsake the

[6] For the purpose of this work antitrust and competition law are considered as synonyms.

[7] Such debate is not limited to antitrust law's experts but has momentum also among the general public. See for instance, the global echo that has had the hearing of the chief executives of Google, Facebook, Apple and Amazon that was held by the antitrust committee of the U.S. Congress on 9 July 2020.

[8] A. Ezrachi (2018), *EU Competition Law Goals and the Digital Economy*, 6 June, Oxford Legal Studies Research Paper No. 17/2018.

[9] In the Guidelines on the application of Article 81(3), the European Commission wrote: "[t]he objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources". See European Commission (2004), *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101 (para 13). Similarly, the Guidelines on the application of Article 102 TFEU provides that "[t]he aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice." See European Commission (2009), *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, para 19.
On the topic see R. Whish and D. Bailey (2018), *Competition Law*, Ninth Edition, Oxford University Press, pp.18-24 and M. Maggiolino (2018), *I Big Data e il Diritto Antitrust*, *cit.*, pp. 99-103, where the Author clearly defines the roles of consumer welfare in contemporary antitrust law.

paradigm of consumer welfare – not only to cope with anticompetitive conducts and ensure a stronger antitrust enforcement, but also to provide a more powerful contribution to fears of social, political and individual nature that - while overstepping the boundaries of "traditional" antitrust law and policy - are associated with the increasing concentration of economic and political power in the hands of few tech giants, considered more or less capable of undermining political pluralism and the democratic process, a fair distribution of wealth[10], freedom of information and the privacy of individuals[11].

"Hipster Antitrust" has become a catchy (while belittling) term to refer to the new wave of criticisms that have been levelled at the current antitrust regime, and specifically, at the consumer welfare standard[12]. These scholars (also called Neo-Brandesians[13]) have questioned whether the narrow focus of consumer welfare is misplaced or ill-equipped to cope with the competitive concerns raised by large technology platforms[14]. The movement has been particularly vigorous in the U.S. where it was first developed based on the assumption that a lax antitrust enforcement grounded on the *laissez-faire* principles of the Chicago School has worsened market concentration and wealth inequality thereby leading to an increasing concentration of market power in the hands of few big companies. The movement has also had a considerable resonance across the pond[15] despite the fact that in the European Union the economic objectives must be consistent with the entire set of other goals and values established by the Treaties (including the integration of the national markets, social

[10] On the topic of antitrust and inequalities see, for instance, J.B. Baker and S.C. Salop (2015), *Antitrust, Competition Policy, and Inequality*, Georgetown Law Faculty Publications and Other Works, p. 1462. https://scholarship.law.georgetown.edu/facpub/1462.

[11] M. Maggiolino (2018), *I Big Data e il Diritto Antitrust*, *cit.*, p. 3-4. For an overview and classification of the many critics moved towards the consumer welfare standard see A. D. Melamed and N. Petit (2019), *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, *Review of Industrial Organization*, no. 54, pp. 741–774, https://doi.org/10.1007/s11151-019-09688-4.

[12] The term was coined by K. Medvedovsky. See K. Medvedovsky (2018), *Hipster Antitrust – A Brief Fling Or Something More?*, *Competition Policy International*. The CPI Author page reports that Mr. Medvedovsky is credited with coining "hipster antitrust," a phrase he used to describe appeals for a return to 1960s-era "big is bad" antitrust enforcement in a Twitter exchange with Joshua Wright, former member of the Federal Trade Commission. The hashtag #HipsterAntitrust was referenced in a U.S. Senate speech and has been covered in publications including WIRED and Global Competition Review. In the paper the Author recalls that while criticisms to the consumer welfare standard are not new, the Hipster Antitrust movement reached its maturity with the publication of Lina Khan's piece in the Yale Law Journal, *Amazon's Antitrust Paradox* and differently from other wave of criticisms to the consumer welfare "the current Hipster movement appears to have staying power" (pp. 2-3). The term "hipster" is mainly employed by those criticizing the movement, while its followers opt for the term "New Brandeis".

[13] The term originates from the name of Justice Brandeis, who served on the US Supreme Court between 1916 and 1939, who espoused the moral value of networks of small independent business.

[14] K. Medvedovsky (2018), *Hipster Antitrust*, *cit*., p.2.

[15] See, for instance, M. Botta, S. Solidoro, *Hipster antitrust, the European way?*, Policy Briefs, 2020/02, Florence Competition Programme Retrieved from Cadmus, European University Institute Research Repository, at: http://hdl.handle.net/1814/65747, and M. Vestager (2020), *Keeping the EU competitive in a green and digital world*, Speech delivered at the College of Europe, Bruges, 2 March 2020.

protection, equality and environmental sustainability)[16] and that the European Commission has so far proved to be a proactive enforcement authority, compared to less interventionist jurisdictions such as the U.S., Canada, and the U.K. ones.

One of the most frequent accusations that are moved to the consumer welfare framework is that focusing on consumer welfare means focusing mainly on short-term prices and output effects and thus prohibiting only those conducts that lead to output reduction and price increases. Such a narrow approach leads to an under-enforcement in the high-tech industries, while not properly addressing considerations that relate to other – and wider – factors, including quality, choice and innovation[17]. Moreover, a price-based competition leads to thinking too short-term[18]. In Lina Khan's words, "the current framework in antitrust—specifically its pegging competition to consumer welfare, defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy"[19].

The idea is that antitrust policy should be reoriented to consider objectives other than the well-functioning of the market in that the consumer welfare standard – and the exclusively economic approach underneath it – has become outdated and not broad enough to deal with a variety of social, political and economic issues such as innovation competition, labor market monopsonization, and the difference between a consumer welfare and a total welfare standard[20].

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[16] Although the economic objectives which come directly from the Chicago School are predominant in "every day antitrust" and guide the analysis of EU institutions in the great majority of cases, in the European Union the protection of competition as such does not represent an autonomous and neutral policy objective but it must be consistent with other values and objectives identified in the Treaties (see Article 2 and Article 3 of the Treaty on European Union (TEU)). For instance, the EU Commission, in deciding whether to exempt a distortive agreement under Article 101(3) TFEU has sometimes considered its impact on environment, employment, or on the EU industrial policy as means to achieve the "technical and economic progress" sufficient to outweigh the restriction in competition.

[17] M. Botta, S. Solidoro (2020), *Hipster antitrust, the European way?, cit*. See also A.D. Melamed, N. Petit (2019), *The Misguided Assault on the Consumer Welfare Standard, cit.*, pp. 750-752, where the Authors recalled that according to the critics of consumer welfare, three supposed blind spots are created when antitrust law (and the consumer welfare standard) is applied to platform markets: innovation (harm to innovation is not cognizable under the CW standard), monopsony and zero price markers.

[18] D. Streitfeld (2018), *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, New York Times, 7 September 2018, https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html; K. Medvedovsky (2018), *Hipster Antitrust*, *cit*.

[19] L. Khan (2017), *Amazon's Antitrust Paradox*, *Yale Law Journal*, Vol. 126, https://ssrn.com/abstract=2911742, p. 710.

[20] K. Medvedovsky (2018), *Hipster Antitrust*, *cit*, p. 4. On the total vs consumer welfare see H. Hovenkamp (2019), *Is Antitrust's Consumer Welfare Principle Imperiled?, Journal of Corporation Law*, Vol. 45, p. 101, 2019, U of Penn, Inst for Law & Econ Research Paper No. 18-15, https://ssrn.com/abstract=3197329 and H. Hovenkamp (2016), *Federal Antitrust Policy, The Law of Competition and Its Practice*, Fifth Edition, West Academy Publishing, pp. 100-104.

It is therefore argued that the consumer welfare framework should be replaced by other objectives, such as preserving the competitive process and the market structure[21].

Being a diverse group of proponents, the alternative objectives that are put forward by the Hipster/Neo-Brandeis movements are also varied[22]. Some suggest replacing the consumer welfare standard with other structural objectives that would protect the preservation of small businesses and the dispersion of economic power – and thereby a particular (and superimposed) market structure - retrieving the structural analysis that ruled in the "Big is Bad" era of antitrust, before the consumer welfare standard took hold[23]. Others claim to adopt additional objectives such as protecting the competitive process or fairness, consumer choice and market access. Others argue the need to special rules governing the technology sector and the platforms that operate on it, given the "winner-takes-all" outcome associated to digital platforms due to network effects and the importance of data. Others claim the need to focus on labour market effects and on social and economic equity[24].

While the Hipster movement has many merits, including opening up a lively and healthy debate on the role of antitrust law, shedding light to some of the shortcomings as it has been applied so far and reviving interest in both its history and future[25], revising the objectives of antitrust law is not a wiser nor a productive way forward.

First of all, claiming that the consumer welfare standard is solely focused on short-terms price effects is simply not true. Properly construed, the consumer welfare encompasses not only price and output but also quality - and mostly - variety and innovation, which are long term in nature[26]. In other words, embracing the consumer welfare standard means analysing antitrust issues with the goal of answering an economic question, i.e. what will be the impact of a

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[21] *Ibid*.

[22] *Ibid*. According to Medvedovsky: "[t]he concern over technology platforms is perhaps the single unifying thread between all Hipster Antitrust proposals and commentary, distinguishing them from previous critics of the consumer welfare standard" (p.7).

[23] Thereby returning to the boarder normative objectives that the Congress envisaged to protect when passing the Sherman Act in 1890.

[24] This approach is particularly shared by the so called "New Brandeis". A critical overview of the objectives and critics to contemporary antitrust is provided by A.D. Melamed and N. Petit (2019), *The Misguided Assault on the Consumer Welfare Standard, cit.*, P. Akman (2019), *An Agenda for Competition Law and Policy in the Digital Economy*, *Journal of European Competition Law & Practice*, Volume 10, Issue 10, December 2019, pp. 589–590, available at: https://doi.org/10.1093/jeclap/lpz055, and K. Medvedovsky (2018), *Hipster Antitrust, cit*.

[25] In the U.S., given the loose language of the antitrust provisions and the absence of legal tools that allow agencies and courts to consider non-economic objectives in a accountable way, the criticisms about the too narrow approach to antitrust law seem pertinent, or at least worthy of discussion.

[26] As reported by Botta and Solidoro "the consumer welfare paradigm is conceptually sound and is capable of a broader reach than is typically assumed, if it is interpreted beyond its literal meaning". See M. Botta, S. Solidoro (2020), *Hipster antitrust, the European way?, cit*., p. 2. Moreover, also the "consumer" that is considered in the consumer welfare principle is not limited to the end users, but encompasses also direct and indirect purchasers as well as suppliers. Hovenkamp states that "the word 'consumer' is under-inclusive", and while it is still the best term to identify the principle, its understanding should be broader than consumers as normally identified. See H. Hovenkamp (2019), *Is Antitrust's Consumer Welfare, cit.,* pp. 114-115.

conduct on product quality and price, output, variety and innovation? It may seem a relatively "narrow" question, but it is not as it includes considerations that goes beyond efficiencies and prices, and precisely such as quality, choice and also innovation, paramount all in antitrust analysis.

As a consequence, the consumer welfare standard allows for an analysis that is not limited to mere efficiencies and low price, while at the same time avoiding the concrete risk that by protecting other goals (such as market structure or firm size) enforcers end up authorizing practices having a detrimental impact on prices and ultimately to consumers[27]. Therefore, none of the concerns raised with respect to tech platforms are in theory outside the scope of what the consumer welfare standard can address[28]. In particular, through the long-term parameters of competition (product quality, product variety and innovation rate) the consumer welfare is - at least in theory - well equipped to deal with any business models, including those common in the digital economy often entailing zero price markets, i.e. the offer of free service at least of one side of the platform, strong network effects, and winner-takes-all-outcome etc.[29] At the same time, by protecting market well-functioning (and not directly the consumer welfare which is indeed just a benchmark to assess and measure the functioning of the market), competition law is beneficial to society as a whole and indirectly pursue wider positive implications on wealth distribution, fairness[30] as well as the protection of (even small) businesses competitors provided that they have acquired on their merits a place on the market, without incurring the risk that moving away from the consumer welfare standard entails a higher risk of ending up protecting (small[31]) competitors regardless of any market consideration and the costs incurred by such competitors (which can be higher than those of

[27] Those are the critics that the Chicago School moved towards the original policy goals established with the adoption of the Sherman Act, i.e. the protection of small businesses against the power of big trust. By paying attention to all short and long-term elements of the consumer welfare, also the definition of "harm" will be expanded. See P. Marsden (2018), *Who should trust-bust? Hippocrates, not hipsters*, CPI Antitrust Chronicle April 2018.

[28] K. Medvedovsky (2018), *Hipster Antitrust, cit.*

[29] The fact, for instance, "that successful challenges to pure innovation harms and monopsony have been rare" does not imply that they fall outside the scope of consumer welfare. Rather, the scarcity of cases in this regard relate to a problem of practical nature, i.e. that impacts on innovation, technological progress, product quality and potential entry are more difficult to discover, predict and measure. Moreover, even following the same standard, certain enforcers have attributed a different weight to the factual profiles, such as likelihood of future harm and efficiencies and the importance of Type 1 and Type 2 errors. See A.D. Melamed and N. Petit (2019), *The Misguided Assault on the Consumer Welfare Standard, cit*., p. 753 and pp. 757-758.

[30] To this respect, as affirmed in its 2017 Annual Report of Competition Policy, the Commission acknowledges that "competition distortions normally translate into a transfer of wealth that harms many consumers, while the profits generally go to just a few firms". The European Commission also recognizes that "competition policy helps stimulate growth, but it also contributes to important equity and equality objectives". See European Commission, *Report on Competition Policy 2017*, Brussels, 18.6.2018 COM(2018) 482 final.

[31] The neo-Brandeis redistributive approach tends to favor smaller firms, at the expense of consumers and larger firms. See H. Hovenkamp (2019), *Is Antitrust's Consumer Welfare, cit.* p.103.

the bigger firms, potentially at the consumers' expense), rather than competition[32]. Moreover, the prioritization of an economic-based approach does not prevent the possibility of considering non-economic objectives in very specific and peculiar cases.

In these circumstances, however, greater transparency and clarity about the role that these considerations play in the analytical process would be achieved, even in cases where the enforcers would opt to sacrifice competition and market well-functioning for other goals.

Moreover, many of the proposed goals suggested by the proponents of the Neo-Brandeis movement refer to both imprecise, uncertain and undertheorized concepts (such as the competitive process or fairness)[33]. In addition, if no single objective among those proposed by the critics emerge as the new standard or if non-economic factors are to be included in the economic welfare analysis, a multiple set of goals will substitute the consumer welfare as known so far (and thus the economic-based analysis), leading enforcers with the difficult tasks of balancing different goals or factors that may often be in contrast with one another. Enforcing competition law will thus involve weighing the evidence proving the consequences for each of the goals and balancing goals ultimately deciding what goal should prevail[34]. For instance, in Medvedovsky's words, how is an agency supposed to evaluate a merger that can reasonably be expected to lower prices and improve product quality, but also to negatively impact local small businesses?[35] The choice among different objectives may also allow political interests to interfere with the decisions of the enforcement authorities, potentially undermining their independence[36]. In addition, antitrust enforcers would need to effectively pick one side or another in such a case, raising concerns about favouritism, lobbying, and corruption[37], as well as the transparency and accountability of the decision-making process. In addition, how would such objective be measured? And what evidence will be required to address a harm to such objectives? This scenario will also have a negative impact about the predictability of competition law analysis, both at the level of agencies and of the courts that may not share the balancing exercise made by the authorities conducting the case evaluation in the first instance. Similar cases (including mergers) may be "solved" with different outcomes depending on the interests deemed to prevail in the specific circumstances, raising questions about the principle of non-discrimination and the rule of law.

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[32] *Ibid.*
[33] P. Akman (2019), *An Agenda for Competition Law, cit.*
[34] K. Medvedovsky (2018), *Hipster Antitrust, cit.*
[35] *Ibid*, p. 6 where the Author states that *"*if the answer is to simply "balance all factors," then the weighting of each respective factor becomes paramount".
[36] P. Akman (2019), *An Agenda for Competition Law*, *cit.*
[37] K. Medvedovsky (2018), *Hipster Antitrust, cit.*

Moreover, the longer the list of objectives, the less likely any global convergence on the approach to competition policy in the digital economy, whilst this is more than ever necessary, not least because global companies with global business models giving rise to global issues need ideally a global - and at least European - convergence in approaching the issues[38]. Cooperation and convergence cannot be achieved if jurisdictions diverge sharply in their approaches, and as far as the EU is concerned, if centrifugal forces coming from single Member States, defense of national interests of individual State and considerations about national champions should be allowed, also jeopardizing the unity of the single market.

For all these reasons, antitrust objectives should not be revised as doing so would do more harm than good[39]. That being said with regard to the need of maintaining the consumer welfare standard as the polar star guiding the antitrust analysis and enforcement, the criticisms raised by the Hipster movement may prove useful in addressing the second and third part of question, i.e. should the antitrust *rules* and *tools* be reformed?

2. The ongoing revision of antitrust rules and the new initiatives in the digital sector

With regards to the rules, the answer here is less straightforward. The substantive provisions of competition laws, i.e. Article 101 and 102 of the TFEU and Article 2 of Regulation 139/2004 (as well as the equivalent national provisions, such as Articles 2-7 of Law no. 287/1990 in Italy) are broad and open-ended and thus flexible enough to capture any practice that may pose a threat to market well-functioning, even in the context of the digital area[40]. This is true because – as seen above - such legal provisions rely on the economic theory to understand whether a conduct carry out by one or more undertakings is anticompetitive (i.e. harms or may harm the consumer welfare) and thus illegal.

In other words, in antitrust law, economic thinking acts as a bridge between the phenomena of economic reality and the legal rules that would like to regulate those phenomena[41]. The bridge is not carved in the stone but as the economic reality mutates and the economic thinking

[38] P. Akman (2019), *An Agenda for Competition Law*, *cit.*

[39] For criticisms of the hipster movement, see, *inter alia*, E. Dorsey, J. Rybnicek and J. D. Wright (2018), *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, Competition Policy International Antitrust Chronicle. On the need to maintain the consumer welfare standard as it is in that is capable of addressing the economic challenges raised by the platform economy see, among many, A.D. Melamed and N. Petit (2019), *The Misguided Assault on the Consumer Welfare Standard, cit*.

[40] P. Akman (2019), *An Agenda for Competition Law*, *cit.*

[41] This explains why the theory of harm is crucial to assess whether a given conduct breach any antitrust provision. See M. Maggiolino (2018), *I Big Data e il Diritto Antitrust*, *cit.*, pp. 114-118. In addition, while traditionally authorities and judges have endorsed a formalistic assessment of anticompetitive practices (form-based approach), the European Commission and the European Courts with the recent Intel judgment, have shown to prefer in their investigations an analytical framework more focused on the analysis of the effects (effect based). Case C-413/14 P, *Intel Corp. v European Commission*, ECLI:EU:C:2017:632.

progresses, the same changes and progresses are transferred to competition rules thus making competition law designed to react to ever-changing markets[42].

While this constitutes another reason why antitrust objectives should not be revised as doing so would undermine the ability of antirust rules to remain up to date, it is also true at the time of writing the European Commission is in the process of reviewing certain antitrust rules and complementing the current legal framework with platform-specific *ex ante* regulation applicable to certain digital platforms which qualify as gatekeepers.

More in details, the Commission is reviewing the Vertical Block Exemption Regulation[43], the rules that deal with horizontal agreements between competitors[44], and a public consultation was launched in April 2020 for the revision of the Market Definition Notice[45]. Moreover, in

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[42] As the Crémer Report points out, "over the last 60 years, EU competition rules have provided a solid basis for protecting competition in a broad variety of market settings. Competition law doctrine has evolved and reacted to various challenges and changing circumstances case by case, based on solid empirical evidence. At the same time, the stable core principles of EU competition rules have ensured consistent enforcement. We are convinced that the basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era". J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 3 e 4.

[43] Following the evaluation roadmap published on 8 November 2018, on 4 February 2019 the European Commission launched a public consultation on the review of the Vertical Block Exemption Regulation, i.e. Commission Regulation (EU) No 330/2010. This consultation is intended to help the Commission determine whether the Regulation, which will expire on 31 May 2022, should lapse, prolong its duration or be revised "in order to take proper account of new market developments since its adoption in 2010, notably the increased importance of online sales and the emergence of new market players such as online platforms." See European Commission (2018), *Evaluation Roadmap - Evaluation of the Vertical Block Exemption Regulation*, Ref. Ares(2018)5722104, 8 November 2018. In October 2020, the Commission issued the Inception Impact Assessment (IIA) and in December 2020 it launched a second public consultation regarding the policy options detailed in the IIA. The Commission is expected to publish in the course of 2021 a draft of the revised rules (Regulation and Guidelines) to allow interested parties to comment. See the EU Commission's webpage about the revision: https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

[44] On 5 September 2019, the European Commission opened a consultation for stakeholders on the assessment of the Horizontal Block Exemption Regulations, i.e. Commission Regulations (EU) No. 1217/2010 (Research & Development Block Exemption Regulation) and No. 1218/2010 (Specialisation Block Exemption Regulation). The Commission Guidelines on horizontal cooperation agreements provide binding guidance on the Commission for the interpretation of the Regulations and for the application of Article 101 of the Treaty to other horizontal agreements. As the Regulations will expire in 2022, the Commission is seeking to determine whether it is appropriate to extend them or revise them, together with the Horizontal Guidelines. The evaluation roadmap was published on 5 September 2019 and the public consultation was launched on 6 November 2019 (the feedback period expired on 12 February 2020). The final version of the Staff working document is expected to be released in the first quarter of 2021. See European Commission (2019), *Consultation strategy for the evaluation of the two Block Exemption Regulations for horizontal cooperation agreements*, https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html and the consultation launched on the EU Commission's website: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation. In her speech of 9 December 2019, Commissioner Vestager said: "We've just launched a review of the rules that deal with horizontal agreements between competitors – so it's clear when rival companies can work together to produce better results for consumers." M. Vestager (2019), *Defining markets in a new age*, speech of 9 December 2019, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en.

[45] First announced by Commissioner Vestager during her speech on 9 December 2019 *(ibid.*), on 3 April 2020 the European Commission published the evaluation roadmap "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law". "The purpose of this evaluation is to gather evidence on the functioning of the Market Definition Notice in order to assess whether this Notice is still "fit-for-purpose" in light of developments since its adoption in 1997." See European Commission (2020),

June 2020 the Commission also launched a new consultation regarding the so called "Digital Services Act package" comprising i) new and updated rules concerning the role and obligations of online intermediaries (repelling the by now outdated E-commerce Directive (Directive 2000/31/EC)) as well as ii) new rules to "address the issue of the level playing field in European digital markets, where currently a few large online platforms act as gatekeepers"[46]. At the same time the Commission has launched a second consultation concerning a "possible new competition tool that would allow addressing structural competition problems"[47]. Launching the consultation, the Commission has stressed the need of adopting an "holistic and comprehensive approach" to ensure the contestability and fair functioning of markets across the economy, based on three main pillars: i) the sound enforcement of the existing competition rules (Articles 101 and 102 TFEU), including the use of interim measures and restorative remedies, where appropriate; ii) platform-specific *ex ante* regulation, including additional requirements for those that play a gatekeeper role (see the consultation mentioned above about the Digital Services Act package); and iii) the possible new competition tool[48].

While contrary to the expectations the Commission has not released any proposal regarding the New Competition Tool[49], as part of the European Digital Strategy "Shaping Europe's

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Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law, Ref. Ares (2020)1911361, 3 April 2020. The public consultation was launched in June 2020; see the Commission's webpage: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-EU-competition-law-market-definition-notice-evaluation-/public-consultation. In her speech *Defining markets in a new age (ibid.),* Commissioner Vestager recalled the challenges of market definition with regard to both the changing scope geographic markets as well as the changing nature of product markets.

[46] European Commission (2020), *Commission launches consultation to seek views on Digital Services Act package*, press release of 2 June 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_962. See also European Commission (2020), *Inception impact assessment - Ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's internal market*, Ref. Ares (2020)2877647, 4 June 2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers. The Commission is indeed in the process of adopting a regulatory approach, similar to that traditionally used to address market failures in the transportation and energy sectors. See Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, p.15: "In order to increase their profits, firms compete to acquire market share through lower prices and innovation, both in product design and in production technology. When such competition is not possible, governments have traditionally intervened through regulation or public ownership – examples include transportation networks and public utilities. When such competition is possible, governments use the instruments of competition policy to ensure that private entities do not hinder competition for their own interests, through cartel agreements, monopolisation strategies or mergers".

[47] European Commission (2020), *Antitrust: Commission consults stakeholders on a possible new competition tool*, press release of 2 June 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.

[48] *Ibid*.

[49] The new tool would have allowed the Commission to impose behavioural and, where appropriate, structural remedies after having established the existence of a *structural competition problem* through a rigorous market investigation (not leading to any finding of an infringement, nor fines nor damage claims). As a preliminary comment, the new tool will thus give the Commission a pervasive power (that of imposing remedies) even in the absence of any firm's fault. Indeed, the Commission identified a gap in the current competition law framework, and precisely certain structural competition problems *across markets* that the current rules cannot tackle or

Digital Future", in December 2020 the Commission released two proposals for regulations: i) the Digital Services Act ("DSA"), encompassing a new set of obligations – aimed at amending the rules established by Directive 2000/31/EC – applicable to online intermediaries and accountability measures across the single market which vary depending on their role, size and impact in the online ecosystem[50]; and ii) the Digital Markets Act ("DMA" and hereinafter also the "Draft DMA") which aims at complementing the instruments at the Commission's disposal to effectively enforce competition rules in digital markets[51].

In particular, the DMA provides a new set of rules applicable to those platforms – which qualify as *gatekeepers* according to the new criteria established therein – with an objective different from the protection of undistorted competition on the market, i.e. to ensure that markets where gatekeepers are present are and remain *contestable* and *fair* independently from the actual, likely or presumed effects of the conduct of a given gatekeeper covered by

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cannot address in an effective manner and thus aims at complementing the existing competition rules with a new tool, whose legal basis would be Article 103 TFEU in combination with Article 114 TFEU (see European Commission (2020), *Inception impact assessment regarding the New Competition Tool*, 2 June, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool).

In the Commission's analysis structural competition problems can be grouped into two categories depending on whether harm is about to affect the market or has already affected the market. The first category concerns *structural risks for competition*: "certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) coupled with the conduct of the companies operating in those markets can create a threat to competition. This is particularly the case for markets at risk of "tipping". The risks to competition arise through the creation of powerful market players with an entrenched market and/or gatekeeper position which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolize a market through anti-competitive means" (see European Commission (2020), *Antitrust: Commission consults stakeholders on a possible new competition tool*, *cit.).*

The second category refers to a *structural lack of competition*: "certain market structures do not deliver competitive outcomes (i.e. a structural market failure), even without companies acting anti-competitively. For example, markets may display systemic failures due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation. Similarly, oligopolistic market structures increase the risk of tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions, which are becoming increasingly prevalent across sectors" (*Ibid.*)

As for the new tool's specific objectives, in the Commission' view, it will contribute ensuring fair an undistorted competition in the internal market, thus delivering "competitive outcomes in terms of lower prices and higher quality, as well as more choice and innovation. It will also help small and medium-sized enterprises to compete more effectively against powerful incumbents and reaps the fruits of their investments" (European Commission, *Inception impact assessment regarding the New Competition Tool*, *cit.).*

[50] European Commission (2020), *Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, 15 December, COM(2020) 825 final, 2020/0361 (COD). In a nutshell, the DSA's objectives include updating the rules that define the responsibilities and obligations of providers of digital services, and online platforms in particular, by defining clear obligations and reforming existing EU e-commerce legal framework while maintaining the core principles of its liability regime, the prohibition of general monitoring and the internal market clause (as interpreted by the CJEU). The DSA provides, among other things, a common set of rules on intermediaries' obligations and accountability across the single market. Such obligations apply on all online intermediaries offering their services in the single market, whether they are established in the EU or outside and are designed to match their role, size and impact in the online ecosystem; to this end, the DSA defines four categories of intermediaries (those providing intermediary services, hosting services, online platforms and very large platforms).

[51] European Commission (2020), *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)*, 15 December, COM(2020) 842 final, 2020/0374 (COD). See the information provided by the Commission in its webpage available at the following link: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

this Regulation on competition on a given market[52]. Indeed, differently form Articles 101 and 102 TFEU whose application occurs *ex post* and requires a thorough case-by-case investigation of often very complex facts[53], the DMA – in order to protect the internal market[54] – imposes a series of prohibitions and obligations applicable to entities that qualify as gatekeepers, regardless of whether they are dominant or not, and irrespective of their effects. The Draft DMA has thus a purely regulatory nature as it does not leave any room for gatekeepers to challenge their regulatory duties on grounds that their conduct is incapable or unlikely to have anticompetitive effects[55].

As it will be further analysed in chapter 1 (paragraph 2.5), the DMA's scope of application *ratione personae* is identified by looking at: (i) the nature of the services provided by the online platform and (ii) the designation of the latter as gatekeeper. With specific regards to the content, the draft law introduces a series of "dos" and "don'ts" gatekeepers must observe in their daily operations, and more specifically a (fixed) set of eighteen *ex ante* obligations divided into two lists: a list of so-called self-executing obligations, i.e. directly applicable (Article 5) and a list of obligations that may be further specified by the Commission (Article 6).

While an extensive analysis of the Draft DMA falls outside the scope of the present work, certain aspects will be subjected of further analysis in the following pages[56].

Most importantly for the purpose of the present introduction, it appears from the described revision processes described above, that the new and complex dynamics which characterize an increasingly digitised economy have impacted (and still are impacting) on certain concepts and aspects pivotal for the actual implementation of antitrust rules and analysis, while the latter do not need to be revised, there is room for those concepts to be adjusted, updated and even complemented to fit the digital context. It also appears from the above, that while existing antitrust rules do not need a full revision, certain aspects that do concern their actual implementation may be adjusted, updated and even complemented as, according to the

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[52] *Ibid*, Recital 10.

[53] *Ibid*, Recital 5.

[54] Article 114 TFEU is legal basis for the DMA, and not Article 103, which is the legal basis for the implementation of antitrust provisions under Articles 101 and 102 TFEU.

[55] P. Ibáñez Colomo (2021), *The Draft Digital Markets Act, cit.,* p. 19.

[56] See in particular the definition of gatekeeper (Chapter 1, paragraph 2.5) and a brief discussion of the ban of self-preferencing in the context of the DMA (Chapter 3, paragraph 4). This later chapter also provides a brief overview of some of the obligations included in Article 5 and 6 of the DMA and a few considerations on how abusive self-preferencing according to Article 102 TFEU will coexist with the ban of self-preferencing set out in the DMA.

For an analysis of the DMA, see P. Ibáñez Colomo, Pablo (2021), *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 22 February, available at SSRN: https://ssrn.com/abstract=3790276 or http://dx.doi.org/10.2139/ssrn.3790276; M. Cappai, G. Colangelo (2021), *Taming digital gatekeepers: the more regulatory approach to antitrust law*, *Computer Law & Security Review*, forthcoming.

Commission, the rules have proved inadequate to reckon with certain structural problems across markets that prevent especially digital markets "from functioning properly and tilt the level playing field in favour of only a few market players"[57].

In a similar perspective, the new complementary rules provided by the Draft DMA aimed at complementing traditional antitrust rules without overhauling them. In other words, the inadequacy of Article 102 TFEU to deal with "all the problems associated with gatekeepers" is rooted in the market failures experienced in the digital environment, rather than in the "internal flaws" of the provision or the consumer welfare as a parameter to assess the market well-functioning. The idea is therefore to address those market failures (mainly the lack of contestability and fairness) by expanding the overall legal framework applicable to certain companies operating on digital markets (and particularly enriching the toolbox available for the Commission), combining (*ex post*) antitrust rules with a set of (*ex ante*) obligations that – given the regulatory nature – apply regardless of any analysis of the effects[58].

The Draft DMA expressly clarifies that Articles 101 and 102 TFEU will remain applicable to the conduct of gatekeepers but their scope would be limited to certain instances of market power (e.g. dominance on specific markets) and of anticompetitive behaviour; however, as better articulated in Chapter 3, paragraph 4, since many (if not all the) conducts that since now have been observed to take place on digital markets by firms that seems *prima facie* to meet the gatekeeper requirements will be intercepted by the Draft DMA, it cannot be denied that there might be no – or very little – room for antitrust enforcement in digital market once the DMA enters into force.

Finally, it is worth mentioning that at the end of 2020, the German Parliament finalised the Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz), i.e. a reform of the German competition law that originates from the fourth industrial revolution and the subsequent development of the digital economy. Thus, in January 2021, the new Article 19 (a) entered into force, which is precisely aimed at regulating the conduct of undertakings that can be said to be of "fundamental importance for competition

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[57] European Commission (2020), *Inception impact assessment regarding the New Competition Tool*, *cit*. The Commission also stresses the fact that as "the entire economy is increasingly digitised and all sectors (from energy to media, pharma, farming, manufacturing and mobility) will become to a large extent digital in the years to come".

[58] The proposal specifically states, among its aims, that of "address[ing] market failures to ensure contestable and competitive digital markets for increased innovation and consumer choice". They also include "address[ing] gatekeepers' unfair conduct and enhanc[ing] coherence and legal certainty to preserve the internal market". European Commission (2020), *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)*, *cit.*, p. 58. See also European Commission (2020), *Digital Markets Act Impact Assessment support study*, December, Annex 5.4.

across markets" and, in particular, seven classes of practices that the Bundeskartellamt may consider presumably prohibited, unless the undertakings can produce an objective justification in support of the same conduct. While a more detailed analysis of the German reform falls outside of the present work, it should be noted that differently from the DMA, the new German rules are within the perimeter of competition law, while however with the regards to the specific conducts referred to in new Article 19 (a) the task of the German Authority will be extremely simplified in that it is not required to demonstrate the anticompetitive effects stemming from the conduct[59].

3. The antitrust toolkit in the context of the new economy

So, all in all, the reviewing activity must not be interpreted as the inadequacy of antitrust rules to deal with the digital world, but as an opportunity to rethink and eventually adjust certain *tools* within competition analysis, i.e. the *instruments* whereby substantive competition rules are applied and enforced, especially considering that competition rules still apply – and will in any case continue to apply – in digital scenarios notwithstanding the future entry in to force of the DMA. For instance, with regards to the revision of the market definition, Commissioner Vestager has pointed out the need to shape a new test able to focus on quality (or other products' features) capable of addressing substitutability of zero price products, to be used side by side the more "traditional" SSNIP test[60] and digital dynamics are at the core of the reviewing process of Regulation no. 330/2010 on vertical agreements.

Indeed, even among those commentators that do not share the "hipster" need to revise the objectives of competition law and policy and an overhaul or rewriting of antitrust rules, there is common perception that digital markets challenge certain core concepts of antitrust analysis, such as the traditional understandings of market definition, market power, distinctions between unilateral conduct and agreement conduct, vertical and horizontal restrictions[61]. Also, existing "categories" of anticompetitive conducts are challenged by the business models of technology companies[62].

One of the main challenges with figuring out how to apply competition law in the digital economy is that the practices adopted by the technology companies touch upon some of the

[59] On the German reform see M. Cappai, G. Colangelo (2021), *Taming digital gatekeepers: the more regulatory approach to antitrust law*, *cit.*.
[60] M. Vestager (2019), *Defining markets in a new age*, *cit.*
[61] Akman writes that "what is required is not an overhaul or rewriting of the rules or the tools, but a rethinking of some of the core concept of competition law and of the application of some tools". See P. Akman (2019), *An Agenda for Competition Law*, *cit.,* p. 589.
[62] *Ibid.*

least developed aspects of competition law and economics, such as the relationship between innovation and competition and oligopoly competition[63].

Based on these premises and assuming that antitrust law does not need to "reinvent" itself[64], the research activity has tried to examine if and how certain core concepts and the application of some tools that are the core of the conventional competition policy, law and analysis can be reinterpreted and adjusted to properly capture the competitive dynamics existing in a market reality that has been increasingly shaped by information and digital technologies. In other words, the research has measured itself with the question "does a changing economy require changing enforcement attitudes"?[65]. Such exercise – which focuses mainly on European and Italian law and case practice – will be developed as follow.

The research has found that the specific features that characterize digital markets and competition among tech companies do originate certain challenges that require an adjustments of the way competition law framework is interpreted and applied in a digital market environment, and precisely an adaptation and refinement of certain established concepts, doctrines and methodologies, including adjustments of the theories of harm[66]. Such an exercise will help streamlining and thus strengthening antitrust enforcement in the digital markets while building on the sound consumer welfare paradigm, that if rightly interpreted, is capable of encompassing a broader reach than just price and output[67]. In other words, antitrust law needs to *evolve* in order to capture in a time-effective manner competitive distortion taking place in new ways in the tech environment, while holding still to the consumer welfare as the standard against which such distortion should be measured and addressed.

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[63] Akman also mentions "collective dominance, hub-and-spoke agreements, concerted practices, exploitative abuse". P. Akman (2019), *An Agenda for Competition Law*, *cit.,* p. 589.

[64] See N. Petit (2016), *Technology Giants, the Moligopoly Hypothesis and Holistic Competition*: *A Primer*, 20 October 20, https://ssrn.com/abstract=2856502 or http://dx.doi.org/10.2139/ssrn.2856502, p. 5. In other words, a distinction must be made "between vigorous antitrust enforcement within the consumer welfare framework on the one hand, and "Hipster Antitrust" outside the consumer welfare framework on the other"; see K. Medvedovsky (2018), *Hipster Antitrust*, *cit*, p. 3. The Author refers to the words of US Senator Orrin Hatch.

[65] D. Streitfeld (2018), *Amazon's Antitrust Antagonist*, *cit.*

[66] Such approach has been recommended by the Advisers to the Commission: "We do not think that there is a need to rethink the fundamental goals of competition law in the light of the digital "revolution". But we argue that we have to adapt its methodologies and analytical tools, economic theories of harm and legal doctrines to the new environment". See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 15; see also the findings outlined at pages 39-40. In addition, among "EU scholars" there is a consensus on the need to rethink - in an ongoing effort - the application of competition law to digital industries in order to assess whether FANG firms and many others' strategies are procompetitive or anticompetitive; see for instance, N. Petit (2019), *Are 'FANGs' Monopolies? A Theory of Competition under Uncertainty*, 10 October 2019, https://ssrn.com/abstract=3414386 or http://dx.doi.org/10.2139/ssrn.3414386; P. Akman (2019), *An Agenda for Competition Law*, *cit.*

[67] See M. Botta, S. Solidoro, *Hipster antitrust, cit*.

However, believing in the objectives of antitrust law as they are (and thus in the consumer welfare as the standard to measure market well-functioning) does not mean minimizing the heated debate about the future of antitrust law. Indeed, believing in the objectives of antitrust law does not mean ignoring the effects of the digital revolution also on antitrust law, as like any revolution its disruptive force has an impact on many aspects of society (and therefore on the law that intends to regulate those aspects). The world has changed and antitrust law, like any other norm that aims at regulating a set of social and economic phenomena, cannot fail to take this into account. This does not mean having to reinvent antitrust law all over again, but it certainly means understanding how this revolution has changed some of the phenomena that are traditionally scrutinized by enforcers and understanding whether the tools we have at our disposal are effective or need to be adjusted to be adequate to capture, measure and ultimately regulate the changes that have occurred in economic reality.

It is therefore of utmost importance reflecting on how the techniques that aim at ensuring that consumer welfare or economic freedom are safeguarded should evolve and develop so as to keep up with the digital changes, even in the potential new legal context enriched with the DMA.

Against this background, the first chapter focuses on the features that characterize digital markets and the competitive dimension that these features provoke among tech giants. In particular, by focusing on the competitive dynamics that are at play on digital markets, the work has found that increasingly often dominant tech companies recur to pre-emptive and foreclosing strategies, frequently leveraging on their competitive advantage in one (dominated) market to expand into adjacent markets.

Building upon this, the work then focuses on self-preferencing as an analytical tool that can help addressing the said leveraging strategies in digital markets. In particular, chapter 2 provides a detailed analysis of the European Commission's infringement decision in the *Google (Search) Shopping* case, considered to be the forerunner precedent, as well as an in-depth overview of the criticisms and many comments that legal scholars put forward with regards to the Commission's approach in the case, as well as self-preferencing as an autonomous legal category.

Chapter 3 further develops on the findings of chapter 2 and attempts to provide a narrow definition of self-preferencing as well as some considerations concerning the legal test applicable to such type of conduct. In order to do so and to test the theoretical definitions developed in the first part of the chapter, two cases opened by the Italian Competition Authority against Amazon and Google are then analysed. The chapter also address the ban of

self-preferencing introduced in the DMA and the role that abusive self-preferencing pursuant to Article 102 TFEU will have following the entry into force of the DMA.

Finally, the work provides some conclusions about the role of self-preferencing in addressing anticompetitive strategies in the context of the new economy taking the view that self-preferencing can constitute a useful tool to enforce competition law in highly innovative and dynamic markets and to help antitrust law adjusting and somehow developing to meet the challenges posed by the digital economy. The narrow definition of self-preferencing seems also to prove useful in the context of the DMA ban of self-preferencing.

As for the limits of the present work, it does not intend to comprehensively address the wide variety of issues that are at stake when dealing about competition law in the digital environment. Among the topics that are not discussed in the work are algorithmic collusion or algorithmic pricing and procedural issues, such as the question of whether the law on interim measures needs to be reinforced.

As for the economics themes, they are briefly touch upon (in a very simple and mostly descriptive way of a non-economist) to recall some of the features that make the new digital environment challenging for antitrust law, with the aim of providing a useful context to set the discussion from an antitrust law and policy perspective.

Also, it falls outside the scope of this work a proper analysis of (big) data and its implication for antitrust law, as well as data access. The issue of regulation in digital markets would only be mentioned but the analysis of the need of regulation and how to set it fall outside the scope of this work. Also, the relationship between competition law and other legal regime, such as consumer and data protection, would occasionally be touched up but has not been investigated. As mentioned above, also an exhaustive analysis of the Draft DMA falls outside the present work.

Finally, given the importance and the complexity of the themes that will be discussed, this work does not pretend to provide an exhaustive analysis of the many issues that are discussed (not least because of the limited ability of who is writing), but just some considerations that have originated from the research activity and that hopefully would be useful for future research activities.

CHAPTER 1

DIGITAL COMPETITION LAW: KEEPING UP WITH NEW COMPETITIVE DYNAMICS

1. Digital markets' key characteristics (hints)

The terms "Digital Revolution" or "Third Industrial Revolution" indicate the shift from mechanical and analogue electronic technology to digital electronics that have transformed traditional mass production and business models. In particular, the term "revolution" itself well reflects the disruptive changes caused by the fast and ubiquitous advent on the Internet and the spread of digital technologies to a very large population[68]. While the technological shift began in the latter half of the 20th century with the adoption and proliferation of digital computers and digital record-keeping, according to some scholars, the Digital Revolution can be dated back to 2001[69] and still continuous to the present day.

As every revolution, the growth of the "digital economy" – i.e. the global network of economic activities and commercial transactions enabled by the said information and communication technology[70] – has led to relevant market developments and impacted on society as a whole. Online platforms such as search engines, social networks and e-commerce websites, have created new types of social interaction and changed the way consumers purchase most goods and services. Such developments are not limited to online service providers, but have also transformed economic sectors traditionally operating offline, including telecommunications, transport, energy, insurance, banking, and manufacturing industries[71]; moreover, all those sectors are increasingly involved in the so called "Internet of

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[68] For a general definition of the Digital Revolution see, among others, the entry "Digital Revolution" on Wikipedia, https://en.wikipedia.org/wiki/Digital_Revolution; J. Rifkin (2013), *The Third Industrial Revolution*, Palgrave Macmillan Trade; J. Rifkin (2014), *The Zero Marginal Cost Society*, Palgrave Macmillan Trade; A. De Franceschi and R. Schulze, co-edited by M. Graziadei, O. Pollicino, F. Riente, S. Sica and P. Sirena, (2019), *Digital Revolution – New Challenges for Law Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies*, Published by Verlag C. H. Beck oHG, and Nomos Verlagsgesellschaft mbH & Co.; Dirk Helbing (2015), Societal, Economic, Ethical and Legal Challenges of the Digital Revolution, Jusletter IT, 21 May 2015. The term has also become common in the antitrust discourse; see, for instance, J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 3, 15.

[69] S. Quintarelli (2019), *Capitalismo Immateriale, Le tecnologie digitali ed il nuovo conflitto sociale*, Bollati Boringhieri.

[70] A. Jones, B. Sufrin's and N. Dunne (2019), *EU Competition Law*, *Text, Cases and Materials*, Seventh Edition, Oxford University Press, p. 57. The digital economy is in turn part of the "new economy", a term which describes market characterized by rapid innovation and technological change, the features of which include reliance on intellectual property rights, the complementary products, services or platforms to work together and a high degree of technical complexity and technological sophistication. *Ibid*. See also A. Ezrachi and M. E. Stucke (2016), V*irtual Competition: the Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press; M. Moore and D. Tambini (2018), *Digital Dominance, The Power of Google, Amazon, Facebook, and Apple*, Oxford University Press.

[71] Autorité de la concurrance and Bundeskartellamt (2016), Competition Law and Data, 10 May 2016 (the "French-German Report"), Introduction.

Everything"[72]. And indeed, as the digital technology represents a transversal technology - used in every sector of society (economists call it a General Purpose Technology, "GPT") - its effects spread throughout the economy, just like other GPT that were discovered in the past, such as fire, steam engine, electricity and railway. Unlike other previous cases, however, digital technologies tend to evolve and produce their effects at an increasing speed, rather than at a constant speed[73].

In this context, large amount of data generated by users in their online activities (also referred to as "big data") has assumed a key role and led to the creation of new business models that have allowed multinational companies in the Information and Communication Technology ("ICT") sector (including the Bic Tech mentioned in the Introduction) to extract value from our social and economic interactions in the online environment[74].

Despite the fact that the economics of the digital sphere are considered somehow still new and – also in light of their complexity - in need to be better studied and understood[75], a number of specific features have been so far commonly deemed to characterize digital markets and – as seen in the Introduction - to apparently challenge the traditional antitrust regime[76]. These

[72] See OECD (2016), *The Internet of Things: seizing the benefits and addressing the challenges*, May 2016. The term "Industry 4.0" concerns the use of digital technology to enrich material products with an immaterial dimension, with all the resulting benefits in terms of innovation and optimisation of products and processes, and improvement of customer service; all with less environmental impact and faster reaction times.

[73] S. Quintarelli (2019), *Capitalismo Immateriale, cit.*

[74] The basis of much of the digital economy is data. It is the by-product of the business itself and at the same time the "currency" and the "raw material" given by the users to access services which appear to be "free". See A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, pp. 57-59. "Big data" are typically described by some of its specific features (the so called "four Vs" of big data), and specifically: (i) Volume: big data refers to large volumes of generated and stored data. In particular, it refers to datasets that are so large or complex that traditional data processing applications are inadequate to deal with them. As a result, only a few undertakings in the world own the specific technological platform (the so called "big-data technology") necessary to manage such quantity of data; (ii) Variety: big data entails different types, forms and nature of data (it draws from text, images, audio, video etc.) encompassing a variety of contents. They are generated from myriad of transactions, production and communication processes; (iii) Velocity: such feature refers to the speed at which the data is generated and processed, close to real-time analysis of the streaming data; and (iv) Veracity: such feature refers to the uncertainty of data as the quality of captured data can vary greatly, affecting accurate analysis. See, for instance, H. Martin (2016), *Big Data for Development: A Review of Premises and Challenges*, *Development Policy Review*, 2016, 34 (1), pp. 135–174; see also the infographic issued by IBM, *Big Data and Analytics Hub, "Extracting business value from the 4 V's of big data"*, https://www.ibmbigdatahub.com/infographic/extracting-business-value-4-vs-big-data.
While big data does not match the concept of personal data (as defined by article 4 of General Data Protection Regulation) - in that it is a broader concept encompassing both personal and non-personal data - it should be noted that personal data may be among the most valuable components of big data. According to the OECD, the digital/data economy represents the single most important driver of innovation and growth in the world, having the potential to enhance resource efficiency and productivity, economic competitiveness, and social well-being. See OECD (2015), *Data-Driven Innovation: Big Data for Growth and Well-Being*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264229358-en. Some scholars refer to the phenomenon as "Big Data Revolution"; see V. Zeno-Zencovich, G. Giannone Codiglione (2016), *Ten Legal Perspectives on the "Big Data Revolution"*, 23 *Concorrenza e Mercato* 29.

[75] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit.*, p.50.

[76] These features have been analyzed in the various studies commissioned by antitrust authorities, which have been extremely helpful in collecting a wealth of information about the functioning of digital markets. See Introduction.

include 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, which in turn represent significant barriers to entry that make digital markets highly concentrated, prone to tipping and not easily contestable[77].

The present chapter provides a general and brief overview of some of these features with the sole and limited aim of providing a basic description of the market context, dynamics and strategies taking place in the digital sphere, useful – if not essential – to frame and better understand the topics which will be then discussed in chapters 2 and 3, namely the role of self-preferencing in handling the leveraging of market power in digital markets. The chapter is articulated as follows: the present paragraph 1 provides a general overview of some of the main features characterizing digital markets and shaping the competitive dynamics on such market. These include limited (if not zero) marginal costs, extreme return to scale and demand-based pricing, network and lock-in effects and – as a result – a tendency towards market concentration and tipping[78]. Paragraph 2 focuses on the subjects operating on such markets (i.e. platforms) and the features whereby they tend to become ecosystems and conglomerates; specific attention will be reserved to the concept of "gatekeepers" which, while being often in association with digital platforms, is still blurred.

Finally, paragraph 3 deals in general with the competitive dynamics characterising competition among digital platforms and the incentives that drive some of their typical behaviours, including across markets competition, the continuous "race" towards new products and services and envelopment strategies, all elements which explain the importance for the antitrust analysis to rely on tools (such as self-preferencing) able to capture cases where platform expansion into adjacent markets is not due to the platform's merit and consumers appreciation of its products and services but rather on leveraging conducts capable of foreclosing competitors and harm consumer welfare.

1.1. Zero marginal costs, extreme return to scale and demand-based pricing

First of all, it is worth noting that many of the production costs that characterize the "material" or tangible dimension have been drastically reduced in the context of digital

[77] M. Cappai, G. Colangelo (2020), *Navigating the Platform Age: the 'More Regulatory Approach' to Antitrust Law in the EU and the U.S*, Stanford-Vienna TTLF Working Paper No. 55, p. 2.

[78] While data (or "big data") is without doubt another main "feature" characterizing digital markets and shaping the competitive dynamics taking place in that context, the topic will not be specifically addressed in this chapter; for the purpose of this work, it is assumed the importance of data as a crucial input in the context of the digital economy and as a crucial factor for the business models of the platforms operating on those markets. On this topic see also the Introduction.

economy. In the digital dimension, indeed, it is possible to observe that while many online players need to bear hight infrastructural costs, they instead face the almost complete absence of variable costs. This is due to the fact that many of the business models developed in the ICT sectors rely on information (or data) both as input and as output goods and, while they need high infrastructural costs to be able in the first place to manage such information, then reproducing information entail very low production costs[79]. Low or zero marginal costs lead, with a positive feedback mechanism, to an exponential acceleration of good's production in the digital environment. Moreover, in the digital dimension everything happens in real time and the processing is carried out by machines twenty-four hours a day[80].

Therefore, the refinement of an intangible product or service can take place almost in real time. In general, the digitisation of several phases of the life cycle of a product, the enrichment of its material dimension with a digital dimension, make it possible to carry out innovations (product and process) and optimisations at a much higher rate than before[81].

The economy in the material dimension has always been characterised by scarcity: the greater the demand and the smaller the supply, the higher the price of the good. The intangible or information economy instead coexists with the fact that once the investment has been made to create the intangible good or service, potentially all demand can be met at negligible incremental costs[82].

The peculiarities of intangible goods and services explain the reason of increasing returns (or extreme returns to scale), meaning that the cost of production is much less than proportional to the number of customers served. While this has always been true to some extent, as bigger factories or retailers are often more efficient than smaller ones, the digital world pushes this phenomenon to the extreme. Once created, information can be transmitted to a large number

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[79] See G. G., Parker, M.W. Van Alstyne, and S.P. Choudary, (2017), *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You*, W. W. Norton & Company, New York, p. 63-64. The Authors underline how "most Internet applications during the 1990s involved the creation of highly efficient pipelines—online systems for distributing goods and services that outcompeted incumbent industries. Unlike traditional offline pipelines, online pipelines benefited from low marginal costs of distribution—sometimes as low as zero. This allowed them to target and serve large markets with much smaller investment". See also S. Quintarelli (2019), *Capitalismo Immateriale, cit.*; R. A. Posner (2020), *Antitrust in the New Economy*, John M. Olin Law & Economics Working Paper, No. 106 (2nd series). The absence of low marginal costs is not always true; for instance, Amazon and Netflix do have marginal costs (superior than zero); see N. Petit (2019), *Are 'FANGs' Monopolies?, cit*., p.11.

[80] On the other side, in the non-digital dimension producing, transferring and storage take time and manipulation is carried out by people; all with the related costs. Moreover, the tangible dimension is disconnected. See S. Quintarelli (2019), *Capitalismo Immateriale, cit.*

[81] *Ibid.* By contrast, the refinement of a material product requires a lot of time between design, focus group, prototyping, testing, production, distribution and data collection. Only at the end will it be possible to carry out analysis (on statistical data) and improvements to be put back into the cycle from the first phase.

[82] J. Haskel, S. Westlake (2018), *Capitalism without Capital, The rise of intangible economy*, Princeton University Press. The Authors discuss the economic characteristics of intangibles which are summed up in four S's, namely that intangible assets, relative to tangible assets, are more likely to be *scalable*, their costs are more likely to be *sunk*, and they are inclined to have *spillovers* and to exhibit *synergies* with each other.

of users at very low cost[83].

For instance, once a search engine or mapping service has been developed and is running, it can usually serve hundreds of thousands of users fairly cheaply. This is not to say that servicing these users is not costly but rather that the costs rise much more slowly than the number of users[84]. Producing immaterial goods is thus possible at a speed and with a scale totally different from the production of the material good. For instance, the absence of relevant variable costs made it possible for WhatsApp to rely only on 55 employees to scale the world in the years 2009 (when it was first created) to 2014 when it was acquired by Facebook for 19 billion dollars[85].

As already mentioned above, this does not even mean that producing intangible goods or services does not request large investment; however, while the production costs can be high in the first place, once that production cost is covered, all the money that is cashed in addition is basically a margin (i.e. a profit). If the production costs were to be considered as sunk costs, the good/service could be provided at any price, as there are no variable costs. More than ever, the price is thus disconnected from costs and even from the value of the good or the service to the consumers or to the firms which are selling them, depending only on the customer's willingness to pay[86], and generating a particular and extreme form of or demand-based pricing[87]. The mechanism set up by Google for selling advertising space in the search engine is an emblematic example of this phenomenon; indeed, the cost of those advertising spaces is not decided by Google's marketing or sales departments, but it is decided by the clients themselves (the advertisers) who conduct a real time auction on each advertising. For Google the cost of the system that manages the advertisements is basically fixed (technically it is an irrecoverable cost), while the final price is the maximum price that advertisers are willing to pay with an auction. The "good" sold (i.e. the advertising space and rank) has

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[83] S. Quintarelli (2019), *Capitalismo Immateriale, cit.:* "Increasing returns are the tendency for that which is ahead to get further ahead, for that which loses advantage to lose further advantage. They are mechanisms of positive feedback that operate—within markets, businesses, and industries—to reinforce that which gains success or aggravate that which suffers loss." In standard economic theory, markets show diminishing returns. There are only so many good hydroelectric sites in Norway and after these are exploited hydro energy runs into diminishing returns—it becomes more costly. See W. B. Arthur (1996), *Increasing Returns and the New World of Business*, *Harvard Business Review*, July–August 1996.

[84] The presence of large economies of scale also helps understand the rise of free services. See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 20.

[85] In 2012 only 30 employees were working at the company. See the article of B. X. Chen (2012), *Apps Redirect Text Messages, and Profits, From Cellular Providers*, New York Times, 4 December, https://www.nytimes.com/2012/12/05/technology/free-messaging-apps-siphon-profits-from-cellular-providers.html?auth=login-email&login=email. When acquired by Facebook in 2014 for US$19 billion, only 55 employees where working there. See the article of Akshat Rathi (2014), *Facebook has just acquired the mobile messenger service WhatsApp for US$19 billion*, SBS News, SBS News, 21 February, https://www.sbs.com.au/news/whatsapp-bought-for-19-billion-what-do-its-employees-get.

[86] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 48.

[87] S. Quintarelli (2019), *Capitalisamo Immateriale, cit*.

therefore a price that is determined purely by the demand, without any correlation to an underlying cost, which is in fact zero (after having incurred the initial investments).[88]

1.2 Network and lock-in effects

Another key feature of digital markets is the presence of significant indirect network effects. Network effects (or network externalities) can be direct or indirect. Direct network effects are related to the size of a network and mean that the utility that consumers/users gain from using a given product/service/network is directly affected by the number of other users and thus increases the more consumers use it. The classic example is telecommunications networks (including Skype and WhatsApp), but that is also the case of social media sites where in both cases an increased number of users means more people with whom interact[89]. Similarly, if a large customer base is already using certain social networks such as Facebook or LinkedIn, this tends to attract even more users, as a large customer base increases the probability of finding valuable contacts.

In contrast, indirect network effects arise in multi-sided markets if the increase in the number of one group of users on one side of the market attracts more users of the other (and different) group on the other market side. While there is no direct benefit of an increase in users on the same market side (in fact there may even be negative direct effects via increased competition), the network effect unfolds indirectly through the opposite market side as an increase in users on one market side attracts more potential transaction partners on the other side of the market. The classic example in the brick-and-mortar world is that of dance clubs where women typically enter for free given that the more women are present in dance club the more it will attract users of the other groups (wen) who instead have to pay to entry. In the digital world, taking eBay or Amazon Marketplace as illustrations, more potential buyers attract more sellers to offer goods on these platforms as the likelihood to sell their goods increases with the number of potential buyers. These indirect network effects are the key characteristics of two-sided markets, such as platforms (whose definition will be provided further below), and which in turn are the subjects which enjoy strong indirect network effects[90].

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[88] *Ibid.* Additional information about Google Ads (formerly Google AdWords) can be find at the following link: https://support.google.com/google-ads/answer/2459326?hl=en.

[89] A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 60. As for the literature on the topic see also M. Katz, C. Shapiro (1985), *Network externalities, competition, and compatibility*, *American Economic Review*, Vol. 75, No. 3, 1985, pp. 424-440.

[90] A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 60. As for the economic literature on indirect network effects being an important characteristic of two-sided platforms, see J.-C. Rochet, J. Tirole (2003), *Platform competition in two-sided markets*, *Journal of the European Economics Association*, Vol. 1, No. 4, pp. 990-1029; J.-C. Rochet, J. Tirole (2006), *Two-sided markets: A progress report*, *RAND Journal of Economics*, Vol. 37, pp. 645-667; D. S. Evans, R. Schmalensee (2007), *The industrial organization of markets with two-sided platforms*,

Network effects reduce customer acquisition costs, because the user has a natural advantage to be part of the network where there are many users; however, network effects are traditionally considered as a barrier to entry in that any new business will need to build up simultaneously a critical mass of users (on all sides of the market) to be successful. Failure to reach a certain side, i.e. to acquire a critical mass of users, means that the new business won't be able to access the market at all[91].

While network effects (including indirect ones) are not a new phenomenon, in the twenty-first-century Internet era the size of the phenomenon have acquired a completely new scale. While marketplaces such as fairs, discotheques or malls have always shown these indirect network effects, capacity constraints and transport costs or travel times have limited their expansion. In contrast, such constraints play virtually no role in online markets: the so-called "death of distance" removes the natural barrier to expansion imposed on traditional marketplaces through travel costs, while the virtual location on the internet removes the barrier to expansion traditionally imposed by space or capacity constraints[92], thereby leading to extreme forms of indirect network effects, which in turn can facilitate market concentration processes (see paragraph 1.3 below).

Network effects can also generate lock-in effects which translate into the users' difficulty in changing the service provider (i.e. high switching costs). Leaving Facebook, Gmail or other similar services means losing your entire network of friends and contacts. Getting in is easy (and often free, or *rectius*, involves zero monetary consideration whereas other non-monetary forms of consideration such as users' data and attention occur[93]), but once in the system, getting out can be costly and thus uneasy. Lock-in effects explain why services like those mentioned are provided for free: the point is convincing in the first-place users to start using

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Competition Policy International, Vol. 3, No. 1, pp. 151-179; P.A. Johnson (2019), I*ndirect network effects, usage externalities and platform competition*, *Journal of Competition Law & Economics*, Volume 15, Issue 2-3, June/September 2019, pp 283–297, https://doi.org/10.1093/joclec/nhz014.

[91] A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, pp. 61, 130. See also A. Moazed, N.L. Johnson (2016), *Modern Monopolies: What it takes to dominate the 21st Century Economy*, St Martin's Press; A. Ezrachi, M.E. Stucke (2016), *Virtual Competition: the Promise and Perils, cit.*; D. S. Evans, R. Schmalensee (2016), *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press.

[92] J. Haucap (2019), *Competition and Competition Policy in a Data-Driven Economy*, *Intereconomics* 54, 201–208, pp. 202-203. Prominent online platforms that exhibit indirect network effects include eBay, Amazon Marketplace, Uber, Lyft and similar ride-sharing platforms, Airbnb, Expedia, Booking and other travel-related booking platforms, Google, Bing and other search engines, Craigslist, file sharing networks and many other platforms and applications. *Ibid.*

[93] Antitrust authorities have recognized that the provision of "free" services entails an economic transaction taking place whereby users pay with their data. See, among others, the Commission's decision on the *Google Shopping* case where in replying to one of Google's counterargument, the Commission argued that the fact that generic search services are offered free of charge did not preclude the assessment of dominance in the light of the fact that users pay for the services with the data provided for each search query. See European Commission, Case AT. 39740, *Google Search (Shopping)*, Decision 27 June 2017, paras 319 and following. The decision will be analyzed in detail in chapter 2.

such services, and since it's then very difficult to change system, users tend to remain loyal and can then be "monetized" by the firms providing those services, typically through advertisement activities[94].

For instance, let's imagine supporting an important investment to make a new spreadsheet. Selling the first copy convincing the first customer to buy the spreadsheet is certainly difficult; on the other hand, everyone knows how to use Excel and exchange files in its format. But when in Italy 19.999.999 people adopt the new spreadsheet, acquiring the twenty millionth customer will cost almost nothing, as that customer will be eager to join in order to interact with all the other people. In the hypothetical spreadsheet program, the mechanism of file sharing that pushes other users to adopt the system chosen by the former determines a multiplicative effect called, indeed, network externalities. If then no other program is able to decode the files of the new spreadsheet program, it is very unlikely (not to say impossible) that the twenty million users will decide to change system. The first one who does so will not be able to exchange data with anyone, so it would be more convenient to wait until there is a critical mass before switching. But this is true for all twenty million users, and thus it would prove difficult for an alternative program to reach a critical mass[95].

The community (i.e. users altogether) is another good example of lock-in system. If a consumer wants to buy a used bicycle, he/she will probably look for it on eBay where most of the second-hand sellers are. Similarly, if a person wants to sell a used bicycle, he/she will probably choose to advertisement the post on eBay, where all the advertisers go. Due to these lock-in effect, therefore, moving an entire community from its location is a very difficult mission[96].

Significant production costs (considered as non-recoverable costs), zero variable costs, network effects and lock-in largely explain a common trend in online marketing strategies: an idea must be implemented quickly and elements that generate network effects and lock-in elements must be included. Even if it is not perfect, as soon as the system is good enough to be usable by a mass of users, it must be launched on the market. The first one to arrive using network and lock-in effects builds a community that is very unlikely to change providers. Getting there first is often better than being the best. To improve there is time, if you are not committed to chase. For these reasons, "control over a large installed base of users can be the greatest asset you can have"[97] and competition takes the form of competing "for the market".

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[94] S. Quintarelli (2019), *Capitalisamo Immateriale, cit*.
[95] *Ibid.*
[96] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 22.
[97] See also C. Shapiro, H. R. Varian (1999), *Information Rules: A Strategic Guide to the Network Economy*, *Harvard Business School Press*, Boston, MA, pp. 184-5.

Firms operating online know, in fact, that the scarce resource is not money or a raw material available in small quantities, as is the case in the "material dimension"; rather, the scarce resource, to be conquered quickly, is that part of the users' attention that will make them use service *a* and not service *b*. The budget to invest will be more profitably oriented to the conquest of the users to monetize (the monetization strategy must be clear), rather than to the construction and publication of the best possible product or service[98].

1.3 Market concentration and tipping

Extreme return to scale, indirect network and lock-in effects (especially when the latter are not-counterbalanced my "multi-homing"), in turn often lead to a market structure dominated by a few large companies (platforms) and thus high levels of market concentration[99]. Moreover, these same phenomena tend to shield the platform which have reached a dominant position, providing that firm a strong incumbency advantage and making it difficult for other firms to contest that position.

"Tipping point" is a happy expression – originally coined in 2000 by Malcolm Gladwell – indicating a point, a moment from which the trend of a phenomenon changes radically. In the Author's words, "the tipping point is the magic moment when an idea, a trend or a social behaviour crosses a threshold and spreads like wildfire. Just as a single sick person can start a flu epidemic, so a small but precisely oriented push can trigger a fashion trend, the popularity of a new product, or a drop in the crime rate"[100].

The term has recently become very popular to indicate that the digital markets "tip", i.e. they tend to reach a critical mass after which – like a snowball caused by network effects – a certain technology, product or service spreads so predominantly that it becomes the new standard, paving the way to something near market monopoly as it's no longer possible for

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[98] On the topic of the "attention market", see D. S. Evans (2020), *The Economics of Attention Markets*, https://ssrn.com/abstract=3044858 or http://dx.doi.org/10.2139/ssrn.3044858 and J. M. Newman (2019), *Regulating Attention Markets*, University of Miami Legal Studies Research Paper, https://ssrn.com/abstract=3423487 or http://dx.doi.org/10.2139/ssrn.3423487.

[99] If "multi-homing" (i.e. the possibility of participating in several systems/platforms at the same time) is difficult for some reason, large platform sizes will also lead to high concentration levels that cannot simply be interpreted in the same manner as such case in conventional markets without network effects. The existence of one large marketplaces, indeed, can be efficient as it helps to reduce search costs for potential trading partners compared to a situation in which a large number of small marketplaces exist; however, if multi-homing is easy, network effects do not need to induce high concentration levels. See J. Haucap (2019), *Competition and Competition Policy*, *cit.*, p. 203. See also D.S. Evans, R. Schmalensee (2013), *The antitrust analysis of multi-sided-platform businesses*, in: R. Blair, D. Sokol (eds), *Oxford Handbook on International Antitrust Economics*, Vol. 1, Oxford 2015, Oxford University Press, pp. 404-449. See also J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit.*, pp. 54-55: "In markets where network externalities and returns to scale are strong, there is, without multi-homing, protocol and data interoperability or differentiation, place for only a limited number of platforms, thus leading to a particularly concentrated market structure".

[100] M. Gladwell (2000), *The Tipping Point: How Little Things Can Make a Big Difference*, Little Brown.

others to compete[101]. In particular, Commissioner Vestager pointed out that "in a digital world, where size is often the key to success, growing companies can quickly reach the point where the market simply tips in their favour – and competition is lost forever."[102] The European Commission also refers to tipping markets as a specific form of structural risks for competition (and precisely "a sudden and radical decreases in competition") inherent to the digital environment and that has led to launch the consultation on the New Competition Tool[103]; this is because "the rules we have today can't stop big companies from pushing markets towards the tipping point, unless those companies are already dominant in a market"[104]. In other words, as seen in the Introduction, the Commission is worried about market tipping, not only when it does so because of the conduct carried out by a dominant undertaking (in that case the Commission has the ability to intervene by applying Article 102 TFEU) but also when this is the consequence of other factors, not least the conducts of non-dominant undertakings.

However, Petit warns about the risk of cultivating misconception when talking about "tipping" point (i.e. "critical mass" in network effects markets). According to the Author, it is somehow too naïve thinking about the tipping point as "an economic model or a theory predicting that as soon as a firm in a network effects market crosses a 'tipping' point of user adoption, it ignites an automatic domino effect of self-reinforcing technology diffusion that ends with near market monopoly". Instead, the "principle of critical mass" should be considered as a "mental model" apt to characterize complex "recurrent behaviour patterns" when "people's behaviour depends on how many are behaving a particular way" in technology markets, but also in other walks of life like sports or university seminars. More specifically, the simplicity of the intuition behind critical mass and tipping effects obfuscates that such dynamics are actually a driver of complexity for firms operating in network effects markets[105]. In particular, critical mass threshold and tipping point are not a set of measures against which it is possible to assess network adoption performances (if anything, there is a range of numbers that define a zone in which tipping is likely and it has to be beard in mind that markets that have tipped may re-tip)[106]. Moreover, critical mass and tipping effects are not exogenous but can be influenced by firms' behaviours and they do not provide any guarantee, meaning that despite users' mass adoption of their services or products firms can

[101] S. Quintarelli (2019), *Capitalismo Immateriale*, *cit.*

[102] M. Vestager (2020), *Keeping the EU competitive, cit. in a green and digital world*, speech delivered at the College of Europe, Bruges, 2 March 2020.

[103] See European Commission (2020), *Antitrust: Commission consults stakeholders on a possible new competition tool*, *cit.* See also above in the Introduction, paragraph 2.

[104] M. Vestager (2020), *Keeping the EU competitive, cit.*

[105] N. Petit (2019), *Are 'FANGs' Monopolies?, cit*., pp. 20-26.

[106] *Ibid*., p. 21.

fail to sustain market relevance; moreover, they are market specific (and not firm specific), meaning that is the market that can tip, not the firm and competitors can free ride on rival's network specific investments to make the market tipping[107].

Bearing in mind such clarifications, the idea is that tipping mechanisms combined with the other features of digital markets push tech companies to compete "for" the market. Today no one has the idea of competing against Google. Tech companies compete for the market with the idea that once they have conquered a slice (or segment) of the market, it would be very difficult for other companies to take that away, given the specific features of digital markets[108]. WhatsApp can serve as a good example of such a phenomenon. It was certainly neither the first nor the best online messaging system; however, it has been the one that has best balanced the available features with the largest promotional investment in a concentrated time frame, so that it could be adopted by a mass of users. This has unleashed network effects with an exponential trend for adoption by others and therefore a very strong lock-in result. The monetization strategy has always been clear: in a first phase, to facilitate the acquisition of users, the service was proposed free of charge for the first year with a small payment for the following years. More recently, after the acquisition by Facebook, the service is offered free of charge to users who use it directly on their phones, and a paid service has been announced for companies wishing to send messages to users: a very large number of non-paying users are used to sell services to businesses[109].

2. Platforms, ecosystems and digital conglomerates

That said with regards to some of the digital market's features, the present paragraph focuses on the subjects operating on such market, namely multi or two-sided platforms. In the antitrust discourse, however, it has become increasingly common to refer also to digital ecosystems and conglomerates. The present paragraph aims at framing each of these concepts, highlighting their specific features as well as the potential differences, also by providing a few concrete examples. In order to do so, the analysis will preliminarily report the main findings of a study on the importance of the business model to correctly understand the phenomena taking place in the context of the "new economy".

[107] *Ibid.*
[108] S. Quintarelli (2019), *Capitalismo Immateriale*, *cit.*
[109] *Ibid.*

2.1 The importance of the business model: "network orchestrators"

In their study published in August 2016, Libert *et al.* asked the question "Why Are We Still Classifying Companies by Industry?"[110] pointing out that while for more than 60 years companies' classification systems and codes were based on *industries (*such as the Standard and Poor's Global Industry Classification Standard, GICS)[111], these standards and measures no longer reflect today's realities – especially when looking at tech firms. Those systems were conceived following the (First) Industrial Revolution[112] when brick and mortar companies like Exxon Mobile and General Electric were becoming industrial giants with big physical plants and lots of physical (or "tangible") products.

These systems – while can still provide certain useful information with regards to physical businesses – are certainly not fitted for tech companies. In the Authors' words, "[t]imes have changed. Industry walls are disintegrating at a rapid pace. Over the past five years, Apple and Google have made significant moves in the automotive, healthcare, media, and smart home markets, among many others. They have expanded far beyond the 'Information Technology' tag attached to them by GICS. Today, technology is just a standard part of corporate infrastructure, like operations or marketing. It's not an industry in itself."[113]

Despite the fact that the so called Fab Five are profitable in different ways (Apple makes most of its money on hardware, Microsoft on software, and Facebook and Google from advertising), they do share a lot of similarities; but, according to the Authors, Information Technology doesn't seem like the right category to group them into. The fifth member of the group, Amazon, is a Consumer Discretionary firm[114]; it is a retailer, but it also has a digital platform rather than physical stores, and nearly 50% of the units sold through its website are sold by third-party sellers. With that in mind, the Authors argued that Amazon seems closer in DNA to Facebook than Walmart: like Facebook, it created an open platform that anyone, anywhere in the world, can use. These companies, which are remarkable for beating out historical leaders like Exxon despite their relatively young existences, are all digital platform

[110] B. Libert, M. Beck, Y. Wind (2016), *Why Are We Still Classifying Companies by Industry?, Harvard Business Review*, https://hbr.org/2016/08/why-are-we-still-classifying-companies-by-industry.

[111] More information about the Global Industry Classification Standard is available at the following link: https://www.msci.com/gics.

[112] The Industrial Revolution, now also known as the First Industrial Revolution, was the transition to new manufacturing processes in Europe and the United States, in the period from about 1760 to sometime between 1820 and 1840 and it mainly concerned the textile-metallurgical sector and involved the introduction of the steam engine and the development of railway networks.

[113] B. Libert *et al.* (2016), *Why Are We Still Classifying, cit.*

[114] Consumer discretionary is a term for classifying goods and services that are considered non-essential by consumers, but desirable if their available income is sufficient to purchase them. Examples of consumer discretionary products can include durable goods, high-end apparel, entertainment, leisure activities, and automobiles.

organizations that leverage a growing and virtual network of suppliers and customers. Therefore, rather than focusing on vertical industries, the Authors suggest looking and giving greater importance to business models. Based on those, they have developed a new framework to identify the principal way an organization invests its capital to generate and capture value; according to them there are four models of how companies create growth and value, and which can serve the purpose of classifying any firm:

i. "Asset Builders"; these companies make and sell physical things; they build, develop, and lease physical assets to make, market, distribute, and sell physical things. Examples include Ford, Wal-Mart, and FedEx;
ii. "Service Providers"; these companies use people to offer services; they hire employees who provide services to customers or produce billable hours for which they charge. Examples include United Healthcare, Accenture, and JP Morgan;
iii. "Technology Creators"; these companies generate and deliver intellectual property (software and data); they develop and sell intellectual property such as software, analytics, pharmaceuticals, and biotechnology. Examples include Microsoft, Oracle, and Amgen; and finally,
iv. "Network Orchestrators"; these companies facilitate transactions and interactions within a network; they create a network of peers in which the participants interact and share in the value creation. They may sell products or services, build relationships, share advice, give reviews, collaborate, co-create and more. Examples include eBay, Red Hat, and Visa, Uber, TripAdvisor and Alibaba.

According to the Authors, while the GAFAM operate business models that span industries and countries, they do all have elements of Network Orchestrators. In their conclusions, the Authors point out that companies that build and manage digital platforms, particularly those that invite a broad network of participants to share in value creation (such as how we all add content to Facebook's platform or that anyone can sell goods on Amazon's), achieve faster growth, lower marginal cost, higher profits, and higher market valuations. Therefore, for organizations like these, business model is a far better way of identifying competitors and comparing performance, instead of focusing on vertical industries[115].

This analysis does not apply only to the Big Tech, but it can also help analysing other companies that while relying on a more traditional business model, have put a strong focus on

[115] The Authors recommend updating the Global Industry Classification Standard to reflect the wider view taken by today's winners. New measures and standards are essential to helping investors, customers, and employees navigate the new strategic landscape with better insights. Technology Creators and Network Orchestrators play an intermediary role that is reinventing/ intermediating traditional economic sectors where traditionally Asset Builders and Service Providers operate.

digital strategies, leveraging on horizontal platforms and virtual networks to keep pace in a hyper connected and mobile world[116]. Networks have also created new cross-industry transformations, affecting traditional sectors and "brick and mortar" players (consider for instance, Uber's impact on the taxi industry or how Airbnb has affecting the hotel industry)[117]. While companies' classification falls outside the scope of the present research, it is believed that the findings of the study can prove useful in setting the context for the further topics of the analysis, i.e. platforms and ecosystems, especially as antitrust scholarly works still struggle to capture in a clear manner differences and similarities among the FANG and platforms more in general[118].

2.2 Multi-sided platforms and the information advantage

While it is argued that there is no consensus on what constitutes a "digital platform"[119], platforms tend to be generally defined as firms "whose core mission is to enable and to generate value from interactions between users"[120]. They are often called also "intermediaries" and "matchmakers", the latter concept stressing the idea that they are places where members belonging to different groups can meet, the groups being the equivalent of the "raw materials" in traditional manufacturing businesses[121].

Indeed, despite the remarkable differences between platforms businesses (examples include other than the FANG, companies like Twitter, Uber, Instagram, TripAdvisor, Airbnb and so on), they all have in common what is defined as the "fundamental platform DNA", namely creating matches and facilitating interactions among producers and consumers, whatever the goods exchanges[122].

Platforms therefore not only indicates the entities operating in digital markets, but also - as seen in the previous paragraph - the very business model that those subjects operate[123].

According to Parker *et al.* a platform is a "business based on enabling value-creating interactions between external producers and consumers. The platform provides an open, participative infrastructure for these interactions and sets governance conditions for them. The

[116] Other scholars have underlined the importance of business models – see for instance A. De Corniere, G. Taylor (2019), *A model of biased intermediation*, *The RAND Journal of Economics*, October 2019, 50(1).
[117] See also B. Libert, Y. Wind and M. Beck, (2014), *What Airbnb, Uber, and Alibaba Have in Common*, 20 November 2014, https://hbr.org/2014/11/what-airbnb-uber-and-alibaba-have-in-common.
[118] See, for instance, D. Geradin, (2018), *What Should EU Competition Policy do to Address the Concerns Raised by the Digital Platforms' Market Power?*, 30 September 2018, https://ssrn.com/abstract=3257967 or http://dx.doi.org/10.2139/ssrn.3257967, p. 2, and N. Petit (2019), *Are 'FANGs' Monopolies?, cit.*
[119] D. Geradin, (2018), *What Should EU Competition Policy*, *cit.*, p. 2.
[120] P. Belleflamme, M., Peitz, (2018), *Inside the engine room of digital platforms: Reviews, ratings, and recommendations*, AMSE Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128141.
[121] D. S. Evans, R. Schmalensee (2016), *Matchmakers, cit.* (see Introduction).
[122] G. G. Parker *et al.*, (2017), *Platform Revolution*, *cit.*, p.13.
[123] A. Jones *et al.*, *EU Competition Law*, *cit.*, p. 58.

platform's overarching purpose: to consummate matches among users and facilitate the exchange of goods, services, or social currency, thereby enabling value creation for all participants"[124].

The Commission's Advisers, however, disagree with this notion of platform where two-sidedness is the crucial defining element which is deemed too restrictive and thus allegedly uncapable of capturing many social networks or messaging systems and the value creation inherent to certain platforms relying on one-sided network externalities. Instead, they suggest adopting a more general definition of platforms including what some others call "networks", and including also desktops, mobile operating systems and browsers, "offline" software, and app stores[125].

Regardless of these divergences – which in light of the study mentioned under paragraph 2.1 above seem to be based more on a matter of terminology rather than substance – as a matter of fact, platforms with two or more sides have existed long before the advent of the digital economy. Although they have ancient roots, economists came to understand them as an important, and distinct type of businesses starting from 2000 and have since then been the subject of many studies and later absorbed into the antitrust discourse and analysis[126].

And indeed, they are called *multi* (or *two*) *sided* because they provide a way for two, or more, types (groups) of participants to get together, and *platform* because they typically operate a physical or virtual place that enables these different types of agents to interact; moreover, they typically reduce frictions that get in the way of economic agents finding each other, interacting, and exchanging value on their own (for instance, a platform such as e-Bay makes it easier for buyers and sellers to find each other) and increase the odds that participants will find counterparties that generate value for value (for instance, an online dating site secures many women and men thereby increasing the likelihood that people will find someone they would like to date and perhaps even marry)[127].

Differently from traditional business employing a *linear value chain* where value flows in a straight line from producers to consumers, values may be created, changes, exchanges and consumed in a variety of ways and places, all made possible by the connections facilitated by the platform itself and thus originating a complex value matrix[128].

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[124] G. G. Parker *et al*., (2017), *Platform Revolution*, *cit*., p. 4.
[125] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 21-22.
[126] D.S. Evans (2016), *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, 10 March, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 753, https://ssrn.com/abstract=2746095 or http://dx.doi.org/10.2139/ssrn.2746095, p.5.
[127] *Ibid*., p.6.
[128] G. G. Parker *et. al.* (2017), *Platform Revolution*, *cit*., pp. 5-6. The linear value chain is described as follows: "a firm first designs a product or service. Then the product is manufactures and offered for sale, or a system is put in place to deliver a service. Finally, a customer shows up and purchases the product or service."

Most importantly, as platforms exhibit two-sidedness, meaning that they connect two different and well-identified groups of users, they are the subjects that enjoy indirect network effects. As seen above (paragraph 1.2), indeed, the benefit that one side derives from the platform depends mainly on the identity and overall number of who participates on the other side. Each side of the market is both a consumer of the platform, and the "product" which is being sold to the other side of the market[129].

Having more than one group of customers, it is rational (and can be pro-competitive) for a platform to subsidise the services offered on one of the sides (typically the users' side) with the profits made on a different side of the platforms (typically the advertisers' side) when presence of one side on the platform (users in the example) is very valuable to the other side (advertisers)[130]. For instance, platforms which rely on advertising revenues will often provide content for a very low price, or even for free, to consumers in order to attract them. The same phenomena are also present in non-digital platforms, for instance credit card companies subsidising cardholders and charging high prices to merchants[131].

As by their very nature digital platforms connect different groups of users in the online environment, they are endowed with the data that are the by-products of those same transactions, and that can reveal crucial information. The availability of large amount of data (also called big data[132]) allows platforms to know – before others do – what will happen next, because they have at their disposal data about researches and users' interests before all others. This is to say that data allows companies to gain an information advantage on the current and future trends of a market and to offer a more targeted product accordingly. For instance, if female boxing will become the new trend among young female, such companies will probably see it before others do, by gathering and analysing the data they own. To make a comparison,

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[129] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 21-22. On the economics of platform, see D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment in the Digital World*, *Journal of Competition Law & Economics*, Volume 16, Issue 2, June 2020, pp. 5-7.

[130] On the allocation of prices between the various sides see D. S. Evans, R. Schmalensee (2016), *Matchmakers*, *cit*, and D. S. Evans, R. Schmalensee (2013), *The antitrust analysis*, *cit.*.

[131] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 22. The online platform economy indeed tends to be complex due to the connections between the various activities dominant platforms operate. On the economic theory of platforms see B. Jullien, and W. Sand-Zantman (2020), *The Economics of Platforms: A Theory Guide for Competition Policy*, Toulouse School of Economics, TSE Digital Center Policy Papers Series, No.1, July 2020, https://www.tse-fr.eu/sites/default/files/TSE/documents/ChaireJJL/PolicyPapers/platforms_july_2020.pdf; European Commission (2016), *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, Communication from the Commission, Brussels, 25 May 2016, COM(2016) 288 final; European Commission (2016), *Staff Working Document Online Platforms accompanying the document Communication on Online Platforms and the Digital Single Market*, COM(2016) 288 final; B. Martens (2016), *An economic policy perspective on online platforms*, JRC/IPTS Digital Economy Working Paper 2016-05, https://ec.europa.eu/jrc/sites/default/files/JRC101501.pdf; D. S. Evans and R. Schmalensee (2013), *The antitrust analysis, cit.*.

[132] On the notion of big data see chapter 1, paragraph 1.

this kind of competitive advantage is similar to the kind of knowledge that allows a trader to know before others when the price of a stock or any other financial instruments will decrease or increase. If that kind of information is acquired against the rules, that represents an hypothesis of insider trading, while if it is the result of the trader's skills it is a competitive advantage gained on the merits. The same is true for tech companies; by relying on big data, it is argued that they can do the equivalent of insider trading but on the markets in general, and without incurring in any criminal offence since nothing prevents tech companies to use aggregate data internally to ameliorate their production process and seize business opportunities[133]. This constitutes a huge competitive advantage and it allows companies – and particularly incumbents – to benefit of the possibility to enter certain markets before the others, not because they have an idea or an intuition to do so, but because they have the data: the market tells them what its needs are, the demand; in a way, it is said, it's like having the crystal ball in your hand[134].

As mentioned above, there have always been intermediaries, however new digital intermediaries disregard a number of costs and other material variables (that is the case, for instance, of the app stores – intermediaries that have very limited costs as they sell immaterial things). And indeed, while, so described, the notion of platform seems quite straightforward after all, it is argued that the economic implications stemming from this model – which make platforms capable of beating "pipelines" (i.e. the traditional systems employing a linear value chain) – are instead staggering and still to be fully understood. These include:

i. the elimination of traditional gatekeepers (such as editors in the traditional publishing industry, selecting a few books and authors) that allow the platform system to grow and scale more rapidly and efficiently (Amazon, for instance, allows anyone to publish a book relying on real-time consumer feedback to determine which book will be successful);
ii. the capability of unlocking new sources of value creation and supply (for instance, differently from hotel giants, Airbnb doesn't need to own any rooms) and which is at the core of the "sharing economy", as well as
iii. iii) using data-based tools to create community feedback loops[135].

[133] S. Quintarelli (2019), *Capitalismo Immateriale*, *cit*. See also M. Bourreau, A. de Streel (2019), *Digital Conglomerates and EU Competition Policy*, 6 April 2019, https://ssrn.com/abstract=3350512 or http://dx.doi.org/10.2139/ssrn.3350512, p. 9.

[134] According to Stucke and Grunes digital platforms can leverage their large datasets to discern consumer trends well before others and "quickly identify (and squelch) nascent competitive threats". M. Stucke, A. Grunes, (2016), *Big Data and Competition Policy*, Oxford, Oxford University Press.

[135] G.G. Parker *et. al.* (2017), *Platform Revolution*, *cit.*, pp. 6-10. The term "sharing economy" originally referred to peer-to-peer networks in which spare capacity and under-utilized assets could be rented to those who need them. See A. Jones et. al., *EU Competition Law*, *cit*. p. 58 and G. M. Eckhardt and F. Bardhi (2015), *The*

Because for multi-sided platforms the demand by one customer group depends on the demand by the other customer group, they need to have both sides on board to create value for either side. But neither type of participant will join if the other type of participant is not already on board. This gives rise to a so-called "chicken and egg" problem[136].

2.3 Ecosystems and conglomerates

"Big Tech's great strength is that is everywhere."[137] While simple, this sentence has the merit to provide an immediate perception of another feature that characterize most digital platforms, namely their tendency to offer more than one product and/or service and thus to expand across more than one sectors. Due to this feature, the term (services or products) "ecosystem" has become common in the ongoing antitrust discourse to refer to the mix of products and services that are offered by a single online company.

Ecosystems can be defined as multiservice platforms; for instance, when buying a phone today the user "buys into" a larger ecosystem that includes, for example, not only the operating system, but also a marketplace for applications, a payment system, a cloud service, as well as a range of smart home applications and other devices[138].

The ability of companies using information technologies to offer a mix of (sometimes new) services – and thus to be active in more adjacent markets – is rooted in the modular nature of information technologies, whereby the firms holding such technology can simply add some components (or a few lines of code) to a core body of the system that has already gained a solid consumer base[139].

From a technical standpoint, ecosystems are an ensemble of services, some complementary, connected to another through private APIs which are APIs accessible only to services from the same ecosystem[140].

Sharing Economy Isn't About Sharing at All, *Harvard Business Review*, 28 January 2015, https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all.

[136] D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment*, *cit.*, p. 6.

[137] D. Streitfeld (2018), *Amazon's Antitrust Antagonist cit*.

[138] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 33. On the definition of ecosystem see also M. Bourreau and A. de Streel (2019), *Digital Conglomerates*, *cit.*, p.10.

[139] As seen above, information technologies are modular and complementary, i.e. they consist of parts which, although they may exist individually, fully express their technological potential when communicating with other parts. This is the case, for instance, of microchips and operating systems, location sensors and the Internet, online music shops and smart phones. On the topic see M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit*., and Y. Lim (2017), *Tech Wars: Return of the Conglomerate - Throwback or Dawn of a New Series for Competition in the Digital Era?*, 19 *Journal of Korean Law* 47 (2020), https://ssrn.com/abstract=3051560 or http://dx.doi.org/10.2139/ssrn.3051560.

[140] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 31 and 34. A private API (Application Programming Interface) is a technique by which a service from an ecosystem can have access to data controlled by another service of this ecosystem. Private APIs are not available to services that do not belong to the ecosystem and to competitors.

In this regard, scholars have pointed out that technology firms constitute "conglomerate organizations" offering a mix of products and services; while they are typically active in one core business where they often enjoy considerable market shares (often referred to as quasi monopoly) they also offer a multitude of other products and services in markets where there are other incumbents[141]. As a result, their main economic activity is accompanied – and therefore protected – by a multitude of secondary activities[142] .

While often used as almost synonyms, the terms ecosystems and conglomerates highlight two different aspects of the same phenomenon, i.e. the high degree of diversification reached by tech companies by entering either related or even weakly related (and sometimes totally unrelated) new markets[143]. In particular, while the term ecosystems can be used to specifically address the multitude of related services and/or devices offered by a tech company to manage and satisfy the customers' needs with regards to a certain sphere, the term conglomerates can be used to refer also to the observed trend of digital platforms to expansion into adjacent, upstream, and/or downstream markets (as it will be better provided by the examples below), regardless of any form of complementary, at least *prima facie*.

As for the motivations of digital firms to expand as conglomerates, Bourreau and de Streel have identified two key characteristics of the digital economy which may explain the development of wide product portfolios by digital players: on the supply side, the presence of important economies of scope in the development of digital products and services, precisely because of the modular design which characterises hardware and software and the presence of sharable inputs (data); on the demand-side, the consumption synergies derived by consumers when adopting product ecosystems[144].

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[141] See, for instance, N. Petit (2016), *Technology Giants, cit.* The Author has further developed the ideas first expressed in the article in his book; see N. Petit (2020), *Big Tech and the digital economy, The Moligopoly Scenario*, Oxford University Press, October 2020. See also M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.*

[142] M. Maggiolino, (2018), *I Big Data e il Diritto Antitrust*, *cit*., p.45

[143] M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.;* C. Karbaum, M. Schulz (2018), *Ecosystems – New challenges for competition law enforcement,* response to the public consultation "Shaping competition policy in the era of digitisation" launched by the European Commission.

[144] M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.,* pp. 7-11. See also J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 33-34. Along the same lines, Prufer and Schottmüller suggest a model which demonstrates the importance of data in product innovation and diversification strategies. They identify what they call "data-driven indirect network effects", namely the positive correlation existing between the amount of data collected from consumers and firm's marginal cost of innovation (i.e. the reduction of innovation costs connected to the amount of data) and show that when they are present, firms have incentives to diversify into connected markets. Their study focuses on the strategy of a firm that benefits from data-driven indirect network effects and which then enters another market that is not initially data-driven and shows that- if entry costs are not too high - the firm can successfully leverage its market power in its primary market to dominate the new market. This happens in particular if the markets are what the Authors call "connected", which means that the data collected in one market allows the improvement of product quality in another. J. Prufer J. and C. Schottmüller (2017), *Competing with Big Data*, CentER Discussion Paper; Vol. 2017-007, CentER,

Petit stresses another factor which may explain Big Tech's expansion beyond their core business and transform into conglomerates, namely the fear of technological disruption. And, indeed, the empirical evidence analysed by the Author shows that as disruption has been a part of the GAFAM's own business history, the same companies do not express much confidence in their future and forecast "disruptive technologies" as a credible outlook and thus as a competitive threat they have to address[145]. The fear of technological disruption is among the factors which can explain why tech companies want to hold a foot in new markets and are always in search of new products and services that will make it to market tomorrow[146], and at the same time they attempt to disrupt entrenched incumbents in low-end footholds[147]. This is because entrant platforms rarely compete directly with a dominant platform; rather competition comes through niches as a new platform offers some services which are not offered through a dominant platform, operates in adjacent markets, or, when technically possible, offers services which complement those of the main platform. Because of the presence of network externalities, the incumbent platform can fear that the entrant will, after having accumulated enough consumers, expand the range of services offered and threaten the incumbent's position[148]. In other words, players on tech markets, intend not to leave any competitor the possibility of experimenting "alone" a potentially disruptive technological path. Platforms would chase each other in different secondary markets, also

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Center for Economic Research. Moreover, according to the Authors, two markets can be connected because they share the same data, while being weakly related from a product market definition point of view.

[145] N. Petit (2016), *Technology Giants, cit.,* pp. 18-19. The Author provides many evidences of this fear. These include statement from Google former CEO "Even more graphically, Google CEO Eric Schmidt once declared 'somewhere, someone in a garage is gunning for us') at least in the form of competitive irrelevance, if not of terminal exit." See N. Petit (2019), *Are 'FANGs' Monopolies?*, *cit*., p. 27.

[146] Dobbs *et. al.* wrote: "[i]n this era of tech disruption, companies need to be willing to disrupt themselves before others do it to them. That requires overcoming the fear that a new product or channel will cannibalize an existing business. Self-disruption may be the root of the advent of technology conglomerates". R. Dobbs, T. Koller, S. Ramaswamy (2015), *The Future and How to Survive It*, *Harvard Business Review*. See also N. Petit (2016), *Technology Giants, cit.,* p. 34. the Authors also suggests that "In subsequent books and papers, Christensen expressed a similar idea, and introduced a powerful concept which is little mentioned in mainstream commentary. Firms engaged in self-disruption 'compete against the non-consumption'. They try to serve potential purchases that are not made my customers because existing products or services are 'too expensive or too complicated' or 'new market applications for entirely new customers'". See also B. Evans (2020), How to lose a monopoly, 1 January, https://www.ben-evans.com/benedictevans/2020/01/01/microsoft-monopoly-and-dominance and C. M. Christensen, M. Raynor (2013), *The Innovator's Solution: Creating and Sustaining Successful Growth*, Harvard Business Review Press; C. M. Christensen, M. W. Johnson, D. K. Rigby (200), *Foundations for Growth: How to Identify and Build Disruptive New Businesses*, 43 MIT *Sloan Management Review* 22.

[147] N. Petit (2016), *Technology Giants, cit*., p. 37: "In this variant, the strategy starts as a small-scale experiment. The disruptor targets the fringe of a market – customers not served or with low profitability – and progressively moves upmarket to erode the profitability of the incumbent." This implication will be further addressed below (see paragraphs 3.1 and 3.2).

[148] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit.*, p. 37. Indeed, there are many examples of installed large platforms who integrate new services pioneered by start-ups in the bundle of services that they offer. The same dynamic is visible when considering ecosystems that launch new services in response to the threat of new entrants, sometimes leveraging their user base and/or data access. This is often done without increasing the price of the basic service and therefore puts enormous pressure on the new firms.

cannibalizing their own products, with the aim of dispelling the possibility that a competitor left free to experiment a technological way finds in that secondary market such a disruptive innovation to leave the rival platforms disrupted[149].

More in general, other scholars have pointed out that in dynamic innovative markets perceived dominant positions or monopolies can be eroded very quickly through technical innovation[150].

Big Tech's kind of "race" towards new products and services is also driven by the "tipping point" itself, i.e. the very awareness that markets will end up being dominated by the company that first, by merit or luck, reaches the critical mass of users needed to conquer the market, making its technology the dominant standard (i.e. the so called tipping point), as well as other reasons, such as the determination to acquire more and more data from different sources and the desire to enrich and expand the experience of their users, so that they always turn to the same "ecosystem" to meet all their needs[151].

As for the ways in which the process of conglomerate expansion[152] has been achieved over the years, these include firms' internal strategies (which will be discussed below under paragraph 3), as well as external growth phenomena (conglomerate acquisitions), suggesting that in the tech sector particular attention should also be paid – not only to certain unilateral conducts – but also to certain pre-emptive acquisitions (on this latter point see the reference to the so called "killer acquisition" under paragraph 3.1 below).

As mentioned, Google and Apple constitute suitable examples of ecosystems (with regards to the vast range of services that is linked to the use of a smartphone, including - just to name a few – operating systems, app stores, mobile payment systems), as well as conglomerates. In particular, focusing on the latter aspect, it has been pointed out that Google is much more than a search engine.[153] Other than providing the most popular mobile operating system Android, the Alphabet circle encompasses a large number of firms operating in many different sectors.

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[149] R. Dobbs *et. al.* argued "[i]n this era of tech disruption, companies need to be willing to disrupt themselves before others do it to them. That requires overcoming the fear that a new product or channel will cannibalize an existing business. Self-disruption may be the root of the advent of technology conglomerates". See R. Dobbs *et. al.* (2015), *The Future and How to Survive It*, *cit.* See also C. M. Christensen, M. Raynor (2013), *The Innovator's Solution, cit*. and C. M. Christensen et. al. (2002), *Foundations for Growth, cit.*

[150] See I. Kokkoris,(2018), *The Google Saga: episode I*, *European Competition Journal*, 14:2-3, p.465; D. Geradin, C. Ahlborn, V. Denicolò, and J. Padilla (2006), *European Commission's Discussion Paper on [then] Art. 82*, DG Comp's Discussion Paper on Article 82 Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=894466, and J. Verhaert (2014), *The Challenges Involved with the Application of Article 102 TFEU to the New Economy a Case Study of Google, European Competition Law Review,* 35 (6).

[151] M. Maggiolino (2018), *I Big Data e il Diritto Antitrust*, *cit.,* p. 45.

[152] The term is used by Petit; see N. Petit (2016), *Technology Giants, cit.,* p. 3.

[153] J. Herrman (2019), *We're Stuck With the Tech Giants. But They're Stuck With Each Other*, New York Times Magazine (special issue about the future of the internet), 13 November; https://www.nytimes.com/interactive/2019/11/13/magazine/internet-platform.html.

For instance, there is Google with the profitable AdWords business selling online advertising. Through Google Ventures the company is investing a lot of resources in start-ups. Just to name one, Google is also very active in the health sector where it is carrying out heavy investments and many acquisitions of companies that are linked to the health sector. The company is the process of purchasing Fitbit, the wearable technology maker[154]. Moreover, within the holding the company is active in what they call "moon-shot" projects, carried out with the aim of revolutionizing the world. For instance, among them, there is Calico, which has the aim of lengthening life expectancy. There is also Verily, also active in the health sector, and precisely on preventive care[155]. Google is also investing a lot of resources in research project in all these fields. Not long ago, Google has acquired DeepMind, the most advanced company in artificial intelligence, which among other things, "feeds" on health data[156]. Google's subsidiary Waymo is also developing projects in the sector of self-driving cars[157].

Given the enormous potential of the health market[158], Google is not the only tech company which has focused on the health-sectors, as also Amazon, Apple, and Microsoft have engaged into projects in the healthcare market, and they have starting to hone their strategies in on specific corners of the ecosystem[159].

Similarly, Amazon is much more than a simple e-commerce site: not only it has expanded from the online sale of books to the sale of almost everything online, but it also provides

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[154] According to the articles published on tech press, Google will spend $2.1 billion for the acquisition of FitBit. See for instance C. Gartenberg (2019), *Google buys Fitbit for $2.1 billion*, The Verge, 1 November, https://www.theverge.com/2019/11/1/20943318/google-fitbit-acquisition-fitness-tracker-announcement. At the time of writing, the transaction is subject to the assessment of the European Commission which on 4 August 2020 has opened an in-depth investigation to assess the proposed acquisition under the EU Merger Regulation. See European Commission (2020), *Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google*, press release, 4 August, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1446.

[155] Verily focuses mainly on robotics, blood tests and addiction treatment.

[156] DeepMind was acquired by Google in 2014; see the entry "DeepMind" on Wikipedia, https://en.wikipedia.org/wiki/DeepMind. For more information on the companies owned by Alphabet see also the entry "Alphabet Inc" on Wikipedia, https://en.wikipedia.org/wiki/Alphabet_Inc. Eric Smith, former CEO of Google, said that Google can analyze the X-rays, feed them to Google which is capable of looking at billions of them and at that point Google will be able provide doctors with very useful indications. Google's master plan in the health sector is to become the technical supporting infrastructure for hospitals and all other entities working in the sector by providing them data, tech tools, and cloud services for the storage of such data. As for Google's future plan in the health sector, see the statements released by Eric Smith, former CEO of Google. See T. Sullivan (2018), *Eric Schmidt lays out formula for healthcare innovation*, *Healthcare IT News*, 6 March, https://www.healthcareitnews.com/news/eric-schmidt-lays-out-formula-healthcare-innovation.

[157] See the entry "Waymo" on Wikipedia, https://en.wikipedia.org/wiki/Waymo.

[158] According to the data published on World Health Net, only in the U.S. is estimated to be worth 3.5 trillion a year; see the information available at: https://www.worldhealth.net/news/healthcare-35-trillion-year-market/.

[159] See Z. LaRock (2020), *Big Tech in Healthcare: Here's who wins and loses as Alphabet, Amazon, Apple, and Microsoft hone in on niche sectors of healthcare*, *Business Insider*, 30 January, https://www.businessinsider.com/big-tech-in-healthcare-report?IR=T.

payment services, logistics services, cloud computing, as well as movies and television series production and distribution.[160]

Also Facebook has expanded far beyond its original social networking platform since its founding and its products also include messenger services (WhatsApp), photo and video sharing (Instagram), augmented reality (Oculus VR), and many other apps and services (such as Facebook Shops, Spark AR Studio, Audience Network, NPE Team)[161].

The emergence of ecosystems (and conglomerates) has several implications for competition including lock-in into an ecosystem (especially when high switching costs are present or there are not sufficient competitors in one or more product markets), data concentration and the difficulty for complementary services to develop and compete on the merit[162]. However, even though product ecosystems raise several challenges for competition, at the same time, they allow consumers to enjoy important consumption synergies (for example, consumers can positively value purchasing different products or services from the same seller) and sellers benefits on the supply side (for instance synergies generated on the supply side from the operation of multiple product lines)[163].

From a theoretical point, the notions of ecosystems and mostly conglomerates do not clash with the notion of multi-sided platforms as they both are correct reconstructions of reality. While the latter has the merit to highlight the peculiar business models underneath the functioning of the most successful tech firms, also the concept of digital ecosystems and conglomerates provides an equally truthful description of the tech-realities focusing on a different aspect of the same phenomenon.

2.4 Gatekeepers

Finally, this paragraph attempts to shed some light on another term that has become more and more common – as well as somehow fashionable – in the antitrust discourse and which has gained a crucial importance in the context of the regulation envisaged by the Commission in the context of the Digital Service Act – and most recently the Draft DMA, namely that of

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[160] See J. Herrman (2019), *We're Stuck With the Tech Giants*, *cit.* and A. R. Sorkin (2017), *Conglomerates Didn't Die. They Look Like Amazon*, New York Times, 19 June.

[161] See N. Reiff (2020), *5 Companies Owned By Facebook*, article published on Investopedia, 1 April, https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp#citation-1. See also the page available on Facebook.com, "What are the Facebook Products?", https://www.facebook.com/help/1561485474074139.

[162] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*. p. 34.

[163] M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.*, p. 11. See also J. Haskel, S. Westlake (2018), *Capitalism without Capital*, *cit*., p. 80-86.

"gatekeepers"[164]. The term is usually referred to digital platforms to indicate the fact that in certain circumstances they have become firms' access point to users and thus to markets. Sometimes it is even used to indicate more generally the "enormous power [that certain platforms have] over our lives"[165], thereby contaminating the antitrust discourse with fears of social and political nature that antitrust law and policy can only tangentially addressed[166].

A reference to the quality of "gatekeeper" is also present in the text of the lawsuit filed in the U.S. against Google on 20 October 2020 where Google is defined – at the very opening of the lawsuit - as "[…] a monopoly gatekeeper for the internet, and one of the wealthiest companies on the planet, with a market value of $1 trillion and annual revenue exceeding $160 billion"[167].

Giving the increase use and relevance of the term in the antitrust discourse, the present paragraph attempts to better frame the concept of "gatekeeper", trying to articulate on the features – if any – that make a platform a gatekeeper and why it is important to consider such aspect in the antitrust analysis, regardless of the definition adopted by the Draft DMA which will be instead analysed in the following paragraph.

Despite being commonly used, indeed, the concept is still quite fuzzy: antitrust scholars have argued that as of now it is rather unclear what exactly turns a platform into a "gatekeeper"[168] and the European Commission studied the phenomenon in the context of the Digital Service Act consultation[169]. The questionnaire issued with the consultation, indeed, was dedicated, among other issues, to better identify "large platforms with significant network effects acting

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[164] The adjective "fashionable" is used by R. H. Weber (2016), *Data Portability and Big Data Analitycs. New Competition Policy Challenges*, 23 *Concorrenza e Mercato* 59.

[165] M. Vestager (2020), *Building trust in technology*, Speech by Executive Vice-President, 29 October 2020, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-executive-vice-president-margrethe-vestager-building-trust-technology_en. The Commissioner pointed out that "[…] these platforms have become gatekeepers, with enormous power over our lives. They can influence our safety – whether dangerous products and harmful content can spread widely, or whether they're quickly removed. They can affect our opportunities – whether markets respond to our needs, or whether they just work in the interests of the platforms themselves. They even have the power to guide our political debates, and to protect – or undermine – our democracy".

[166] On this topic see the reference in the Introduction, paragraph 1. If anything, antitrust law can help addressing such fears in that its enforcement is beneficial for the market-wellbeing and thus for society as a whole.

[167] Para 1 of the lawsuit. The full text of the lawsuit is available at the following link: https://www.justice.gov/opa/press-release/file/1328941/download. On this topic see also chapter 3, paragraph 3.1.

[168] I. Graef (2019), *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, *Yearbook of European Law*, Vol. 38, No. 1 (2019), pp. 448–499, advance access published 12 November 2019, p. 486.

[169] See European Commission (2020), *Commission launches consultation to seek views on Digital Services Act package*, cit., and European Commission (2020), *Inception impact assessment - Ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's internal market*, *cit.*

as gatekeepers" which will probably be the subject of the new set of rules[170] and, at the same time, the Commission has issued a term of reference for commissioning an *ad hoc* study on the subject, which should include "robust data and insights as regards issues linked with significant network effects [and] gatekeeping power" – still to be released[171]. In particular, the term of reference provides many suggestions about the factors which may be deemed key to identify platforms that could have a gatekeeping role[172]; however, while certainly useful, they tend to overlap with the features that characterize digital platforms without adding any specific element which can help distinguish the difference between digital platforms (according to the notion outlined above) and actual gatekeepers. And indeed, the challenge is of course to identify which of those factors should be central to the definition of a gatekeeper and how the selected factors should be organized[173].

Similarly, some of the recent reports touched upon the "gatekeeper aspect": the Crémer Report points out that "a few large platforms have become in recent years the new gateways through which people use digital services"[174] and identify platforms with "intermediation power" which thus are able to perform a regulatory function[175]; the Furman Report, on the

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[170] The questionnaire includes the following questions: "What issues derive from the gatekeeper power of digital platforms?"; "Which characteristics are relevant in determining the gatekeeper role of large online platform companies?"; "How could different criteria be combined to accurately identify large online platform companies with gatekeeper role?". The questionnaire is available at the following link: https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package.

[171] See Competition Policy International (2020), *EU To Contract €600,000 Study On Gatekeeping Power Of Digital Platforms*, 12 May, https://www.competitionpolicyinternational.com/eu-to-contract-e600000-study-on-gatekeeping-power-of-digital-platforms/ and S. Stolton (2020), *Commission to contract €600,000 study on gatekeeping power of digital platforms*, Euractiv, 11 May, https://www.euractiv.com/section/digital/news/commission-to-contract-e600000-study-on-gatekeeping-power-of-digital-platforms/.

[172] These include the fact that they are "driven by strong economies of scale, and direct and indirect network effects [and] increasingly act as private gatekeepers to critical online activities for an exceptionally large population of private and business users."; their "gatekeeper role is enabled inter alia by their hold over vast amounts of data and in some cases very large customer bases."; they enjoy a "systemic ability to cement and even expand their critical gatekeeping roles, including in other ecosystems, to raise barriers to entry and expansion for rivals and to increase their hold and leverage over their users."; their "large competitive advantage due to the economies of scale and of scope, reinforced by data-driven network effects" allows them "to act as private regulators setting the rules of the game on the markets they control." and the ability to leverage their core abilities (data, customer base, technological assets, etc.) to enter and potentially conquer new markets with relative ease "may lead to unusually large commercial imbalances and bargaining power between platforms on the one hand and their users and rivals on the other." See Geradin reporting on the terms of reference, D. Geradin (2020), *European Commission issues terms of reference for study on "platforms with significant network effects acting as gatekeepers"*, The Platform Law Blog, 11 May, https://theplatformlaw.blog/2020/05/11/european-commission-issues-terms-of-reference-for-study-on-platforms-with-significant-network-effects-acting-as-gatekeepers/.

[173] *Ibid.*

[174] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 13. For instance, the Crémer Report highlights that Google is the primary means by which people in the Western world find information and contents on the Internet. Facebook/WhatsApp, with 2.6 billion users, is the primary means by which people connect and communicate with one another, while Amazon is the primary means for people to purchase goods on the Internet. Moreover, some of those platforms are embedded into ecosystems of services and, increasingly, devices that complement and integrate with one another.

[175] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 4, 49, 60-65 and 69.

other hand, refers to platform with the same characteristics as "digital companies that have been designated with a strategic market status"[176].

According to Geradin, the core element of a definition of gatekeeper "is that it 'controls access' to critical online services which allow to reach a large category of users", an example being the App Store which controls access to iOS device users as it is the only way for app developers to distribute their apps to iOS users, also in light of the fact Apple does not allow other app stores on iOS devices, hence, no rival app store can possibly emerge. However, according to the Author a platform qualifies as gatekeeper not only when it is the only access point to a given category of users; but also when "it controls access to a sufficiently large category of users for access to its platform to be critical for business users to compete on a market where these users are customers", an example being the search traffic generated by Google, as it may be hard, if at all possible, for many businesses to compete without it; similarly, for many resellers access to the Amazon platform is critical to earn a living[177].

According to the Author, some of the other factors referred to in the Commission terms of references or the Digital Service Act public consultation, such as the presence of barriers to entry (e.g., large economies of scale and significant network effects) and market power, can be deemed to be the *cause* or the *consequence* of the gatekeeping position enjoyed by some platforms. The Author suggests including these factors in the definition of a "gatekeeper", making them cumulative so as to avoid an overinclusive definition, and adding a *temporary* dimension (by requiring that the market power enjoyed by the platform is "enduring") and some *quantitative* factors to "objectivize" the definition, such as the platform's turnover, the number of users and the volume of data it held[178].

Bourreau and de Streel distinguish two different types of situations, namely the case of a gatekeeper that controls access by third-party firms to its users (such as an online social network – i.e. Facebook – which has, to some extent, control over access to its users by online advertisers) and the case of a gatekeeper controlling access to content, products and/or services (such as Google Search which controls access of users to web content via its ranking algorithm and Spotify which controls access to its large catalogue of music titles through its personalized recommendations etc.)[179]. Stressing the implications of each of the situations, they argue that in the first scenario – i.e. when there is a potential bottleneck for access to

[176] J. Furman *et al.* (2019), *Unlocking digital competition*, *cit.*, pp. 31, 42, 58.
[177] D. Geradin (2020), *European Commission issues terms of reference, cit.*
[178] According to Geradin, the definition of a "gatekeeper", should include the following factors: (i) the platform "controls access" to critical online services for business users to compete on a relevant market; (ii) it is protected by high barriers to entry and (iii) it holds market power on the market for the critical services it delivers to business users. See D. Geradin (2020), *What is a digital gatekeeper?*, The Platform Law Blog, 5 October, https://theplatformlaw.blog/2020/10/05/what-is-a-digital-gatekeeper/.
[179] M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.*, pp.17-20.

users (for advertisers, sellers, etc.) – a digital platform may have an incentive to expand into new markets to broaden the engagement of its customers with a larger line of products and services so as to lock in its customers into its product ecosystem. In the second scenario – i.e. when platforms have control over the consumption of content, products, or services by their users – gatekeepers may have the ability to steer consumers towards products or services that are not the best match for them, to the extent that consumers do not have any other alternative. Incentives to do so would be, for example, to steer consumers towards offers that generate higher profits for the platform, or to favour in-house offers (e.g., in-house content for a content platform)[180].

Weber refers to gatekeepers as "competitive bottlenecks" which "arise when a given platform is an unavoidable trading partner for agents on one side of the market to reach the single-homing agents on the other side"[181].

Based on these few preliminary considerations, the idea which will be useful for the analysis provided in the present thesis is that given their intermediary function inherent to their business model, popular (or strategic) digital platforms can become *de facto* a key gateway for businesses to reach consumers in that they offer critical digital services for those firms wishing to stay and/or entry the marketplace operated by the platform. In particular, it should be bear in mind when applying Article 102 TFEU in digital contexts that certain platforms can function as "gatekeepers", meaning that being the "marketplace manager" they may be in the position to decide the market conditions applicable to product suppliers trading their goods on the intermediaries' websites. Therefore, the idea of gatekeeper goes hand in hand with the perception that those platforms can create new burdens or barriers for smaller firms which depend on the services provided by such platforms[182], and even more so when the platform holding a strategic gateway position in one market also compete with other firms on vertical related market, where the platform is also active.

2.5 Gatekeepers in the DMA

Gatekeepers are the addressees of the new provisions envisaged in the DMA[183]. After a few general considerations, the Draft DMA provides an *ad hoc* definition of the term: providers of

[180] *Ibid*., p. 17-18.
[181] R. H. Weber (2016), *Data Portability, cit*.
[182] See for instance, J. Furman *et al.* (2019), *Unlocking digital competition*, *cit.*, p.42.
[183] The DMA's scope of application *ratione personae* is identified by looking at: (i) the nature of the services provided by the online platform and (ii) the designation of the latter as gatekeeper. With reference to the first requirement, the proposal introduces the concept of "core platform services" in order to isolate those digital services in relation to which – due to the economic characteristics of the services themselves – it would be more frequent to observe both the low contestability of the markets and the occurrence of unfair practices. The list of such basic services includes online brokerage services (including, for example, marketplaces, software

core platform services can be deemed to be gatekeepers if they meet three cumulative criteria: (i) they have a "significant" impact on the internal market, (ii) they operate one or more "important gateways for business users to reach end users" and (iii) enjoy or are expected to enjoy an "entrenched and durable position" in their operations[184]. The proposal then introduces *ad hoc* quantitative criteria (based on turnover and number of active users) corresponding to each qualitative requirement: where these thresholds are met, it is assumed that each of the qualitative criteria is automatically met[185]. The platform, on the other hand, may rebut the presumption by presenting "sufficiently strong arguments" to show that, although it meets the thresholds, it does not in fact meet the quality requirements set out above. However, as pointed out in the early literature[186], this is the only way in which companies can "escape" the notion of gatekeeper – and thus the application of the obligations envisaged in the DMA, since both the economic efficiencies produced by companies for the services they provide and the particular business model adopted by the platform would be irrelevant for that purpose[187]. Furthermore, the Commission reserves the right – following a market investigation conducted in accordance with Article 15.2 – to identify as gatekeeper any provider of core platform services which, although not meeting the quantitative thresholds, meets certain qualitative elements, such as the size, the number of business users, entry barriers derived from network effects and data driven advantages, scale and scope effects, business user or end user lock-in as well as other structural market characteristics[188]. And in order to avoid the phenomenon of so-called market tipping, the Draft DMA also

application shops and online brokerage services in other sectors such as mobility, transport or energy), online search engines, social networking services, video sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services and advertising services (see article 2 (2)). In essence, therefore, first and foremost, gatekeepers are companies that, by offering these services, end up occupying the position of those companies governing the market (see recitals 2 and 12).

[184] European Commission (2020), *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)*, *cit*., Article 3(1).

[185] *Ibid*., Article 3(2). According to it, a provider of core platform services shall be presumed to satisfy the first requirement (significant impact on the internal market) "where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States"; the second requirement (important gateways) "where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year; the third requirement (entrenched and durable position) "where the thresholds […] were met in each of the last three financial years".

[186] M. Cappai, G. Colangelo (2021), *Taming digital gatekeepers: the more regulatory approach, cit*., p. 20.

[187] European Commission (2020), *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)*, *cit*., recital 23.

[188] *Ibid.*, Article 3(6). In conducting such assessment, the Commission shall take into account the following elements: (a) the size, including turnover and market capitalisation, operations and position of the provider of core platform services; (b) the number of business users depending on the core platform service to reach end users and the number of end users; (c) entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities; (d) scale and scope effects the provider benefits from, including with regard to data; (e) business user or end user lock-in; (f) other structural market characteristics.

provides for the possibility of designating an "emerging gatekeeper" when a platform meets the first two qualitative criteria (significant impact and important gateway) but the criterion of the consolidated and lasting position is only foreseeable and not already achieved[189].

In light of the above, it seems *prima facie* that the Commission has built a definition of gatekeepers through elements that mostly look at the "size" of the platform as well as the stability of that "size" over time (the first and third elements), while only the second element (i.e. gateway) seems to more accurately reflect what was so far identified in the economic literature as one of the core features of gatekeepers.

It has been noted that the DMA builds from scratch a new regulatory regime based on autonomous legal concepts and that those concepts are too broad and unsuited to somehow constrain or guide the Commission in its assessment activity. The literal wording of the very criteria built upon the concepts of "significant impact on the market" or "important gateway" seems to suggest that basically all providers of some importance would fit in the category[190].

At the same time, the "elements" identified in Article 3(6) – which the Commission should refer to in order to identify other gatekeepers that do not meet the quantitative criteria – are by express definition of the same letter (f) of that Article, the characteristics of many markets in the digital sphere. Therefore, on the one hand the concepts of significant impact on the internal market and entrenched and durable position leave the Commission a great space of discretion only partly reflecting some of the main features associated with gatekeepers (as seen in the previous paragraph); on the other, the elements referred to in Article 3(6) – while reflecting the economic reality and dynamics observed in digital markets, are more descriptive than dispositive[191]. In addition, their supplementary nature makes it difficult to imagine how those more descriptive features would play out in practice, should the DMA be enacted in its current form.

3. Big Tech competition across industries and the incentives to foreclose

3.1 Competition across markets

Having shed some light about the subjects active in digital markets and their peculiar features, the focus will now be placed on the competitive dynamics that take place on digital markets, including both how digital platforms compete against one another and how they compete with other firms, and especially "traditional" brick-and-mortar firms which rely on business

[189] *Ibid.*, see Article 15(4), Recitals 26 and 63.
[190] P. Ibáñez Colomo, Pablo (2021), *The Draft Digital Markets Act, cit.,* p.29.
[191] *Ibid.*, pp. 29-30.

models different from those of "network orchestrators". Against this background, indeed, new forms of competition have been observed and gained prominence in digital markets.

As tech firms (whether big or of a smaller size) tend to build up ecosystems and expand into conglomerates, they are increasingly active in more than one markets. As a consequence, competitive dynamics among them and other players are not constrained into single markets either, thus somehow "complicating" the idea of competition[192]. In other words, since big tech are everywhere, competition too takes place outside industries' traditional boundaries across different industries and markets.

As reported in an article published on the New York Times in November 2019, "testifying before two Senate committees in 2018, Mark Zuckerberg was asked about his company's biggest competitor. He struggled to name one, instead he gestured vaguely at 'the other tech platforms,' including Google, Apple, Amazon and Microsoft. 'We overlap with them in different ways', he said, answering as if the question were flawed; competition is something you do in a market you share with others; it is, in the Facebook investor and board member Peter Thiel's words, 'for losers.' Overlap is what might occur when sovereign powers happen to occupy the same space or lay claims to the same populations in the normal course of conquest."[193]

While non-technical, the passage has the merit of concretely exemplify certain ideas of conceiving competition among Big Tech that scholars have developed in recent years, based on evidence (including articles in the tech press) showing that each Big Tech company faces a variety of competitive pressures exerted across industries by other technology and non-technology firms in actual or future, non-core markets[194].

In other words, as Big Tech are active in more than one market, competition in the digital sector today is mainly a competition between large digital conglomerates[195]. While Big Tech players all keep strong strongholds where they have been historically powerful – search for Alphabet/Google (with more than 90% market share worldwide), e-commerce for Amazon (with a market share close to 50% in the US), social networks for Facebook (with a market share close to 70%) – they also compete with one another on multiple markets and with

[192] J. Herrman (2019), *We're Stuck With Tech Giants, cit.*, p.3.

[193] *Ibid.* Zuckerberg's statements are important parameters to keep in mind also when defining the markets in the antitrust analysis. With specific regards to certain criticism that followed the Commission's market assessment in certain cases (and specifically in the *Google Android* case, see chapter 3) Renda has sharply note that "there may be something wrong if policymakers systematically identify different competitors compared to those that the companies themselves consider to be their rivals." See A. Renda (2015), *Searching for Harm or Harming Search?*, CEPS Special Report, No. 118, September.

[194] N. Petit (2016), *Technology Giants*, *cit.*, and N. Petit (2020), *Big Tech and the Digital Economy*, *cit*.

[195] M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.*, p. 3. See also J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 33 where the Authors stress that "competition in the digital economy is also increasingly a competition between ecosystems".

smaller rivals focusing in specific markets, all against the background of rapid innovation and dynamic market forces[196].

In particular, Petit observes an apparent contradiction in how Tech Giants and the competitive dynamics among them are described: are they monopolies (and the antitrust analysis seems to the classify them in more instances) or oligopolies (a concept more uses in business articles and tech press)? According to the Author, they are both, hence the term "moligopoly competition" that he coined, suggesting the idea that tech giants are conglomerates that compete three-dimensionally as oligopolists across industries (where other incumbents are present), and not only within itemized relevant markets where they (inevitably) are monopolists[197].

Being technology firms/platforms conglomerates that offer a mix of products and services, which while enjoying a superior position in one or more core businesses, also face a variety of competitive pressures exerted "across industries" other tech and non-tech players, the Author suggest that traditional "itemized" competition analysis which, from a methodological point of view, tend to circumscribe investigations to those relevant markets – and only those– where the firm occupies a significant position, assessing whether it can be deemed dominant (i.e., whether it holds substantial market power) and initiating full scrutiny of business strategy on the dominated relevant markets or on proximate market segments, may not be sufficient to adequately capture the competitive dynamics taking place in the market[198].

Petit also points out that the process of conglomerate expansion follows two directions: first, what he calls "moligopolists" engage in entrepreneurial ventures in frontier technological areas, driven by the ambition to discover the next transformative technology, and become the ultimate XXIth century disruptors; second, they also attack peripheral markets with the hope of disrupting incumbent players. The strategy consists in serving customers who are currently not served by existing players, by the provision of no-frills, low end services. The Author also

[196] M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.*, p. 3.

[197] N. Petit (2016), *Technology Giants, cit.,* p. 3. The Author argues that the traditional monopoly model constitutes a poor framework to discuss FANG firms (how they behave and the harm they can cause) in lights of the specific properties characterizing the digital industries of the network effect markets, and he sketches an alternative theory which he calls of "non equilibrium competition with uncertainty". See also N. Petit (2019), *Are 'FANGs' Monopolies?*, *cit.*, p. 11.

[198] N. Petit (2016), *Technology Giants, cit.,* p. 14. See also J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 49 where it is stated that "[i]t is a commonplace in the economics of two-sided platforms that there can be market power even in an apparently fragmented marketplace. The classic example would be paper-based daily newspapers. Few people read more than one, and therefore the newspaper that an individual reads has a monopoly over access to that reader by a daily newspaper, even if the newspapers market is fragmented. This kind of market power – which is linked to the well- known competition law concept of "unavoidable trading partner" and has, with a view to platforms, sometimes been called intermediation power68 – is compatible with fierce competition on the "monopolistic side". Indeed, because it is very valuable, firms will compete to acquire it, and will aggressively try to conserve it and possibly try to leverage it into adjacent markets once they have acquired it. Any such leveraging practices would then, however, be subject to abuse control. At the same time, widespread multi-homing will reduce this type of market power".

stress what seems another key characteristic of the competitive landscape in digital markets, namely the fact in both variants, platforms tend to mimic each other initiatives: "[t]his seems to mark a deliberate attempt to keep iron in the fire in case a rival tech giant would be the first to discover a viral technology application"[199].

Along the same lines, the Advisers to the Commission point out that where this type of competition is observed, a "classical" – or itemized in Petit's word – definition of markets for products or services may fail to capture a firm's strategy, as firms essentially compete for "access points" to consumers. The access points themselves can differ; for instance, multi-function devices such as computers and smartphones can serve as the access point to consumers and often function better if services from the same ecosystem are used on all of them. Control over the devices allows a platform to become a gatekeeper in terms of access to consumer data and capacity to deliver content and services[200].

And indeed, data and information technologies have made the markets fluid and interdependent. The concepts of across market competition and related markets is not new for antitrust law; already in the pre-digital era, experience has shown that even between distinct markets there are very close relationships and connections, due to geographic, technological or commercial factors that make them interdependent and mutually influential, like a sort of communicating vessels[201]. However, now more and more the technological factor has made markets extremely fluid[202]. In addition, other elements of complexity related to dynamic market environment is that of fluid, quickly changing relationships of substitutability and possibly partial overlaps of varying significance between different services[203].

As seen above, the spread of a data-driven economy sharply increases the ability of companies using information technologies to enter new markets simply by adding some components (or a few lines of code) to the core body of the system that has already gained a solid consumer base, thereby favouring the creation of services or products ecosystems whose main economic activity is accompanied – and therefore protected – by a multitude of secondary activities[204]. Differently from the past, the phenomenon has acquired a much bigger dimension due to the fact that information technologies are modular and

[199] N. Petit (2016), *Technology Giants, cit.,* pp. 3-4 and 38-40.
[200] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 47-48.
[201] F. Ghezzi and G. Olivieri (2019), *Diritto Antitrust*, Seconda Edizione, Giappichelli Editore, Torino, 2019, p. 189. See also Evans David S. (2016), *Multisided Platforms, Dynamic Competition, cit*.
[202] *Ibid*., p. 4. where the Author argues that "[f]or competition policy analysis, this means that market power analysis needs to consider the constraints imposed by dynamic competition and in new products and services that may appear very different than the firm under investigation".
[203] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 47. Examples include the demand for cars that is turning into a broader demand for mobility, as well as consumer demand for travel information, which can be nowadays be met in very different ways compared to a few years ago.
[204] M. Maggiolino (2018), *I Big Data*, *cit*., p. 45.

complementary, i.e. they consist of parts which, although they may exist individually, fully express their technological potential when communicating with other parts.

This dynamic across markets form of competition is not necessarily problematic under an antitrust perspective. Due to the intrinsic characteristics of digital markets, the platform which is active (and often dominant) in providing one product or services, it is generally very well placed to innovate in adjacent services and in general to move into adjacent services, not least because they are particularly well placed to innovate into adjacent spaces by taking advantage of a set of synergies and efficiencies, including economies of scope. This means that in a healthy and well-functioning market, platforms' organic expansion into adjacent areas (including through acquisitions with new start-ups and ideas in complementary and adjacent spaces) should be a regular and healthy phenomenon. However, this expansion can also be problematic under competition law analysis as it can give rise to foreclosure effects, based for instance, on self-preferencing behaviours and so called "killer acquisitions"[205]. Still, distinguishing between positive "synergies" and negative "spill-overs" may prove to be challenging and requires a very careful analysis[206]. While synergies can be described as the efficiencies that organic expansion (or mergers) and deep integration generate inside the firms, while spill-overs are instead efficiencies that happen in the ecosystem around the firm and which may impede the development and survival of new technologies and services in the absences of intervention aiming at ensuring that ecosystem preserve somehow an open architecture[207].

[205] In recent years, it has been observed an incredible number of M&A transactions in tech industries. Google, Facebook, Apple, Amazon, and Microsoft, in the aggregate, have managed to make over 500 acquisitions in the past ten to fifteen years, in several cases without any challenge from either the American or European antitrust enforcers. See M. Lao (2019), *Strengthening Antitrust Enforcement within the Consumer Welfare Rubric*, *Competition Policy Antitrust Chronicle*, November 2019. While certainly not all those acquisitions were negative ones under a competition law perspective, the issue of the so-called "killer acquisitions" has lately raised increasing concern within the antitrust community. By this term, the law and economic literature refers to acquisitions by incumbent firms of promising companies, able to potentially and significantly threaten their position, with the objective of eliminating future competition. For an analysis of the topic see, among others, K. Bryan and E. Hovenkamp (2019), *Startup Acquisitions, Error Costs, and Antitrust Policy, University of Chicago Law Review*, 23 April; M. Bourreau, A. de Streel (2019), *Digital Conglomerates, cit.,* pp. 19-20; OECD (2020), *Start-ups, Killer Acquisitions and Merger Control*, Background Note By the Secretariat, 12 May; J. Eichlin, M. de Fays (2020), *Diagnosing "Killer" Acquisitions: FTC Market Study to Review Past M&A Deals in Big Tech*, 20 February.

[206] These ideas were expressed by David Foster (Director at Frontier Economics) during the webinar organized by Concurrences "Global Antitrust hot topics #2 Platforms: towards a regulated industry?" held on 24 September 2020; the presentations, transcripts and other materials are available at the following link: https://www.concurrences.com/en/conferences/global-antitrust-hot-topics-2-platforms-towards-a-regulated-industry.

[207] On these topics see also J. Haskel and S. Westlake (2018), *Capitalism without Capital*, *cit.*

3.2 Platforms' incentives and strategies: envelopment

Against this background, the present paragraph intends to recall some of the strategies that scholars have identified as potentially recurrent in the context of digital markets given the existing incentives to platforms in such a scenario. In this context, envelopment strategies are key factors of competition in digital markets[208].

According to Eisenmann, Parker, and Van Alstyne – the first to provide a definition of the strategy – envelopment "entails entry by one platform provider into another's market by bundling its own platform's functionality with that of the target's so as to leverage shared user relationships and common components"[209]. Building on that notion, Condorelli and Padilla stressed the importance of data by defining envelopment as a platform strategy "whereby a dominant platform (the enveloper) operating in a multi-sided market (the origin market) enters a second multi-sided market (the target market) by leveraging the data obtained from its shared user relationships"[210].

By way of example, Google's decision to enter the market of self-driving cars can be read as platform envelopment. Indeed, by relying on the user relationship it has throughout the ecosystem and the data it collects from it (such as search data and data retrieved by consumers using Google Maps), it can leverage on those inputs to start a business in the self-driving car industry[211].

Platform envelopment is considered as one of the two possible ways of entry in platform markets subject to network effects and high switching costs, the other one being the offering drastically new functionality or product (i.e., through Schumpeterian innovation). Indeed, as seen above, because of strong network effects and "winner-take-all" outcomes, firms – competing through R&D activities – strive to develop the "killer" product, service or feature

[208] In their report, the Advisers to the Commission underline that "[d]iscussions are only just beginning about novel theories of harm regarding some types of conduct of conglomerate firms that are dominant in a core market characterized by strong network effects and a large user base but, based on these particular strengths, including data, reach out to broader markets. The relevant strategies, and their effects on competition and innovation, will need to be studied more in depth. Similarly, further research on the competitive impact of (big) data pooling might be needed". See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 17. The chapter stresses the importance of envelopment strategies, however, there are other strategies that may be equally relevant in the context of digital markets and the competitive scenario underlined above, such as for instance, those dealing with interoperability. Reference to interoperability issues (also declined as data interoperability) are present in many of the studies and reports commissioned and issued by antitrust authorities and institutions (referred to in the Introduction). See, for instance, See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 58-60.

[209] T. Eisenmann, G. Parker and M. Van Alstyne (2011), *Platform Envelopment*, *Strategic Management Journal* 32, no. 12, December, pp. 1270–1285.

[210] D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment, cit.*

[211] The example was suggested during the webinar held by Concurrences in collaboration with King's College London on 6 July 2020 on "Innovation Economics Conference #4 Platforms: The Envelopment Strategy", https://www.concurrences.com/en/conferences/innovation-economics-conference-for-antitrust-lawyers-4-platforms-the. Google's subsidiary Waymo is actually developing projects in the sector, see https://en.wikipedia.org/wiki/Waymo.

that alone or though the addition of new functionalities to existing products will confer them market leadership[212]. On the other hand, it is argued that platform markets often evolve, not through Schumpeterian innovation, but rather through the leveraging of market power, user base, and resources into a target market by a platform who is already successful in another platform market (the origin market)[213].

Both innovations and envelopment are said to have played a major role in shaping the ecosystems of platform-mediated network industries. Early examples include Microsoft entering the streaming media and browser markets, at the time dominated by Real Media and Netscape, respectively. Microsoft entered by bundling Windows with its new products, Windows Media Player and Internet Explorer, which at the outset were arguably inferior to those provided by the incumbents. Nonetheless, Microsoft quickly managed to conquer those markets and drive out the rivals.

More recent envelopment cases involve online advertising platforms; it is argued that the number of "envelopment attacks" conducted by Google are several, and include entry in several diverse markets, such as the market for operating systems (through Android), browsers (through Chrome), social media (through Google +), maps (through Google Maps), and payments (through Google Pay) and that, analogously, Facebook has entered, among others, the market for classified ads (through Facebook Marketplace) and dating (through Facebook Dating)[214].

While envelopment is most commonly successful when the products in the origin and target platform markets are complements (for example, operating systems and applications), it also occurs in cases where the products are weak substitutes or even unrelated (for example, mobile operating systems and PC search engines)[215].

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[212] The Crémer report stresses some peculiar features of innovation in digital markets: "Competition between platforms and ecosystems takes place in a spectacular way, through innovation. Innovation in the digital industries is however very different from innovation in, e.g. the pharmaceutical industry. First, it is less discrete: a new platform is a mixture of new features, new processes and new technologies arranged in a unique and innovative way to support a business idea. Second, it is never finished; products are in constant evolution, permanently being reworked. Third, it is less structured: often, the features of the innovation are developed at the same time as the innovation is implemented and tested. Fourth, it places less importance on formal intellectual property protection, such as patents or copyrights. The benefits of innovation are achieved by being 'first to the market' with a service or a product and the ability to develop a user base". See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 35.

[213] D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment, cit.*, pp. 7-8. See also T. Eisenmann *et. al.* (2011), *Platform Envelopment*, *cit.* and N. Petit (2016), *Technology Giants, cit.,* pp. 40-44.

[214] *Ibid*.

[215] D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment, cit.*, pp. 7-8. According to the Authors, two products sold in different platforms are demand-side complements if the value that customers attach to jointly consuming both products is higher than the sum of the values from consuming them separately. Otherwise, two products are independent or unrelated. A special case of complements is that of "system goods," that is, two or more goods that are always consumed in fixed proportions or not at all.

Most importantly for the purpose of this thesis, it has been observed that envelopment can take the form of bundling (either "traditional" or "virtual") and self-preferencing. In the first case, in order to enter the target market, the enveloper, i.e. a platform who is dominant in a related market, might decide to sell the products or services in the origin and target platforms to its overlapping customer base as a bundle, rather than separately. In the case of self-preferencing, instead, the enveloper expands into a target market that is mediated by its own origin platform. The peculiarity of such case is that, through its behaviour, the enveloping platform in the origin market can affects the terms of trade in the target market, including the possibility of trade itself. The enveloper thus is in the unique position to enter the target market and, at the same time, bend the origin platform's rules to provide a better outcome for its own products or services[216]. Examples include Amazon entering into a market whose products are sold through its own website, Google offering an online service that is mainly accessible through its search engine, or Microsoft developing a software that competes with other software that can only be sold if it enjoys Windows interoperability[217].

More in details, Condorelli and Padilla observe that self-preferencing can be seen as a practice involving tying in one side of the market, as well as another vertical restraint on another side of the market. The case of Google Maps can be used as an exemplification of those concepts, in that on the user side consumers are offered the bundled product of search and maps, while on the advertiser side Google offers the advertising input (that is, access to Google's search engine research page) on non-equal grounds to its own subsidiaries and to competitors[218].

A number of economic incentives can lead firms to in particular engage in envelopment, either in the form of bundling or self-preferencing[219]. In particular, there are specific economic incentives that may make entry especially more convenient for the enveloper compared to a generic entrant firm with no prior platform operations. Static incentives include enjoying the benefits resulting from supply-side and demand-side economies of scope, as well as price discrimination. As for the economies of scope, they were already mentioned above under paragraph 2.3 where both types of economies of scope are identified as key motivations of digital firms to expand as conglomerates; moreover, even in cases where the available surplus is not substantially affected by economies of scope, price discrimination may allow the enveloper to extract a larger share of consumer surplus than what two independently

[216] D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment, cit.*, pp. 9-11.
[217] *Ibid.*, p. 11. According to Condorelli and Padilla.
[218] *Ibid.*
[219] Condorelli and Padilla also identify a new envelopment strategy, namely "privacy policy tying" consisting in linking the enveloper's privacy policies in the origin and target markets to extract the user's consent to the combination of data generated in both markets for commercial purposes. *Ibid.*, pp. 19-30.

operating platforms would be able to[220]. Dynamic incentives, which – as opposed to static ones – operate through a change in market structure, refer to foreclosure. Despite being potentially unlawful, it is argued that the advantages conferred by successful foreclosure (resulting in a market structure with fewer competitors) are substantial. In this respect, two forms of foreclosure are identified: first, *leveraging market power*, that is, using the market power in the origin market to exclude competitors from the target market to acquire market power and extract profits in that market and second, *protecting market power*, that is, protecting the origin market, where the enveloper holds market power, from potential entry by competitors that operate in the target market [221].

And indeed, economists have pointed out that in platform markets incentives to foreclose are in general much stronger than in "traditional" markets, as online platforms operate in the so called "tippy" or "winner-takes-all" markets. For instance, Katz pointed out that "[…] there are also reasons to believe that two-sided markets may be particularly fertile ground for exclusionary behaviour"[222]; similarly, Amelio, Karlinger and Valletti write: "[t]raditional exclusionary practices carry over to platform competition and in some circumstances indirect network externalities accentuate the incentive to foreclose by incumbents"[223] and Vasconcelos has highlighted the increased risk of exclusionary behavior for digital platforms[224].

This is because due to the network effects and the chicken-and-egg problem described above, entry becomes rather difficult once a platform has been monopolized; moreover, due to the presence of economies of scale, it can be sufficient for a firm to capture only small parts of the market to render a market uncontestable as even efficient competitors may not be able to reach an efficient scale if enough customers face switching costs. Where network effects exist on top of economies of scale – which is actually a situation rather characteristic of most

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[220] *Ibid.*, pp.11-14.

[221] For a detailed description of those incentives with specific regards to bundling and self-preferencing see J. Choi, D.-S., Jeon (2018), *A Leverage Theory of Tying in Two-Sided Markets*, Toulouse School of Economics (TSE) Working Paper, pp. 16–689 and D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment, cit.*, pp. 15-19. The Report to the Commission provides that "[s]ome firms might leverage their market power to a closely related market, not for the 'offensive' motive of generating greater profits, but for 'defensive' motives of preventing entry in their core market). It is not clear that this is a meaningful difference analytically or legally. Nor is the topic separate from the 'competition on the market' topic: particularly in cases of vertical integration, the dominant position on the platform market can be leveraged to the product or services market for which the platform provides an intermediation infrastructure". See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p.65.

[222] M. Katz (2018), Exclusionary conduct in multi-sided markets, in: OECD (ed.): Rethinking Antitrust Tools for Multi-Sided Platforms, Paris 2018, OECD Publishing, p.121.

[223] OECD (2017), *Exclusionary practices and two-sided platforms - Note by Andrea Amelio, Liliane Karlinger and Tommaso Valletti, Hearing on Re-thinking the use of traditional antitrust enforcement tools in multi-sided markets*, 15 November 2017, https://one.oecd.org/document/DAF/COMP/WD(2017)34/FINAL/en/pdf, p.19.

[224] H. Vasconcelos (2015), *Is exclusionary pricing anticompetitive in two-sided markets?*, *International Journal of Industrial Organization*, Vol. 40, 2015, pp. 1-10. See also J. Haucap (2019), *Competition and Competition Policy*, *cit.*, p. 206.

digital platforms – the said logic is even strengthened. Hence, direct and indirect network effects plus economies of scale often give rise to "winner-takes-all markets" or "tippy markets" especially if multi-homing is difficult or unattractive to many users. As a consequence, incumbent platform may have particularly high incentives to foreclose competitors by enacting exclusionary practices[225].

As for the effects, envelopment strategies can have either procompetitive and anticompetitive effects. On the one hand, platform envelopment strategies may facilitate the entry of new players in target platform markets where entry would otherwise be difficult, due to significant network effects and switching costs. Moreover, as the enveloper will also internalize the positive effect on the origin platform's profits of additional volumes in the origin market it will be able to price very aggressively in the target market. Also, the combination of user data obtained in the target market the enveloper's data from the origin market can be used to improve the services offered to one or more of the sides of that market and hence their well-being when combined with the enveloper's data from the origin market. Platform envelopment may thus result in an increased competition in the target market as well as in efficiency gains, to the ultimate benefit of customers from all sides of that market, at least in the short term. In the example provided above, Google entering in the market of self-driving cars can provide positive synergies and efficiencies, namely contribute to the development of self-driving cars by taking advantaging of the existing economies of scope[226].

However, they may give rise to exclusionary (and potentially anticompetitive) effects. In light of the above, firms operating only in the target market would find it very difficult – if not impossible – to compete with the enveloper in that market, even when they are as efficient or even more efficient than the enveloper. In particular, being active on more markets, the enveloper can use the rents derived in the origin market to cross-subsidize its offerings in the target market, not only in terms of "deep pockets", but rather in its unique position to combine and monetize data from the origin and target markets, a possibility that is instead precluded to those firms operating only in the target market.

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[225] J. Haucap (2019), *Competition and Competition Policy*, *cit*., p. 206. See also I.R. Segal, M.D. Whinston (2000), *Naked exclusion: Comment*, *American Economic Review*, Vol. 90, No. 1, 2000, pp. 296-309. Geradin *et al.* further point out that whilst in other industries, competition takes place primarily through standard price competition and, possibly, also via incremental innovations, in innovative and dynamic industries the primary and distinguishing feature lies in the fact that market participants (undertakings) engage in dynamic competition for rather than in the market. See D. Geradin, C. Ahlborn, V. Denicolò, and J. Padilla (2006), *European Commission's Discussion Paper on [then] Art. 82, cit*., pp. 15 ff. On disruptive innovation see also I. Graef, S.Y. Wahyuningtyas, P. Valcke (2014), *How Google and Others Upset Competition Analysis Disruptive Innovation and European Competition Law*, Conference Paper, 25th European Regional Conference of the International Telecommunications Society (ITS), Brussels, Belgium, 22–25 June, https://econstor.eu/bitstream/10419/101378/1/795226780.pdf.

[226] D. Condorelli, J. Padilla (2020), *Harnessing Platform Envelopment, cit.*, pp. 31-32.

In addition, by entering and monopolizing the target market, the dominant player in the origin market may be able to entrench its dominant position in that market in the long term.

When the enveloper succeeds in monopolizing the target market and entrench its dominant position in the origin market, the reduction in competition may harm platform users by exposing them to higher prices, lower quality, loss of privacy, and reduction in innovation[227]. The cases provided in chapters 2 and 3 will provide concrete examples of such negative effects.

While the existence of exclusionary incentive to envelop needs to be established on a case by case basis (depending, among other factors, on the cost of entry into the target market, the value of the incremental data in the origin market, the risk of entry into the origin market in the absence of entry in the target market, the reaction of users, etc.) and – as any exclusionary strategy – envelopment will only be anticompetitive when it distorts the competitive process (because the enveloper's actions cannot be contested by an as-efficient competitor in the target market) and it results in consumer welfare harm, it is clear from the analysis sketched in the present chapter that dominant digital firms have incentives to extend their dominant position in other markets, often leveraging on the dominant position they already hold in their core market. Therefore, specific attention should be paid to those concepts and categories in the antitrust analysis that by their very nature are designed to "capture" leveraging strategies between (or across) two or more markets. As self-preferencing (other than, as seen above being one of the form in which envelopment can take place) has emerged in the recent scholarly work as a potential new theory of harm and form of abuse of a dominant position on digital markets following the Commission's decision on the *Google Shopping* case, the following chapters will have the difficult task of identifying if, and on what conditions, self-preferencing can represent a new category of abuse able to tackle the envelopment strategy whereby dominant firms are able to negatively affect competition on the target market given their unique position to curve the origin platform's rules to provide a better outcome for its own products or services.

[227] *Ibid.*

CHAPTER 2

A NEW FORM OF ABUSE? SELF-PREFERENCING

1. The origin of the discussion around self-preferencing

In the context of digital markets, the concept of self-preferencing has gained increasing attention since the opening of the *Google Shopping* investigation by the European Commission in November 2010[228], which eventually led – seven years after – to the adoption of an infringement decision in June 2017[229]. Given the conduct under scrutiny in the case, namely the more favourable treatment given by a dominant platform to its products or service, many authors have analysed whether a self-preferencing type of conduct could and should be held abusive, either by fitting it under a well-established category of abuses or considering it as a new form of abusive behaviour, especially as the Commission hasn't articulated much on this point (see *infra*).

The same question drove the research whose results are provided therein and the present chapter aims at setting the basis to address the core question of whether self-preferencing should and can be considered as a new and distinct category of abuse of a dominant position under Article 102 TFEU and – if so – why and at what conditions[230]. In order to properly address such issues, the first paragraph of this chapter briefly recalls *i)* the very theoretical basis of the behavioural element of monopolistic conducts – and precisely of exclusionary and anticompetitive abuses since self-preferencing is more often associated with exclusionary rather than exploitative effects – so as to provide a sound reference framework when dealing with the many aspects and arguments that the current debate about self-preferencing brings about, as well as *ii)* the reasons why self-preferencing has become an hot topic in the context of digital competition law. Paragraph 2 will then recall the reasonings followed by the Commission in its decision on the *Google Shopping* case, while paragraph 3 will provide an

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[228] See the first press release published by the European Commission on 30 November 2010, *Antitrust: Commission probes allegations of antitrust violations by Google*, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1624.

[229] Case AT. 39740, Decision of the European Commission, 27 June 2017 - *Google Search (Shopping)*, C (2017) 4444 final. The full text of the decision was published later on 18 December 2017.

[230] The present work focuses on self-preferencing as a potential abuse of Article 102 TFEU because up to now the kind of behaviours that qualify as self-preferencing have been examined under Article 102 TFEU. Moreover, the legal framework of monopolistic conduct seems to be best suited to capture the anticompetitive nature of self-preferencing kind of conducts. However, nothing prevents in theory the evaluation of self-preferencing practices under Article 101 TFEU when amounting to multilateral practices (for instance when involving the use of contractual mechanisms). See P. Ibáñez Colomo (2020), *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, 17 July, 43 *World Competition*, p. 6.

extensive overview of the many criticisms and comments on the Commission's approach and self-preferencing in general.

1.1 Back to the basics

On a general note, the building blocks of any abuse of dominance are two: the structural element (i.e. the dominant position) for which the well-established criteria continue to apply[231], and the behavioural element (i.e. the actual abuse). With specific regards to exclusionary and anticompetitive practices (as opposed to the unfair and discriminatory types of abuse[232]), the general theory of antitrust law analysis mandates the application of the two-prong test, according to which a certain conduct qualifies as an exclusionary and anticompetitive abuse if *i)* it strengthens the market power of the dominant firm and is therefore exclusionary (meaning that it excludes actual rivals, marginalizes them to a niche of the market or prevents the entry of potential rivals), and *ii)* is capable of decreasing consumer welfare and it is therefore anticompetitive[233].

As acknowledged by the European Court of Justice in *Intel* and *Post Danmark*, mere exclusionary practices are not forbidden under antitrust law; they are in breach of Article 102 TFEU only if those exclusionary practices are also anticompetitive, meaning that they reduce, or are capable of reducing, consumer welfare[234]. Accordingly, any of the strategies that a

[231] On a general note, in order to assess monopoly power/dominance antitrust enforcers look not only at the market share of the firm in question, which must be higher than 40% at least, but also at the market shares of its actual rivals, the bargaining power of its actual suppliers and customers, barriers to entry, such as sunk costs, intellectual property rights, product differentiation, network effects, administrative privileges, vertical integration, broad product range, customer loyalty. See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para. 9-18. See also, *ex multis*, R. Whish, D. Bailey (2018), *Competition Law*, *cit*., pp. 187-197. As mentioned in the Introduction, in recent times many issues regarding the exact market definition in digital markets have gained the spotlight and in April 2020 the Commission launched a public consultation for the revision of the Market Definition Notice.

[232] With regards to the behavioural element, antitrust analysis distinguishes two types of abuses: unfair and discriminatory practices, generally considered to be referred to under letters a) and c) of Article 102 TFEU (these include excessive pricing, unfair practices, and discriminatory prices) and exclusionary and anticompetitive practices, generally comprising the conducts listed under letters b) and d) of Article 102. See, among others, R. Whish, D. Bailey (2018), *Competition Law*, *cit*., pp. 207-211 and A. Jones *et. al.* (2019), *EU Competition Law, cit.,* pp. 361-366.

[233] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 19. According to Maggiolino any exclusionary conduct can be prohibited if two conditions are met, namely if there is a dominant position (structural element) and if the conduct is considered an exclusionary and anticompetitive practice within the meaning of paragraph b) of Article 102 TFEU (behavioural element). See M. Maggiolino (2018), *I Big Data*, *cit.*, p. 157. According to Dunne "anticompetitive foreclosure (requiring both exclusion of competitors and attendant consumer harm) has been adopted as the baseline standard for intervention across Article 102 TFEU. See N. Dunne (2019), *Dispensing with Indispensability*, LSE Legal Studies Working Paper No. 15/2019, 11 September, https://ssrn.com/abstract=3476938 or http://dx.doi.org/10.2139/ssrn.3476938.

[234] "It must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and

dominant firm may undertake in order to "exclude its rivals", including predatory strategies, raising rivals' costs, foreclosing and pre-emptive strategies[235], are not forbidden under EU competition law as long as they do (or may) not cause a reduction of consumer welfare.

Therefore, consistently with the "effects-based approach", an exclusionary and anticompetitive abuse can be verified when it can be demonstrated that the conduct under scrutiny reinforces the already dominant position held by the company in a dominant position *and* it damages the well-functioning of the market as it is inferred from the variations of the consumer welfare's variables, i.e. prices and market quantity, quality, variety and product innovation[236]. In other words, any conduct, even if different from those expressly set out under paragraphs b) and d) of Articles 102 TFEU, can be found abusive when it is capable of "excluding" rivals (in the broad sense referred above) but *at the same time* it is capable of harming consumer welfare. The harm to consumer welfare is indeed a crucial element to consider and assess in every case since it is well-established in contemporary antitrust law that an undertaking in a dominant position, which sees its power grow, consolidate and persist through conduct that increases the quantity, quality or degree of innovation of the goods available on the market, cannot be considered contrary to the normal functioning of the market, which operates as a selective mechanism to protect meritorious undertakings; therefore, the departure from the market of rivals that are less efficient than the dominant firm in the sense that they are less attractive in terms of, *inter alia*, price, quality or innovation is a

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so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation". Case C-413/14 P, *Intel Corp., cit.*, paras 133-134, referring in turn to case C-209/10, *Post Danmark*, EU:C:2012:172, para 21. The approach according to which agreement, abuses and mergers are qualified based on the effects that those conducts provoke on the market functioning, as assessed based on consumer welfare variations, as stated by the Court in *Intel* and *Post Danmark* is referred to as the "effects-based approach" or the "more economic approach". On the topic, see *ex multis*, P. Ibáñez Colomo, (2018), *The Future of Article 102 TFEU after* Intel, *Journal of European Competition Law & Practice*, Volume 9, Issue 5, May 2018; W. Wils, (2014), *The Judgment of the EU General Court in Intel and the So-Called "More Economic Approach" to Abuse of Dominance*, *World Competition: Law and Economics Review*, Vol. 37, No. 4, 2014, 19 September pp. 405-434, https://ssrn.com/abstract=2498407.

[235] Predatory strategies refer to cases when the dominant firm accepts to suffer short run losses in light of the long run gains that it will collect after rivals' exclusion. Raising rivals' costs strategies occur when the dominant firm obliges its rivals to be less efficient and, hence, less competitive than it is. Foreclosing strategies when the dominant firm subtracts relevant suppliers and relevant customers to its horizontal rivals. Pre-emptive strategies when the dominant firm subtracts competitive spaces to its horizontal rivals. See S.C. Salop and D. T. Scheffman (1987), *Cost-Raising Strategies*, T*he Journal of Industrial Economics* 36, no. 1 (1987), pp.19-34, doi:10.2307/2098594.

[236] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 23. For the sake of completeness, the referred two-prong test holds true for non-pricing conducts. In the case of pricing conducts, the harm to consumer welfare is assessed by referring to the costs' structure of the undertaking under scrutiny in order to assess whether the pricing strategies is the result of efficiencies or innovations or predatory strategies by applying the "as efficient competitor standard". See M. Maggiolino (2018), *I Big Data*, *cit.*, p. 157.

natural outcome of the competitive process and as such unproblematic under an antitrust perspective[237].

Given the importance of ascertaining anticompetitive effects to identify an abuse, it is always possible for the dominant firm to prove the existence of an objective justification, by demonstrating that its conduct is objectively justified and/or produce procompetitive effects (efficiency gains that also benefit consumers) such as to counterbalance or even offset the negative effect[238].

While the above constitutes the reference framework of exclusionary and anticompetitive abuses, a shortcut can be sometimes observed in practice. Since in the long run exclusionary practices inevitably tend to reduce consumer welfare as the "exclusion" of rivals typically results in higher market prices, it often happens in practice that by and large, antitrust authorities focus on showing: *i)* the exclusionary nature of the practice at stake and *ii)* the absence of any procompetitive effects justifying such practice. This is because, once the authority has shown the exclusionary nature of the practice at stake, it may not need to show some anticompetitive effects other than the physiological "price increase effect" that the exclusionary practice produces over the long run - at least in circumstances where the price is an important parameter of competition. Despite such practical shortcut, the dominant firm can always defend its behaviour by referencing to welfare enhancing aims. If the undertaking concerned is able to show and prove that the allegedly abusive conduct was indeed objectively necessary or that is has indeed created substantial procompetitive effects, it will dismantle the theory of harm (on consumer welfare) brought foreword by the authority and win the case.

1.2 "Branded practices" and the novelty of self-preferencing

The recurrent application of the two-prong general test has led to identify so-called "branded practices", i.e. practices that over the years have been the subject of many decisions and for

[237] See P. Ibáñez Colomo, (2018), *The Future of Article 102 TFEU, cit.*, p. 293 and M. Maggiolino (2018), *I Big Data*, *cit.*, pp. 146 ff.

[238] The language of objective justification can be found in many judgements and decisions, coupled with the proposition that, to be objectively justified, the conduct in question must be proportionate. The principle of objective justification and proportionality have been invoked on other occasions. See R. Whish, Richard and D. Bailey (2018), *Competition Law*, cit., pp. 217-218. Reiterated most recently in *Intel* and *Post Danmark* (C-413/14 P, *Intel Corp.*, *cit.*, para 140 and C-209/10, *Post Danmark*, cit., paras 40-41). See also the European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* paras 28-31 which provide that: "[i]t is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified. It then falls to the Commission to make the ultimate assessment of whether the conduct concerned is not objectively necessary and, based on a weighing-up of any apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm." (para 31). On the objective justification after *Intel* see also P. Ibáñez Colomo, (2018), *The Future of Article 102, cit.,* p. 293.

which the Commission and the European Court of Justice (ECJ) have "found out" and set some liability conditions, that is, some conditions that, once met, are assumed to show that the practice at stake produces more anticompetitive than procompetitive effects and thus it must be forbidden. These include, just to name a few, exclusive dealing (including fidelity rebates, tying and bundling), refusal to supply and margin squeeze[239].

Against this well-established theoretical background and state of the art and given the lack of clarity in the *Google Shopping* decision due the fact that the Commission merely referred to leveraging market power from one market to an adjacent one as an independent form of abuse without much explanations (see paragraph 2.3 below), it is still unclear – among the scholars and commentators - whether the Commission reached its conclusions based on a pure effects analysis strictly limited to the facts of the case or if instead self-preferencing constitutes somehow a new autonomous form of abuse (and if so why and what are its boundaries). Moreover, some authors suggest that the conduct would have been better address by "fitting" it in the established categories of "branded practices", while others point out that by properly relying on the well-established categories of abuses and legal tests as elaborated during the years in the case, the preferential treatment of one's products or services does not meet any liability condition and should thus be held lawful – especially if the theory of antitrust liability that is deemed to apply to self-preferencing type of abuses is that of refusal to deal and the "essential facility doctrine".

In a nutshell, while some authors suggest that the emergence of self-preferencing as a distinct category of abuse would have substantial negative implications in the treatment and analysis of abusive practices, including the dangerous detachment from the consolidated principles established in the ECJ's case law, others uphold that – at some conditions – there is legitimate room for such a "new tool". In particular, in the absence of clear indications by the European Commission some authors have made the exercise of elaborating theory of harm that sought to explain why Google's conducts was found abusive.

The idea behind many critics to the Commission's decision is that dominant firms do not have a duty not to favour (i.e. promote) their own products in the EU system of competition law. Such a burdensome duty may be justified only in exceptional circumstances such as those established in *Bronner*, *IMS Health* and *Microsoft* concerning refusal to deal where the Court requested the indispensable (or essential) nature of the input as a "filter" to impose a duty to

[239] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.*, Section iv) entitled "Specific forms of abuse".

supply, which is an extremely intrusive remedy similar to the one of not to favour one's own products[240].

Moreover, those rejecting this new form of abuse argue about the importance of ensuring legal certainty and thus predictable decisions by sticking to the legal tests and liability conditions established by the case law. They also believe that the new naïve approach adopted by the Commission in *Google Shopping* can be detrimental for innovation as it will burden so called "gatekeeper companies" with an obligation to ensure their rivals equal access to their innovations, regardless of whether such access is essential, and thus adversely affect *ex ante* investment incentives. On these premises, they argue that the self-preferencing hardly constitutes a useful nor sound legal category and it may end up preventing an in-depth analysis of the issues at stake in a given case.

On the other hand, other scholars are more keen to recognize a space for abusive self-preferencing either by classifying it under the established "branded conducts", or by recurring to the general framework of abusive behaviours under EU competition law, in light of the non-exclusive nature of the list of practices referred to under Article 102 TFEU, the need to ensure an effective enforcement of competition law and the Commission's discretion in selecting a theory of liability in Article 102 cases.

The above is just a preliminary sketch of the extensive debate around self-preferencing which will be analysed more in details under paragraph 3 below, after an in-depth overview of the Commission's Google Shopping decision and the arguments it has used to frame the theory of liability and the legal test[241].

2. The key precedent: the *Google Shopping* case

As mentioned, the Commission applied for the first time the "self-preferencing test" in the *Google Search (Shopping)* decision, despite the fact that the term as such was not employed in that circumstance[242].

The case concerns Google Shopping, Google's comparison shopping service that – like similar comparison services offered by competitors – allows users to compare a number of

[240] Case C-7/97, *Oscar BronnerGmbH & Co. KG v. Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, ECLI: EU:C:1998:569; Case C-418/01, *IMS Health & Co. OHG v NDC Health GmbH & Co. KG*, ECLI:EU:C:2004:257 and Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289.

[241] For an overview of the debate around self-preferencing see also P. Caro de Sousa (2020), *What Shall We Do About Self-Preferencing?*, *Competition Policy International*, June Chronicle 2020, https://ssrn.com/abstract=3659065.

[242] European Commission, Case AT. 39740, *Google Search (Shopping)*, *cit.*, hereinafter *Decision*.

different online shopping websites managed by retailers (online retailers or merchants) and to search within them the products to buy, comparing their prices[243].

In the EU, Google Inc. and Alphabet Inc were held responsible for abusing the dominant position in the market for generic search services – related but distinct from the market for comparative shopping services – since Google had systematically favoured its own comparison shopping service Google Shopping giving it a more favourable treatment in terms of positioning and display in the results pages of the Google generic search engine, to the detriment of competing services which were instead subject to an ad hoc demotion mechanism.

2.1 The relevant markets and Google's dominance

The Commission identified two distinct relevant product markets: the market for generic search services and the market for comparison shopping services, both of which national in scope[244].

With regards to the market for generic search, the Commission ascertained that although Google's users do not pay a monetary consideration for online search services, those services constitute an economic activity for a two-fold reason. First, users provide their (personal) data in exchange for the provision of search services[245], data that the platform is then able to monetize on the other side of the market. And indeed, the zero prices of those services are justified in the light of the commercial logic of multisided or two-sided platforms, which maximize their profits as the number of users increases, since the latter attract an increasing number of advertisers who "for a fee" purchase space on the same platform (so called network effects)[246].

According to the Commission's analysis, the market for generic search services constitutes a separate product market since there is limited demand side substitutability between general search services and other online services, including content sites (such as Wikipedia or websites of newspapers and magazines such as The New York Times or Nature), specialised search services (such as those specialised in flights, hotels, restaurants, news, etc.), social

[243] For a practical example of the functioning of comparison shopping services see A. Caro (2018), *Leveraging market power online: the Google Shopping case*, *Competition Law Journal*, Vol. 17, Issue 1, pp. 49–56, https://doi.org/10.4337/clj.2018.01.06, p. 49.

[244] On the geographic markets see *Decision*, paras 251-263.

[245] The Commission cites Google's Terms of Service which provide that "[b]y using our Services, you agree that Google can use such data in accordance with our privacy policies". According to Google's privacy policies, Google may retain and re-use data relating to users' search queries. Such use of the data represents an economic value to the service provider, which may use the data to improve search services and to display advertisements that are more relevant to users' interests. See *Decision*, para 158.

[246] See *Decision*, paras 159-160.

networking sites, as well as a limited supply side substitutability given the significant investments in terms of time and resources that providers of other online services would need to make to enter the market of generic search[247].

With regard to the second relevant market, comparison shopping services are identified as specialised search services that allow users to search for products and compare their prices and characteristics across the offers of several different online merchants and marketplaces; they do not "sell" products themselves but instead provide links that lead (directly or via one or more successive intermediary pages) to the websites of such online retailers or merchant platforms[248]. According to the Commission, they represent a distinct product market because from the demand-side perspective they are not interchangeable with the services offered by search services specialised in different subject matters, online search advertising platforms, online retailers, merchant platforms and offline comparison shopping tools[249]. These findings are supported by the lack of supply-side substitutability as the activity of the providers of such specialized search services varies greatly depending on the specialized search involved[250].

Google has been considered dominant in each national market for generic search services since 2008 in every EEA country (with the exception of the Czech Republic where dominance has been achieved since 2011)[251] due to both the company's high market shares in these markets (at least 80% in almost all countries of the European Economic Area and over 90% in most of them), the existence of significant barriers to expansion and barriers to market entry, such as network effects, the infrequency of user multi-homing, the existence of brand effects and the lack of countervailing buyer power[252].

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[247] See *Decision*, paras 161-185. The barriers to entry are also described in *Decision*, section 6.2.2.

[248] See *Decision*, paras 191 and 209. Content sites, unlike generic search engines that aim to redirect the user to other websites, propose instead to offer themselves in a direct way the information or products searched by users (think, for example, Wikipedia).

[249] *Decision*, paras 193-223.

[250] *Decision*, paras 224-250.

[251] The Commission found that Google abused its dominant position in 13 national markets for general search services in the European Economic Area where Google introduced its comparison shopping service. See *Decision*, para 341. The duration varies on the country (see *Decision*, para 744).

[252] On Google's dominant position see *Decision*, paras 271-327. With specific regards to the barriers to entry, the Commission's decision emphasizes that entering and operating in the market for generic search services requires significant investments in terms of time and resources, as well as the availability of a large amount of data and search queries so that the results are refined from time to time in order to offer users the most relevant results and be competitive (*Decision*, paras 285-305). As for network effects, the Commission emphasis the existence of indirect network effects "due to the link between the number of users of a general search service and the value of the online search advertisements shown by that general search engine. The higher the number of users of a general service, the greater the likelihood that a given search advisements is matched to a user and converted into a sale. This in turn increases the price that a general search engine can charge advertises if their search advertisements are clicked on." (*Decision*, paras 292 ff.).
In addition, Google's dominant position stems from the low frequency of multi-homing, i.e. the simultaneous use of multiple platforms by users who, despite the technical possibility of using different search services (such behaviour has been verified through surveys and market surveys carried out by the Commission), in fact rarely use different search engines, the existence of effects produced by the brand and the absence of any form of

2.2. The abusive conduct

After having ascertained Google's dominance in the search services market, the Commission focuses on Google's conduct. By introducing the so-called "Universal Search Box", that is the technology and the visualization whereby Google "blends" results from "vertical" search engines (like Google Images or Google News) into its web search listings, Google was found liable of unfairly promoting its own vertical (or specialized) properties (i.e. Google Shopping), to the detriment of competitors offering the same comparison shopping services. That is because as part of the new "Universal Search Box" Google showed the "Shopping Units" – which only included Google Shopping's results – in rich graphical format at the top of the first general results page above the so-called "blue links" provided in Google's general search results pages and which traditionally display the search results provided by Google search engine[253].

The abusive conduct was defined as "the more favourable positioning and display, in Google's general search results pages, of Google's own comparison shopping service compared to competing comparison shopping services"[254].

More in details, according to the Commission's findings, the abusive conduct has been supplemented by two distinct behaviours. The company, in fact, on the one side – as seen above – has favoured its own comparative shopping service by attributing it a preeminent position in its general search results pages returned from Google Search through the so called Shopping-Unit; what is more, on the other side, the company has voluntarily damaged its competitors by demoting (i.e. reducing the ranking of) competing comparison shopping services on average to page four (or following) of the results obtained through Google Search, with strong negative repercussions on their visibility. Indeed, the analysis of user behaviour

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bargaining power by Google users. Finally, the Commission specifies how this conclusion is valid despite the fact that generic search services are offered free of charge and regardless of whether or not generic search on fixed devices constitutes a separate market from generic search on mobile devices. Google argued that dominance could not be established in light of the fact that search services were offered free of charge. However, the Commission considered that the free services did not preclude the assessment of dominance in the light of the fact that (i) users pay for the services with the data provided for each search query and (ii) the free service is only one of the relevant factors in the assessment of a company's market power (see *Decision*, paras 319 and following). Amelio *et al.* point out that the dominance of Google in general search originated from three factors: i) the importance of scale, ii) indirect network effects and iii) brand effect. See A. Amelio, T. Buettner, C. Hariton, G. Koltay, P. Papandropoulos, G. Sapi, T. Valletti, H. Zenger (2018), *Recent Developments at DG Competition: 2017/2018*, *Review of Industrial Organization*, 53: 653–679, https://doi.org/10.1007/s11151-018-9671-7, pp. 660-661.

[253] See in particular *Decision*, paras 14, and 344 ff. of the decision. When a consumer enters a product query into Google general search engine, the results of Google's comparison shopping service are positioned and displayed in the so-called Shopping Unit with in a more attractive format at, or near, the top of the general search results. The functioning of Google "Universal Search Box" and the Shopping Units is well described the Report for the Hearing before the General Court; see GCEU, Report for the Hearing, Case T-612/17, *Google and Alphabet v Commission*, February 2020, case pending, paras 3 -19.

[254] See for instance *Decision*, para 2.

has shown how users tend to click more on the links that are more visible on the general page of search results.

More in details, while the first behaviour was implemented through the display of results generated by Google Shopping at the top of the first result page with considerable graphic evidence and rich graphical features (such as images), the demotion of competing services – which "by default" could not be displayed in the enriched format of the Shopping Units at the top of the first results' page – has been further achieved through the application of special ranking mechanisms – i.e. specific algorithms (one of these called "Panda") – specifically designed to reduce the ranking of rivals on the general result page; in this latter regard, the Commission emphasizes that Google applied such generic search algorithms based on demoting criteria only to its rivals while – on the contrary – Google has never applied the same algorithms and criteria to its service Google Shopping (previously named Froogle) despite it presents many of the characteristics that made competitors' services eligible to be relegated[255].

The Commission clarified that it does not question the design of the algorithms applied by Google, nor the prominent display enjoyed by the results offered by Google Shopping (as a consequence of which the service could enjoy higher click-through rates), but rather the fact that Google has never subject its comparative shopping service to the same treatment reserved for rivals. Google in this way has given its comparison service an undue competitive advantage by leveraging the dominant position it held in the market for generic search services and cancelling any form of competition based on merit[256].

The Commission then demonstrated how the downgrading of competitors' services, together with the preferential treatment given to its own service, has led competitors' services to suffer a drastic reduction in visibility and thus user traffic – which is of utmost importance (or essential) for comparison shopping services to compete – while, on the other hand, it led to an increase in traffic to Google's shopping service. Indeed, the Commission's findings are based

[255] In the Commission's words whereas the competing "comparison shopping services are prone to being demoted by the Panda algorithm [of Google] due to the characteristics inherent to those services", "Google's own comparison shopping service is not subject to the same ranking mechanisms as competing comparison shopping services, including adjustment algorithms such as […] Panda. This is despite the fact that Google's own comparison shopping service exhibits several of the characteristics that make competing comparison shopping services prone to being demoted by the […] and Panda algorithms". See *Decision*, paras 358 and 380.

[256] Among others, see *Decision*, paras 440, 537-538 and 600. See also the press release announcing the decision where the Commission refers to an "illegal advantage" and Vestager's statement dating back to 2015; European Commission (2017), *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, press release, 27 June, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784 and M. Vestager (2015), *Statement by Commissioner Vestager on antitrust decisions concerning Google*, 15 April, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_4785.

on the fact that "[…] generic search traffic from Google's general search results pages accounts for a large proportion of traffic for competing comparison shopping services and cannot be effectively replaced by other sources of traffic currently available to competing comparison shopping services, including AdWords, mobile applications, direct traffic, referrals from partner websites, social network sites and other general search engines"[257].
Therefore, Google's behaviour was deemed exclusionary because by giving an artificial advantage to its service it has the potential to foreclose competitors in the market of shopping services, leading to (anticompetitive) foreclosure[258]. In particular, by decreasing the internet traffic available to its rivals through Google Search, Google increased the costs that competitors have to bear to access the markets of comparison shopping services and made Google Search's dominant position less contestable[259].

2.3 The theory of harm: leveraging and anticompetitive foreclosure

Moving on to analyse the harm on consumer welfare identified by the Commission, Google's conduct has been considered capable of generating several anticompetitive effects in both relevant markets. In particular, in the market for comparison shopping services, the foreclosure of competitors (which may cease to provide their services) may determine: i) an increase in advertising costs, i.e. fees payable by merchants who conclude contracts with Google Shopping; ii) and, as a direct consequence, an increase in product prices for consumers making their purchase in comparison site markets; iii) less innovation from competing comparison shopping services and Google Shopping itself; Google's competitors indeed, would not have incentive to improve their services and/or creating new types of services if they cannot expect to be rewarded with sufficient volume of user traffic; as for Google, it would be less prone to innovate absent a real competition on the merits with its

[257] See *Decision*, paras 342 and 539. The Commission provides extensive evidence of these statements in sections 7.2.4.1 and 7.2.4.1 of the decision (paras 540 and following).
[258] See also A. Amelio *et. al*. (2018), *Recent Developments at DG Competition, cit.,* pp. 659 and 661. The Authors also points out Google's incentives to foreclose, which are not discussed directly in the Commission's decision. The incentives derive from the fact that Google does not monetize directly the traffic generated by its general search results, since they are provided for free and only clicks on Google's ads or comparison shopping services trigger a payment in Google's favor. Because of this business model which indeed subsidizes one side of the market, the so called "one monopoly profit" theory of the Chicago School does not hold true in this case; indeed, according to them, Google does have incentives to foreclose competition on adjacent markets. This "static incentive" to foreclosure is also complemented by a "dynamic risk for Google to lose its gatekeeper role for consumers" should a rival comparison shopping service becomes too successful with the risk of bypassing Google Search (see pp. 662-663).
[259] See M. Colangelo, M. Maggiolino (2018), *Manipulation of Information as Antitrust Infringement*, *Columbia Journal of European Law*, 20 June, https://ssrn.com/abstract=3262991, p. 11.

rivals; as well as iv) the inability of consumers to access the most relevant comparison shopping services and therefore a reduced consumers' choice (i.e. variety)[260].

With specific regards to this latter aspect, the decision emphasises how the reduction of consumers' ability to access relevant comparing shopping services is a direct consequence not only of the importance of Google's general search results to access (and generate traffic to) comparison shopping services (see above), but also of the general trust that users have in Google Search's suggestions[261].

As for the market for general search services, the Commission also established that, by favouring Google Shopping against other comparison shopping services, "Google protects the part of the revenue that [Google Shopping] generates on its general search results pages and which serves to finance its general search service"[262], therefore making it more difficult for competing comparison shopping services to reach a critical mass of users that would allow them to compete against Google Search and challenge its dominant position.

According to the Commission, Google failed to provide an objective justification for the conduct. In this regard, Google argued that the adjustment mechanisms it applied to generic search results aimed at preserving their usefulness[263] and the positioning and display of Product Universals and Shopping Units were introduced to improve the overall quality of Google's search service for advertisers and especially for consumers by providing them the most relevant useful results. Moreover, Google argued that "search services compete by showing their results, not results from other services" and that "users do not expect search services to provide results from other services" while at the same time also maintaining that its practices permit it to monetise its online services[264]. According to the Commission, however, Google failed to provide verifiable evidence to prove that its conduct is indispensable to the realization of the claimed efficiencies and that there are no less anti-

[260] See *Decision*, Section 7.3 and in particular paras 593-599. See A. Amelio *et al.* (2018), *Recent Developments at DG Competition*, *cit.*, p. 661. On the capability and likelihood of anticompetitive effects see also A. Jones *et al.* (2019), *EU Competition Law*, *cit*., p. 530. As stated in the Commission's press release, the conduct has denied other companies the chance to compete on the merits and to innovate, and most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation. See European Commission (2017), *Antitrust: Commission fines Google €2.42 billion, cit.*

[261] See *Decision*, para 598 of the decision where it is ascertained that "[i]n the first place, as explained in section 7.2.3.1, users tend to consider that search results that are ranked highly in generic search results on Google's general search results pages are the most relevant for their queries and click on them irrespective of whether other results would be more relevant for their queries." Amelio *et al.* stress that when users shop online and want to compare prices, they first search on Google (Search) and then - based on its suggestions upon which they tend to rely also given fact that they have limited information - decide where to go next. See A. Amelio *et. al*. (2018), *Recent Developments at DG Competition, cit.,* pp. 661.

[262] *Decision*, para 642.

[263] And precisely that "[...] an inability to demote low-quality sites would not serve competition or consumers [...] as it would expose Google to a flood of low-quality results [...] to the ultimate detriment of users". *Decision*, para 655.

[264] See *Decision*, paras 654-659.

competitive alternatives to the conduct capable of producing the same efficiencies, thus rejecting Google's justification for its conduct. The decision also stresses that Google is not prevented from applying adjustment mechanisms, nor – with regard to Google's claim about the quality improvement – from showing specialised search results, but it contested the difference in treatment applied to Google on the one hand and its rivals on the other. In addition, the Commission clearly states that a requirement of equal treatment "does not generally prevent [the company] from monetising its general search results pages" especially as "Google can choose the specific measures through which it intends to comply with this Decision and the possible measures Google might take do not preclude the monetisation of its general search results pages when making this choice"[265].

It is interesting to note that in the U.S. the Federal Trade Commission ("FTC") in the context of its investigation against Google regarding the very same conduct reached an opposite conclusion by accepting the objective justification put forward by Google to explain the conduct. Indeed, the FTC acknowledged that Google's primary goal in introducing the new content provided in the Google Search's top page was to quickly answer and better satisfy its users' search queries by providing directly relevant information, thereby introducing a quality improvement with no necessary connection to the anticompetitive exclusion of rivals[266].

Most importantly for the purpose of the present analysis, the Commission did not explicitly recognize any novelty in the theory of harm underlying Google's conduct, qualifying it as a ("classic") leveraging abuse case, namely "the use of a dominant position on one market to extend that dominant position to one or more adjacent markets" which "constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits"[267].

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[265] *Decision*, paras 664. On the reasons why the Commission rejected Google's attempted justifications see *Decision*, paras 660-671. Jones *et al.* strongly criticize the Commission's reasoning with regards to the justifications advanced by Google as being of a "circular quality" and "illogical" because "the Commission rejected each of its claims on the basis that the intrinsic disparate treatment of competing comparison shopping services negated the legitimacy of any of those claims". They also state that this section of the decision "is one of briefest and most opaque". A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 530.

[266] Federal Trade Commission (2013), *Statement Regarding Google's Search Practices In the Matter of Google Inc.*, FTC File Number 111-0163 3, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf. The approach taken in the US was strongly supported by R.H. Bork, J. G. Sidak (2012), *What does the Chicago School teach about internet search and the antitrust treatment of Google?*, *Journal of Competition Law & Economics*, Volume 8, Issue 4, December 2012, pp. 663–700, https://doi.org/10.1093/joclec/nhs031.

[267] *Decision*, para 649. See also *Decision*, paras 334 and 652. The adjective "classic" is reported in the newsletter referring issued by Cleary Gottlieb about the hearing held in appeal (Google is represented by Cleary Gottlieb). See Cleary Gottlieb (2020), *EU Competition Law Newsletter*, February, https://www.clearygottlieb.com/-/media/files/eu-competition-newsletters/european-competition-newsletter-february-2020-pdf.pdf.
Commenting on the theory of harm relied on by the Commission, Amelio *et al.* reiterate that "[t]he Google Shopping decision is a leveraging abuse case. Google used its dominance in the market for general search

The Commission, however, did point out the non-exhaustive nature of the list of practices provided under Article 102 TFEU and that "[t]he legal characterisation of abusive practice does not depend on name given to it, but on the substantive criteria used in that regard" as well as that "[t]he specific conditions to be met in order to establish the abusive nature of one form of conduct covered by Article 102 of the Treaty and Article 54 of the EEA Agreement must not necessarily also apply when assessing the abusive nature of another form of conduct covered by those articles"[268]. As stated by the Courts in several precedents, an abuse is prohibited under Article 102 "regardless of the means and procedure by which it is achieved" and "irrespective of any fault"[269].

Moreover, in replying to one of Google's argument on the failure to apply the criteria established by the case on refusal to deal types of abuse (the so called "Bronner criteria"), the Commission explained that such a rejection is based on a two-fold reason, namely the actual conduct implemented by Google and the nature of the remedy to be administered (rather than the underlying breach). As for the first aspect, it remarked – without however explicitly drawing a line between self-preferencing and refusal to supply – that the very nature of the facts of the case did not involve "a passive refusal by Google to give competing comparison shopping services access to a proportion of its general search results pages, but active behaviour relating to the more favourable positioning and display by Google, in its general search results pages, of its own comparison shopping service compared to comparison

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services to give its comparison shopping service an artificial advantage and exclude competing comparison shopping services, which leads to anticompetitive foreclosure." A. Amelio *et. al*. (2018), *Recent Developments at DG Competition, cit.,* p. 661. The Authors recall para 19 of the *Guidelines on the application of art. 102 TFUE* on anticompetitive foreclosure which provides that "[t]he aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. […]". See European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit*.

Among others, Dunne points out that the Commission disclaimed any novelty for self-preferencing, probably also in light of the fact that it was determined to impose a heavy fine. N. Dunne, (2020), *Public Interest and EU Competition Law*, *The Antitrust Bulletin*, Vol. 65(2), pp. 278-279. Akman noted that in a previous statement dating back to 2015 the Commission state: "[i]f an infringement is proven, a case focusing on comparison shopping could potentially establish a broader precedent for enforcing EU competition rules in other instances of Google favouring its own services over competing services." European Commission Statement 15/4780, Statement by Commissioner Vestager on Antitrust Decisions Concerning Google, 15 April 2015. See P. Akman, Pinar (2016), *The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law*, (2) *Journal of Law, Technology and Policy* 301, 19 July [2017]; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811789.

[268] *Decision*, para 335.

[269] *Decision*, para 338 where the Commission refers to the following precedents: Case 6/72, *Europemballage and Continental Can v Commission*, ECLI: EU:C:1973:22, paras 27 and 29 and Case T-128/98, *Aéroports de Paris v Commission*, ECLI: EU:T:2000:290, para 170.

shopping services"[270]. Second, it added that "the Bronner criteria are irrelevant in a situation, such as that of the present case, where bringing to an end the infringement does not involve imposing a duty on the dominant undertaking to 'transfer an asset or enter into agreements with persons with whom it has not chosen to contract'. While the Decision requires Google to cease the Conduct, it does not require it either to transfer any asset or to enter into agreements with one or more competing comparison shopping services."[271]

It has been noted that the Commission only devoted 9 paragraphs of the 755-paragraph length decision on the applicable legal test, while greatly privileging the evidence showing the evolution of search traffic both for Google Shopping and its competitors in order to prove the anticompetitive effects[272]. What matters the most for the present work, however, is that by using the general label of "leveraging case" the Commission did not explain if and why self-preferencing is a novel category of abuse, nor has articulated much on the reasons why it has detached from previous case law (except from the brief references above) which in turn led many commentators to interpret the decision giving their opinion on the choice made by the Commission and on how to classify the conduct, as analysed in details under paragraph 3 below.

2.4 The remedy

After the lengthy investigation the Commission ascertained the abusive nature of Google's conduct[273].

The severity and duration of the conduct resulted in one of the highest fines ever imposed in an antitrust case by the Commission (€2.4 billion)[274]. As for the remedies, the Commission ordered Google to stop the abuse and implement corrective measures in accordance with the

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[270] *Decision*, para 650.

[271] *Decision*, para 651.

[272] See I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 475. The evidence is mainly reported at paras 452–538 (analysing how Google's conduct decreased traffic to competing comparison shopping services and increased traffic to Google Shopping) and 589–643 (analysing the anticompetitive effects of Google's conduct).

[273] The chronological steps of the Google Shopping case are available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740. Among other factors, the timing of the proceedings was impacted by the commitments proposed by Google in April 2013, aiming at solving the competition concerns expressed by DG Competition. In particular, Google would have modified the functioning of its search algorithm, in order not to discriminate web sites competing with Google Shopping. After several years of negotiations, the EU Commission rejected the proposed commitments and – after two statement of objections in 2015 and 2016 - adopted an infringement Decision in June 2017. Moreover, during the proceedings the Commission carried out a detailed analysis of the effects of Google's conduct on the market through the request of information to more than 800 companies, the analysis of traffic data related to more than 360 websites, searches that were able to verify the volume of traffic and the degree of visibility in Google's results pages, the study of user behaviour and the relationship between traffic and visibility also through the analysis of 5.2 TB of data related to user queries (equal to 1.7 billion search questions). However, this exercise has been detrimental to the duration of the proceedings.

[274] At the time of the decision, it had been a record-breaking fine.

principle of equal treatment. In particular, the Commission requested Google (and Alphabet) to ensure that competing comparison shopping services are treated by Google no less favourably than its own comparison shopping service within its general search results pages[275]. While the company was left free to propose a way to achieve such result, the Commission has been clear in establishing that *"[…] Google's own comparison shopping service* [should be subject] *to the same underlying processes and methods for the positioning and display in Google's general search results pages as those used for competing comparison shopping services. Such processes and methods should include all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result in Google's general search results pages […]"*[276]. However, the Commission didn't want to interfere with Google's designs choices or how the algorithms work (see paragraph 2.2 above).

Being free to choose between the various ways to apply the requested "equal treatment", Google made two main changes to open up its general search to third-party comparison shopping services. First, it set up a competitive pay-for-placement auction which allows firms to bid for priority placement in the Shopping Units appearing on Google Search results; second, Google Shopping has been made into a separate business unit and it, too, has to bid for priority placement[277]. The European Commission has not publicly expressed its opinion on the remedies, but it has expressed its commitment to closely monitoring Google's compliance with the decision[278]. The way Google has implemented the remedy has however been subject to many criticisms and in February 2019 several competing comparison shopping websites claimed that the they were ineffective to allow them to benefit from an increase in users' traffic[279].

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[275] *Decision*, para 699.

[276] *Decision*, para 700.

[277] See K. Rozga (2020), *What an elusive remedy in the Google Shopping case says about the future of regulating big tech*, article posted on 7 May 2020 on *Tech Law Decoded Navigating the legal landscape of the digital economy*, https://techlawdecoded.com/what-an-elusive-remedy-in-the-google-shopping-case-says-about-the-future-of-regulating-big-tech/. See also Google's page where O. Heckmann (VP Engineering) explain the "Changes to Google Shopping in Europe" (Google Inside AdWords blog, 27 September 2017) https://adwords.googleblog.com/2017/09/changes-to-google-shopping-in-europe.html.

[278] N. Lomas (2017), Google tweaks search ads after EU shopping antitrust ruling, Tech Crunch, 28 September 28, https://techcrunch.com/2017/09/28/google-tweaks-search-ads-after-eu-shopping-antitrust-ruling/?guccounter=1. Since the adoption of the decision, the Commission has taken many initiatives to assess whether the remedy implemented was effective enough to restore competition, including sending questionnaires to stakeholders and hiring external consultants to monitor the remedy. See for instance, Nicholas Hirst (2018), *Vestager kicks off new chapter in Google Shopping probe*, Politico, 16 February, https://www.politico.eu/article/commission-probes-google-shoppings-antitrust-remedy-document/.

[279] See Acheter-moins-cher.com *et al.* (2019), *Google's ongoing abuse of market power is harming consumers and digital companies all over Europe. Comparison shopping services call for vigorous actions against Google's non-compliance with the European Commission's decision in the Google Search (Shopping) case,* letter to Ms Margrethe Vestager, 28 November, https://www.shopalike.nl/downloads/Joint_Letter_of_41_CSSs_to_Ms_Vestager_on_Google_Shopping-Non-Compliance_28.11.2019.pdf. The letter is signed by the founders and CEOs of 41 European comparison

2.5 The ongoing appeal

The decision is currently subject to appeal before the General Court of the European Union, following the action brough forward by Google in September 2017[280]. In its action, Google relied on the following main pleas in law. First, the applicant submitted that the decision "misstates the facts" and that Google did not favour its comparison shopping service as Google launched grouped product results (Product Universals) "to improve quality, not to drive traffic to a Google comparison shopping service"[281]. The applicant further claimed that it did not applied a discriminatory treatment to "product results" compared to "generic results" and that decision violated the legal standard for assessing Google's objective justifications for showing Product Universals. The second claimed relates specifically to Shopping Units contesting the findings that Google favoured its comparison shopping service; to this end the applicant submits that the decision errs in finding that treating grouped product ads and free generic results differently involves favouring of Google Shopping; also in this context the Commission allegedly violated the legal standard for assessing Google's objective justifications for showing Shopping Units.

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shopping services. The letter points out that "without full ownership unbundling (structural separation), Google Shopping's participation in the auction is essentially meaningless". As pointed out by Bostoen who summarizes their complaints: "[f]irst, having competing services bid against each other—and Google—raises the cost of being featured on top of the search results. Secondly, whomever is featured, Google cannot lose out: either Google Comparison Shopping wins the auction and is paid by the company it is promoting, or rival comparison shopping services win the auction—with the proceeds flowing to Google Search". See F. Bostoen (2018), *Online Platforms and Vertical Integration: The Return of Margin Squeeze?*, *Journal of Antitrust Enforcement*, Vol. 6(3), pp. 355-381, Faculty of Law, Stockholm University Research Paper No. 42, p. 20. Complaining about the equal treatment remedy see also P. Marsden (2020), *Google Shopping for the Empress's New Clothes –When a Remedy Isn't a Remedy (and How to Fix it)*, *Journal of European Competition Law & Practice*, 17 September, https://doi.org/10.1093/jeclap/lpaa050. Also the Crémer Report underlined that there have been calls for more aggressive approaches, see J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p.67.
In defense of the remedy, see T. Graf, H. Mostyn (2020), *Do We Need to Regulate Equal Treatment? The Google Shopping Case and the Implications of its Equal Treatment Principle for New Legislative Initiatives*, *Journal of European Competition Law & Practice*, 18 September, https://doi.org/10.1093/jeclap/lpaa053. Moreover, according to Vesterdorf and Fountoukakos the decision does not preclude Google from charging rivals a fee for access to its ad space. As Google's Shopping Unit represents a valuable input to which significant opportunity costs attach, and incorporates innovative ad technologies reflecting years of investment, a non-discriminatory auction mechanism is an appropriate and lawful way to ensure Google is appropriately remunerated. Requesting otherwise (for instance requiring access to the Shopping Unit to be for free would have undermined competition on the merits. They conclude that Google's non-discriminatory auction remedy fully complies with the decision read in light of the case law. See B. Vesterdorf and K. Fountoukakos (2018), *An Appraisal of the Remedy in the Commission's Google Search (Shopping) Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law*, *Journal of European Competition Law & Practice*, Volume 9, Issue 1, January 2018, pp. 3–18, https://doi.org/10.1093/jeclap/lpx087.
On the remedy see also P. Guniganti and T. Madge-Wyld (2018), *Google shopping remedies have had effect, Vestager says*, *Global Competition Review*, London, 18 June.

[280] Case T-612/17, *Google and Alphabet v Commission*, pending. On the appeal see Action brought on 11 September 2017, Case T-612/17, *Google and Alphabet v Commission*, pending. OJ C 369, 30 October 2017, p. 37–38, GCEU, Report for the Hearing, Case T-612/17, *Google and Alphabet v Commission*, February 2020, and Cleary Gottlieb (2020), *EU Competition Law Newsletter*, *cit.*

[281] Action brought on 11 September 2017, Case T-612/17, *Google and Alphabet v Commission*, pending.

Google also claimed that the decision errs in finding that the alleged abusive conduct diverted Google search traffic and that it failed to demonstrate the decrease/increase in traffic, as well as in finding that the alleged abusive conduct is likely to have anticompetitive effects. In this latter regard, Google argued that the decision is based upon speculations about potential anticompetitive effects while failing to consider actual market developments, such as the competitive constraints exercised by merchant platforms, and wrongly considered abusive quality improvements in general search. Moreover, the Commission imposed on Google the duty to supply comparison shopping services with access to its product improvements, without meeting the requisite legal conditions set out in *Bronner*. In particular, the Commission failed to demonstrate "that access to its services was indispensable for competing comparison shopping services and that, without such access, effective competition could be foreclosed, which is necessary for a duty to supply to be imposed on a dominant undertaking"[282].

Indeed, the fact that other sources of internet traffic may be "less efficient" than Google's search traffic is not sufficient to prove the impossibility to develop price comparison services[283]. In *CBEM* the Court has made clear that also when dealing with active conduct (and not mere passive refusal, which – as seen above - was the argument used by the Commission to depart from the case law on refusal to deal) attention should be placed on the indispensability requirement of the services and the risk of elimination all competition given the lack of access to that resource[284]. Similarly, the fact that the Google was left free to choose how to cease the conduct (and that in theory it could have chosen to cease using the service for its benefits) poses Google in the exact same situation of a firm to which a duty to supply is directly imposed[285]. In this regard, the Commission restated its arguments with regards to the inapplicability of the Bronner criteria, while stressing that it did not impose a duty to supply in that "it left Google free to decide how to ensure equal treatment […] which covered both the possibility of continuing to show Shopping Units on its general results page by incorporating, by contract, competing comparison shopping services' results, and the possibility of no longer showing Shopping Units on that page"[286].

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[282] GCEU, Report for the Hearing, Case T-612/17, *Google and Alphabet v Commission*, February 2020, p. 89 (recital 331).
[283] *Ibid*., p. 89 (recital 331).
[284] *Ibid*., p. 90 (recital 332).
[285] *Ibid*., p. 90 (recital 334).
[286] *Ibid*., p. 91 (recital 338 and 340). The Report for the Hearing also mentions the views expressed by VDZ according to which while supporting the Commission's findings that the case does not involve a refusal to deal it also adds that "from a commercial perspective, competing comparison shopping services are not interested in accessing Products Universals or Shopping Units and would prefer Google to stop displaying those 'boxes' on its general results pages instead" (see recital 342).

Finally, Google claimed that as the Commission advanced a novel theory, no fine should have been imposed.

The judgement of the Court is eagerly awaited by the whole antitrust community as, apart from whether the Commission has sufficiently met its burden of proof in showing the anticompetitive effects, it will provide clarity on the legal test established by the Commission and hopefully reconcile the findings within the established case law. In the meantime, an extensive debate on this point has emerged.

3. A critical analysis of the Commission's decision and self-preferencing as a novel category of abuse

The decision has been the subject of many comments and criticisms. For starters, many authors agree that – in Graef's words – the *Google Shopping* decision "finds itself on sketchy legal ground especially with regard to the Commission's statement that leveraging constitutes an independent abuse" as leveraging actually represents a general term for various specific strategies, like tying, refusing to deal, or predatory pricing, a dominant firm may apply to extend its market power from one market to another[287].

What is more, as the decision did not even attempt to reconcile the Commission's analysis with the established case law (especially that on refusal to deal or discrimination) a lively debate has emerged about possible theories of harm that could have served the purpose of addressing the conduct at hand in a legally sound manner. Interestingly, however, both those criticizing the overall approach adopted in the case and those who somehow support the Commission's findings agree on the fact that the conduct does not qualify as an "ordinary" abuse[288]; according to some authors it does not fit any of the established category of practices, while on the contrary, according to others, it does potentially fit one or more (even too many)

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[287] I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 480. The Author cites Giorgio Monti with regards to the meaning to be attributed to leverage. G. Monti (2007), *EC Competition Law*, Cambridge University Press, p. 186. Along the same lines, Caro de Sousa points out that: "'leveraging abuse' is an umbrella term covering different types of unilateral practices that foreclose competition. The case law typically identifies specific features that distinguish the conduct at issue from competition on the merits, such as deteriorations in quality, margin squeezing, or a refusal to supply an indispensable input." See P. Caro de Sousa (2020), *What Shall We Do About Self-Preferencing?*, *cit*., p. 3. Also, Jones *et al.* argue that "the decision is arguably at its most fuzzy when setting out the legal test applied to demonstrate abuse"; "while it is indisputable that Article 102 prohibits certain forms of behavior that involve the leveraging of market power from one segment to another, it is less clear that this broad category represents in itself an established stand-alone form of abuse". A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 531.

[288] According to Romano Subiotto *et al.* the decision "creates the impression that Google's 'leveraging' infringement is largely *sui generis*, or at least a substantial variation on more established themes". R. Subiotto, D. R. Little, R. Lepetska (2018), *The Application of Article 102 TFEU by the European Commission and the European Courts, Journal of European Competition Law & Practice*, Volume 9, Issue 7, September 2018, pp. 476–484, https://doi.org/10.1093/jeclap/lpy042, p. 479.

other categories of "branded conducts" and therefore it should have been qualified following different theories of harm and, most importantly, well-established legal tests.

The present paragraph provides an overview of the main criticisms towards both the reasoning adopted by the Commission and self-preferencing more in general.

Before addressing the different arguments, however, it is worth recalling the high level proposal made by the Special Advisers to the European Commission in the Report published on 4 April 2019: a finding that a dominant platform (at least in circumstances where it serves as an intermediation infrastructure and performs a regulatory function[289]) is restricting the ability of other firms to compete either on the platform or for the market "in a way which is not clearly competition on the merits" should trigger a rebuttable presumption of anti-competitiveness, "given the concentration tendencies of platforms, and the high barriers to entry in some of the markets they dominate"[290]. As a consequence, the platform should bear the burden of proving that self-preferencing has no long-run exclusionary effects on product markets and that the practice at stake brings sufficient compensatory efficiency gains[291].

The very strong proposal is also justified, according to the Advisers, in that given the specific features of the digital world whose economics are still to be completely understood, "it is extremely difficult to estimate consumer welfare effects of specific practices"[292].

While according to the Advisers reversing the burden of proof does not mean that self-preferencing is abusive *per se* and that it should always be subject to an effects test[293], it has been pointed out that reversing the burden of proof would mean considering self-preferencing practices *prima facie* unlawful, in contrast with established case law[294]. And indeed, as seen under paragraph 1.1 above, considering self-preferencing *prima facie* unlawful is at odds with the so-called "effect-based approach" (or "more economic approach") recently endorsed by

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[289] As seen in chapter 1, the Advisers to the European Commission identified a category of platforms that perform "a rule-setting function," whereby platforms "act as regulators, setting up the rules and institutions through which their users interact." See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p.60.

[290] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p.71.

[291] *Ibid.*, pp. 7, 66 and 72. As reported by Botta and Solidoro other authors are concerned that the burden of proof placed on the Commission is often excessively high, as shown in the *Cartes Bancaires* case, suggesting that in the context of the discussion about the aims of antitrust law (as discussed in the Introduction) changes should perhaps be directed towards the current evidentiary burdens, rather than to the very aims of competition law. M. Botta, S. Solidoro (2020), *Hipster antitrust, the European way?, cit*.

[292] *Ibid.*, p.72.

[293] J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 66.

[294] See P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 32-34. The Authors recalls that, first, the ECJ has consistently held that a conduct should be deemed *prima facie* unlawful where it serves no purpose other than the restriction of competition (as stated in *AKZO* and *Hoffmann-LaRoche*), while there is a general consensus on the fact that self-preference is a typical expression of competition on the merits capable of having pro-competitive effects. The ECJ has also held that treating practices as *prima facie* unlawful can only be done when there is robust evidence and experience about its (anti and procompetitive) effects; however, as admitted by the Advisers, the economics of the digital world (including those of self-preferencing) are still to be clearly understood.

the ECJ in its landmark decisions *Intel* and *Post Danmark*. This is especially true if we consider that it is widely acknowledged (as it will be further detailed below) that vertical integration and self-preferencing – or rather differentiated treatment, which is the logical consequence of integration - are able to provide procompetitive effects on consumer welfare[295].

In accordance with the theoretical framework provided above, the present work assumes that a robust analysis of the effects is indispensable in order to assess the lawfulness of self-preferencing, as the proposal made by the Advisers does not meet the principles laid down by the ECJ and informing contemporary antitrust analysis.

Nevertheless, such a proposal has influenced the opinions on self-preferencing expressed by some authors (especially those writing after the Report was published), fearing that coming up with a new legal category would equal embracing legal tests that would make self-preferencing *prima facie* (or *quasi-prima facie*) unlawful (see in particular paragraph 3.4 below).

3.1 Google's conduct does not fit any established form of abuse

According to Akman the facts in Google Shopping should have not be found abusive regardless of the theory of harm to be adopted: they not only do not meet the requirements of the existing law to be found abusive unless the established frameworks for the types of abuse examined are unjustifiably disrupted, but they also do not represent the type of conduct that should be found abusive either under the principled conceptualisation of abuse adopted by the Author[296]. In particular, according to the Author, the facts of the case cannot be placed under any of the existing category of abuse because there is simply no abuse[297]. Other authors agree

[295] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 14 and following.

[296] See P. Akman (2016), *The Theory of Abuse in Google Search, cit.*. The article was supported by Google and published in 2017, before the decision was published. Therefore, the Author based her consideration on the statements of objections issued in April 2015 and July 2016. Other commentators sustain that Google's conduct should have not be held abusive; see for instance, J. Lang (2016), *Comparing Microsoft and Google: The Concept of Exclusionary Abuse*, *World Competition*, Volume 39, Issue 1, pp. 5-28; T. Körber (2015), *Common errors regarding search engine regulation – and how to avoid them*, 36 European Competition Law Review, pp. 239-244; R.H. Bork, J. G. Sidak (2012), *What does the Chicago School, cit.,* T. Graf, H. Mostyn (2020), *Do We Need to Regulate Equal, cit.*

[297] Akman concentrates on "the most likely existing categories of abusive conduct under which Google's conduct might fall", i.e. refusal to deal and the essential facility doctrine, discrimination and tying, carrying out an extensive and detailed analysis and enumerating many different reasons why the conduct at stake in the Google Shopping case does not qualify as such. Being one of the strongest and most detailed analysis objecting against the Commission's findings, in the context of the present paragraph it is used as a guide to systematize the critics to the decision. See P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* p. 307.

on the fact that none of the "traditional" abusive conducts fit the facts of the *Google Shopping* case[298].

3.1.1 The problems with refusal to deal and the essential facility doctrine

First of all, in the views of many, Google's conducts cannot amount to a refusal to deal, which – according to the case law – occurs when a dominant firm refuses an input (product or service) that is objectively necessary for other firms to be able to compete effectively on a downstream market[299]. According to Akman, the first issue with this category is that of identifying a relevant input that is not being supplied, as both the two alternatives she suggested, i.e. free traffic or a particular ranking on Google's general search result pages cannot qualify as a necessary input to provide a service (i.e. the comparison shopping service in the case at hand), at least without reaching unreasonable implications such as imposing on a dominant firm the duty to subsidize competition to itself[300]. The issue of the input came also up in the context of the appeal against the decision; according to Google in fact the service to which the Commission require it to give access are Products Universals and Shopping Units and not, more broadly, the general results pages[301].

Even assuming that an input exists, a theory of antitrust liability based on a refusal to deal type of abuse does not stand in that the conduct does not meet the requirements for refusals to be abusive. First of all, should we consider the case law applicable to the refusal to provide access to a physical property, the facts of the case do not meet the conditions established in *Commercial Solvents* which involved a discontinuation of an existing supply when the dominant firm started competing on the downstream market. In such case, the ECJ verified whether actual substitutes exist concluding that if they exist the conduct do not amount to an abuse. However, in the case at hand it is extremely hard to uphold that the are no available alternatives to Google for generating traffic online or to allow comparison shopping sites to carry out their business[302].

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[298] Also Nazzini reached such a conclusion. See R. Nazzini (2015), *Google and the (Ever-Stretching) Boundaries of Article 102*, *Journal of European Competition Law & Practice*, Volume 6, Issue 5, May 2015, pp. 301–314, https://doi.org/10.1093/jeclap/lpv019. Along the same lines, I. Kokkoris (2018), *The Google Saga*, *cit.* The views of other Authors supporting this thesis are provided below.

[299] European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit.*, para 81.

[300] P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 309-310.

[301] GCEU, Report for the Hearing, Case T-612/17, *Google and Alphabet v Commission*, February 2020, p. 90 (recital 336). According to Google, Products Universals and Shopping Units are infrastructure that are independent from the other components of general results pages.

[302] Joined cases 6 and 7-73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities*, ECLI:EU:C:1974:18. See P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 311-317.

The same argument also suggests that the conditions laid down by the ECJ in *Bronner* – which apply to cases where the dominant firms refuses *tout court* to provide access to an input constituting an *essential facility* – cannot be met[303]; in particular, the indispensability requirement is far from making the cut given the existence of a variety of other ways comparison shopping sites can use to reach consumers and gain traffic: "there are both current and potential substitutes to receiving (free) traffic from Google Search, such as receiving (free) traffic from other search engines, mobile apps, social media or direct (e-)mail campaigns, or online and offline advertising campaigns to increase brand awareness."[304]

Moreover, Akman continues her reasoning by pointing out that neither the even stricter conditions consolidated in the case law (*Microsoft* and *IMS Health*) dealing with refusal to supply intangible property (including intellectual property rights) could be accomplished based on the facts of the case at hand. In particular, given the non-indispensable nature of the input (or platform) the refusal does not prevent the emergence of a new product nor it excludes "any competition" on a secondary market[305]. All in all, according to the Author the facts of the case cannot be fitted under the category of abusive refusal to deal because "strictly speaking there is no refusal"[306].

Along the same lines, Colomo upholds that according to a consistent line of case law, a refusal to give access to an input or platform is not abusive unless it can be shown, *inter alia*, that access to the input (or platform[307]) controlled by the integrated firm is indispensable for

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[303] A refusal to deal constitute an abuse only in "exceptional circumstances". The legal conditions established by the Court in *Bronner* are the following: the access to the infrastructure is indispensable to carry out an economic activity in downstream markets; the infrastructure to which access is requested cannot be duplicated by competitors; access is denied or granted but under unfair or discriminatory conditions; the refusal has no economic or technical justification (such as the non-divisibility of the infrastructure). See European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit.*, para 81. On the legal conditions see, *ex multis*, N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 4-5.

[304] See P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* p. 313.

[305] *Ibid.*, pp. 317-323. The case law clarifies that only in "exceptional circumstances" an exercise of an exclusive right (such as IP rights) can qualify as an abusive refusal to supply; therefore, a further condition apply in case of refusal to access intangible property protected by IP rights: refusal prevents the emergence of a new product for which there is a potential consumer demand; the refusal is unjustified. Case T-201/04, *Microsoft v Commission*, *cit.*, paras 229, 332, 563.

[306] P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* p. 355.

[307] While the Author has not deepened the question of what input is relevant in the *Google Shopping* case, he focuses on the rationale behind the essential facility doctrine. Akman also recalls that some commentators suggested to conceive Google Search as an indispensable distribution tool to which competing specialist search engines and websites should have access. However, "the same commentators also remark that such evidence will be particularly difficult to produce, and requires concrete empirical analysis. Moreover, the theory of the search engine being a natural monopoly and providing an indispensable output without substitutes is directly challenged by the existence of competitors of Google providing search engines such as Bing, Yahoo!, DuckDuckGo, and some local competitors such as Yandex, etc." See P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* p. 316; I. Lianos and E. Motchenkova (2013), *Market Dominance and Search Quality in the Search Engine Market*, 9 J. COMPETITION L. & ECON. 419 (2013), p.434; and L. Mays (2015), *The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe*, *The George Washington law review* 83(2), pp. 721-760, p. 751.

competition on a neighbouring market. The Author also reminds that, as clarified in *IMS Health,* a product is not indispensable merely because it is superior to an alternative, but if lacking it competing on the neighbouring market would be "impossible" or "unreasonably difficult".[308]

In this regards, also Graef acknowledges that while Google search results are an important gateway to reach users, "it would have been hard for the Commission to claim that there were no alternatives at all – considering that the existence of less advantageous alternatives do not render an input indispensable"; thus, "even if the Commission had decided to analyse the *Google Shopping* case as a refusal to deal, it is unclear whether these high standards set out in *Bronner* would have been applicable"; in the end, indeed, according to the Author, the inapplicability of the indispensability requirement is what distinguishes self-preferencing (as established in *Google Shopping*) from refusal to deal cases such as *Bronner*[309].

Therefore, one could argue that there is a general consensus in the literature about the inapplicability of the "Bronner criteria" to the facts of the case, since also the Commission has reiterated that it disregarded these doctrines.

However, the very rationale used by the Court in refusal to deal cases is the basis for the strongest criticisms to the Commission's decision and self-preferencing as a new form of abuse. Several scholars argued, indeed, that the logic behind such rigid requirements is that the Court wanted to set a high threshold for imposing a duty such as that of a duty to deal - which implies requesting the dominant firm to share a competitive advantage with rivals thereby limiting its freedom to dispose of its property and choose its trading partners – which not only falls outside the scope of antitrust law but that can also be detrimental for the market by lowering firms' incentive to invest and innovate[310]. In other words, being aware of the negative policy implications of limiting an undertaking's freedom to contract, "[t]he Bronner

[308] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 7-8. See also P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping*, *Journal of European Competition Law & Practice*, Volume 10, Issue 9, November 2019, pp. 532–551. Colomo - differently from Akman – however, does not take the net position that Google's conduct should have not be deemed abusive. See paragraph 3.1.3 below. On the meaning of "indispensable input" see European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit.*, para 83 and Case C-418/01, *IMS Health, cit.*, para 28. On the topic see also N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 6-7 and N. Petit (2015), *Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf*, *Competition Law & Policy Debate* 1 CLPD, 29 April.

[309] I. Graef (2019), *Differentiated Treatment*, *cit.*, pp. 475-6. Other commentators strongly rejected the applicability of the essential facility doctrine in the context on online search; See R. Bork, G. Sidak (2012), *What does the Chicago school*, *cit.*; M. Lao (2013), *Search, essential facilities and the antitrust duty to deal*, *Northwestern Journal of Technology and Intellectual Property* 11, pp. 275-319.

[310] See European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit.*, para 75.

criteria [and mainly indispensability] reflect an attempt to balance conflicting interests, and to identify circumstances where the risks of intervention are outweighed by likely benefits"[311].

The extensive literature on self-preferencing, indeed, has placed great attention on refusal to deal to point out that a duty of equal treatment (which derives from the ban to self-favour) does not exist in the EU regime and should be considered as a last resort (or *extrema ratio*) remedy only in exceptional circumstances that the case law has identified by requesting the high threshold of indispensability when imposing the similar burdensome duty to deal with an entity that was not chosen by the dominant firm as a business partner. Lowering the established threshold would cause a set of negative implications. A loose enforcement of self-preferencing could be detrimental for the market well-functioning because neutralizing a dominant firm's competitive advantage - by requesting the dominant firm to share it with rivals - can have a negative impact on firms' incentive to invest and innovate[312].

Differently from a regulatory type of intervention, antitrust law aims at preserving the competitive process which is made possible by the very fact that firms seek to gain that competitive edge over rivals and to enjoy the related benefits. Imposing a general principle of non-discrimination or requesting a firm to share a competitive advantage that it has acquired on the merits is not only contrary to the objective of the competition law regime which is that of protecting the ability of firms to compete effectively, but it is also likely to have a negative impact on the incentive to innovate. Accordingly, the current competition law system justifies the imposition on a dominant firm of the duty to share a competitive advantage, only when it is not (at least completely) acquired on the merits, as it is, for instance, the result of public intervention, such as for instance, the award of exclusive rights or regulatory powers due to

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[311] N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, p. 35.

[312] Many authors support such objections. See, for instance, I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 480. According to Colomo: "[s]ome firms may be discouraged to gain an edge over rivals, if a court or a competition authority then orders these advantages to be shared in the name of a level playing field. Other firms, in turn, may fail to invest and innovate in the expectation that the competition law system will allow them to benefit from rivals' efforts". P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 8. See also B. Vesterdorf (2015), *Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin*, *Competition Law & Policy Debate*, Volume 1, Issue 1, February, p.4-9. In 2015, writing while the investigation was pending, the Author, the former president of the General Court, sustained that imposing a new non-discrimination (or abusive self-preferencing) theory requesting firms how to design their products beyond the case law on refusal to deal and the essential facility doctrine would have unexpected adverse effects on firms. Also Jones *et al*. criticize the Commission's decision for the narrow and formalistic interpretation of the "Bronner criteria" underlying how such criteria "reflect an attempt to balance conflicting interests and to identify circumstances where the risks of intervention are outweighed by likely benefits". A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 532. In explaining their concerns, many authors refer to the Opinion of Advocate General Jacos in *Bronner* where the negative implications in the long run of an unduly interventionist approach were extensively covered. Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others*, ECLI: EU:C:1998:264.

the government action[313]. Outstepping such boundaries, will weaken dynamic competition, and therefore harm consumer welfare, as a result of lower quality of products and services[314]. Such an intervention could thus result in protecting competitors, more than competition and precisely disadvantage consumers due to chilling innovation and competition[315].

Moreover, imposing a proactive intrusive remedy (such as a change in the business model or product design) is a very delicate exercise, capable of altering dynamic competition and investment incentive in ways that are difficult to anticipate, especially considering that they fall out of the scope of intervention for which antitrust authority (or courts) are equipped[316].

Another set of objections made to the Commission's approach deals with the close connection established between the antitrust remedy and the antitrust theory of liability and which served the purpose of detaching the facts of the case from refusal to deal types of abuse. Indeed, the Commission upholds that in the case at hand there was no actual refusal and most importantly, the remedy did not entail a duty to deal, as the Commission only imposes a principle (namely the equal treatment) leaving Google free to choose how to implement it. It follows that given the nature of the remedy the Bronner criteria do not apply.

While some commentators agree with such a connection between the remedy and the finding of an abuse[317], many others argue that such approach is inherently flawed first of all, because such an interpretation requires to "put the horse before the cart" requesting the Commission to decide upon preferred remedies before identifying the legal test" and therefore even before reaching a conclusion on whether an abuse has been committed[318]. Such a "procedural" interpretation of the Bronner criteria will ultimately generate confusion about the necessary legal standard to establish abuse of dominance in the face of alleged refusals to deal[319]. Moreover, it presumes a clear distinction between "proactive" remedies (triggering the "Bronner criteria") and mere prohibitive ones (excluding those criteria), while as Google

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[313] See P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 9.

[314] See I. Kokkoris (2018), *The Google Saga, cit*., p. 466 and R. Bork and G. Sidak (2012), What Does the Chicago School, *cit.*

[315] P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 304-305 and R. Bork and G. Sidak (2012), What Does the Chicago School, *cit*.

[316] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 29. On this point see also below paragraph 3.3.

[317] According to Colomo, this approach represents a "sensible aspect of the case-law" see P. Ibáñez Colomo, (2019), *Legal Tests in EU Competition Law: Taxonomy and Operation*, *Journal of European Competition Law & Practice*, Volume 10, Issue 7, September 2019, pp. 424–438, https://doi.org/10.1093/jeclap/lpz045; see also P. Ibáñez Colomo (2019), *Indispensability and Abuse, cit.,* p. 4.

[318] A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 532.

[319] N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, p.32-35. Differently from Colomo, the Author strongly sustain that the nature of the remedy to be administered should be considered as separate issues from the legal test applicable to ascertain the abusive nature of the conduct and should not influence the latter exercise. On this basis, the Author criticizes the contention made by the Commission that applicability of the so called "Bronner criteria" is determined by the nature of the remedy to be imposed, rather than the characteristics of the underlying breach.

Shopping well illustrates, such a distinction is often blurred in practice[320]. In this respect, many commentators noted that - despite the "light" formal framing of the remedy - the duty imposed by the Commission "tends to gravitate towards an essential facility-like non-discriminatory access requirement"[321]. Finally, such an interpretation is deemed to be contrary to the law: the remedial freedom attributed to the Commission by the law which sets out - subject to effectiveness and proportionality principles - the Commission discretion to design either behavioural or structural remedies in antitrust cases, is best proof of the absence of a strict nexus between the remedy and the theory of liability in antitrust cases[322].

3.1.2 Discrimination and tying

Akman and other scholars also articulated in detail the reasons why the facts of the case cannot support a finding of discrimination (letter c) of Article 102[323] (also known as secondary line injury), nor that of tying following under letter d) of Article 102. With regards to the former, the main arguments relate to the concepts of "other trading parties". Indeed, it was pointed out that there is no trading-party relationship between the dominant undertaking (Google) and the relevant parties (comparison shopping websites), which is a necessary requirement for the application of Article 102 (c) TFEU, as well as the absence of "other" in that since Google Shopping can be qualified as a sort of subsidiary of Google, it cannot be seen as "other" in light of the single economic unit theory[324].

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[320] A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 532.

[321] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe: tying and the single monopoly profit theorem in two-sided markets*, *European Journal of Law and Economics* 47, p. 23. Also, Jones *et al.* point out that claiming that "the Commission is not imposing compulsory obligations that are at least broadly equivalent to a mandatory duty to deal is disingenuous at best". A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 32.

[322] N. Petit (2015), *Theories of Self-Preferencing, cit.,* p. 10. Reference is made to Article 7 of Regulation 1/2003. Dunne also underlines that such an interpretation of the law is consistent with the case law: "the Court of Justice in *Bronner* did not distinguish, in application of the 'exceptional circumstances' test, between the substantive legal standard necessary to establish breach of Article 102 TFEU and the remedial powers that follow from such a finding. N. See Dunne (2019), *Dispensing with Indispensability*, *cit.*, p. 32.

[323] Article 102 TFEU, letter c) prohibits abuses consisting in "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

[324] P. Akman (2016), *The Theory of Abuse in Google Search, cit.* The Author sustains that "[g]iven that Article 102(c)TFEU explicitly requires discrimination to put 'other trading parties' at a 'competitive disadvantage' as a result of applying dissimilar conditions to equivalent transactions 'with other trading parties,' it appears difficult to argue that the prohibition can be applied to discrimination between one's self and others." Moreover, "[…] Google Search is two-sided business, but it is not a three-sided business. The argument put forward is that the websites that would like to appear in Google's search results are not trading partners of Google because Google seeks to attract users, not websites. […] This explains why a German court noted that (specialist) websites which appear in search results "free ride" on Google's search engine services and seek (and receive) free promotion on their sites by Google" (pp. 329-330). The Author adds that "Google's (and other search engine's) web crawlers index the millions of websites on the Internet does not create a 'business contact' that could be interpreted as a trading relationship between Google (or other search engine operators) and the potentially infinite number of websites on the Internet" (p. 331). The Author also articulated why in the case at hand, it is not possible to identify a competitive disadvantage, nor the application of dissimilar conditions to equivalent transaction (not

The obstacle of a technical tying type of abuse[325] concerns the fact that there are not separate products/services in the case at hand and the alleged tying product (Google Search) is available – under certain circumstances - without the tied product (Google Shopping). While it can be argued that two separate products do exist in the case at hand, the Author factually points out that there are instances in which – for given search queries - generic results are provided without added features such as Google Shopping results[326].

3.1.3 Google's conduct does not constitute an abuse even according to the general principles of Article 102 TFEU

Akman concludes her thorough analysis by investigating whether the facts of the case could nevertheless be found abusive under what she called a "normative assessment", i.e. the general principles of abuse under Article 102 TFEU (or in the Author's words "the conceptualization of abuse adopted for this normative assessment"[327]). This is because how the conduct is categorised is legally irrelevant since the list of practices in Article 102 have a mere illustrative nature and it is not necessary for a given conduct to fall within one of the listed categories of conduct to be found abusive. Moreover, the concept of "abuse" covers practices not yet found abusive in a case, including novel practices (due to the non-exhaustive nature of the provision) and there is no rule of precedent in EU law; it is therefore possible for the EU Commission and for the EU Courts not to apply any of the existing case law to the

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least because the vertical integration of the firm such as Google makes the transaction non-equivalent) (pp. 332-336), as well as on the relevance of a downstream/upstream market and vertical integration (pp. 336-343).
Also Graef (whose arguments are better provided under paragraph 3.2 below) argues that "[o]ne reason why the Commission did not rely on these precedents in Google Shopping may be the fact that the provision is not the most suitable to address cases of self-preferencing. Article 102 (c) TFEU was designed to deal with pure secondary line differentiation, and transactions with a dominant undertaking's downstream business are difficult to regard as equivalent to a transaction with a third party". See I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 474. Along the same line Höppner points out that: "The EC was right not to base its finding of abuse on discrimination within the meaning of Article 102(2)(c) TFEU. In general, even dominant companies are entitled to grant privileges to services of subsidiaries." See T. Höppner (2017), *Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse*, European Competition and Regulatory Law Review (CoRe) Issue 3/2017, pp. 208-221, https://ssrn.com/abstract=3040605, p.4.

[325] According to the Commission Guidelines on Art. 102 TFUE "[t]echnical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors). Given the absence of a contractual relationship between the users of Google Search and Google, "contractual tying" must be ruled out. European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 48.

[326] For instance, even for the search of a products, the display of the Google Shopping Commercial Unit, only happens when there are, according to the algorithm's relevance criteria, relevant Google Shopping results to be displayed. P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 349-352.

[327] The Author relies here on the conceptualization of abuse that she has previously developed, see P. Akman (2012), *The concept of abuse in EU Competition Law: law and economics approaches*, Hart Publishing (developing the concept particularly in chapter 8).

facts involved in Google Search and even to change the parameters of the existing case law concerning their application[328].

While the premises of this exercise are to take into great account when discussing the *Google Shopping* decision as well as self-preferencing more in general in the context of this work, the conceptualization of abuse made by the Author seems to contrast with the conceptualization provided under paragraph 1.1 above and that informs the present analysis. In particular, the present work relies on a theoretical distinction between, on the one hand, exploitative conducts (such as those referred to under letters a) and c) of Article 102), and exclusionary and anticompetitive conducts (such as those referred to under letters b) and d) of Article 102) on the other: while the latter are subject to the two-prong test (see above), exploitative abuses follow another "test" aimed at detecting unfair and discriminatory practices and which does not entail assessing the exclusionary nature of the conduct. Therefore, the conceptualization made by the Author cannot be shared as it considers i) exploitation of customers/suppliers, ii) "exclusion of competition from competitors at least as efficient as the dominant undertaking that constitutes an harm to competition" and iii) lack of an increase in efficiency as the three cumulative requirements to establish an abuse under Article 102 TFEU[329].

That said, assuming that the second requirement identified by the Author corresponds to the theoretical framework of exclusionary and anticompetitive abuse adopted in the present work, the Author suggests that Google did not exclude competitors in that they lost "essentially a form of free promotion by Google", rather than traffic, and that the conduct did not cause in any case anticompetitive foreclosure because "even if some competitors may have been harmed, competition is unlikely to have been harmed because of the numerous options still available to users wishing to search for and purchase items online and the numerous websites still receiving free traffic from Google Search"[330]. Moreover, when discussing what she considers to be the third element (and which according for the framework adopted here is part of the assessment of the anticompetitive nature of the conduct or the objective justification that can be proved by the firm under scrutiny), it is said that "the move from the ten-blue-links to Universal Search by Google and its competitors is considered to be an improvement in the provision of the search engine service which increased the efficiency of the service to

[328] P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 306-307. On the non-exhaustive list of what amounts to abusive behavior see also R. Whish and D. Bailey (2018), *Competition Law*, *cit.*, p. 198.

[329] *Ibid.*, p. 363. It is not clear why the Author mixes the exclusionary nature of the practice with the harm (or restriction) of competition where she states that "[t]he second condition of abuse is that the exploitative conduct should also harm or restrict competition which can be phrased as it being 'exclusionary.'" (p. 358). According to the theoretical framework at the basis of this work, "exclusion" of competitors in the broader sense explained above under para. 1.1 and anticompetitive effects are two requirements that must be established in order to qualify a conduct as an exclusionary (and anticompetitive) abuse.

[330] *Ibid.*, pp. 363-364.

users by improving quality through innovation (i.e. dynamic efficiencies)", as believed by the FTC, and which represents "an important intermediate step towards the ultimate goal of providing information directly", also representing a further improvement in the search engine service[331].

That said with regards to the reasons why Google's conduct should not have been deemed abusive, the following paragraphs provides an overview of different interpretations of the Commission's findings and potential alternative theories of harm, as well as on self-preferencing as a distinct legal category.

3.2 Google's conduct is exclusionary and anticompetitive according to the general test – a pure effects analysis

As clearly pointed out also by Akman (see above paragraph 3.1.3), the Commission has no duty to classify the abuse into one of the existing categories given the mere illustrative and non-exhaustive nature of the conducts listed under Article 102 and the absence of rule of precedent in EU system. The Commission is thus free to detach from existing case law or to change the parameters of the existing case law – making the question of how the conduct is categorised legally irrelevant – and to ascertain the abusive nature of practices not yet found abusive in a case, including novel practices, according to the general principles of "abuse". Based on such considerations, the decision has been defended on the basis of a pure effects analysis according to the general principles of Article 102 TFEU.

According to Amelio *et al*., indeed, "ready-made abuse categories might not fit new and quickly changing markets. Still, the *Google Shopping* case demonstrates that the antitrust framework of Article 102 of the TFEU can accommodate a foreclosure theory of harm based on the well-established and understood notion of leveraging. The Decision relies on detailed and comprehensive economic evidence which underpins such a foreclosure theory: the evidence on the search habits of users; the visibility and traffic data trends; the correlation of click through rates and ranks; and the critique of Google's ablation experiment."[332] According to the Authors the Commission's decision presented several and strong pieces of empirical evidence demonstrating Google's potential to foreclose competitors while causing an harm for the market. In particular, the decision clearly shows i) that the introduction of specific algorithm (in particular the "Panda") led to the demotions of competitors' ranking; ii) the short-term and long-term traffic decrease suffered by comparison shopping services due to the

[331] P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* p. 364.
[332] A. Amelio *et. al*. (2018), *Recent Developments at DG Competition, cit.,* p. 664.

systematic demotions; iii) the causal effect between the more prominent placement of the Google Shopping Unit and the decrease of traffic for rivals; iv) the increase in traffic experienced by the initially unsuccessful Google's service (originally named Froogle)[333].

Also Höppner supports the finding of abusive self-preferencing in *Google Shopping* based on an effects analysis made in accordance with the long established criteria to assess a leveraging abuse carried out on a different but related market and with the more economic approach to Article 102[334]. The Commission rightly disregarded Google's counterargument to consider the behaviour in accordance with the case law (including that on refusal to deal and thus the indispensability requirement as part of the legal test) given the fact that the Commission was not addressing an abusive discrimination nor a potential or actual refusal to deal. According to the Author "Google's conduct involves some elements of established types of abuse, in particular of tying, discrimination and a refusal to supply. However, squeezing Google's novel conduct into one of these categories is equivalent 'to trying to fit a square peg in a round hole'"[335].

3.2.1 The shortcomings of not addressing the novelty of self-preferencing

While somehow agreeing with the facts that the Commission was not obliged to place the abuse into one existing categories, many authors nevertheless criticize the Commission's decision to confront with its novelty[336]. By choosing to present the case as an already established theory of harm and as an essentially abstract form of abuse by relying to a pure effect analysis the Commission ended up raising a number of conceptual and practical issues[337]. First, by adopting "the principle-based approach" the Commission falls short of

[333] *Ibid.*, p. 663-664. See *Decision*, para 343. Also, at para 490 the decision reported that "before the start of the Conduct, in October 2007, Google's comparison shopping service had been unsuccessful in gaining traffic. By the beginning of 2007, it was losing traffic at a pace of 21% year on year while Google's general search service was gaining 23% of traffic year on year". The decision also contained the evidence that Google's executives were aware of the fact the Froogle was not successful; a Google's executive wrote in an email on 27 February 2007 that "Froogle simply doesn't work".

[334] T. Höppner (2017), *Duty to Treat Downstream Rivals Equally, cit.* In particular, according to the Author, the Commission rightly based its finding of Google's abuse on the monopoly leveraging concept. In accordance with the established case law on classic leveraging strategies, indeed, i) Google's change of conduct on the upstream market (Google Search) made no economic sense but for exclusion of downstream competition, ii) it caused degradation of general search quality through the exclusion of most relevant results from downstream competitors, iii) the shift from equal-treatment to self-promotion can be explained only by Google's objective to gain market share on the downstream markets (comparison shopping services) in order to increase total profits because of a higher profit margin in the market for comparison shopping services, and iv) equally efficient downstream competitors could not counter change of conduct on the primary market (see pp. 7-11).

[335] T. Höppner (2017), *Duty to Treat Downstream Rivals Equally, cit.,* p. 4.

[336] According to Jones *et al.* "perhaps the primary objection to the decision […] is how it refuses to engage with its own novelty". A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 533.

[337] Those concerns do not worry Höppner according to whom the application of the established principles and criteria of abuse to a novel type of conduct does not have major negative implications. The effects analysis led to

addressing important questions about the interpretation of the relevant precedents, and precisely to provide guidance on the applicable legal test, especially considering the proactive remedy imposed on Google which is generally imposed provided that the indispensability threshold is met. In this regard, Colomo points out that while formally the Commission requested to stop the abuse and merely imposed a principle of equal treatment, without imposing a particular way to implement it, the remedy package was indeed very complex and far-reaching and thus very similar to the positive obligations introduced in cases like *Commercial Solvents*, *Magill* and *Microsoft I* and *II*[338] (see paragraph 3.1.1 above). Therefore, by failing to recognize any novelty in the abuse established in Google Shopping as well as to reconcile the abuse with more traditional forms and theory of harms, the Commission blurred the line between different practices (and precisely between exclusionary and discriminatory concepts abuse) to the detriment of legal certainty[339] (on this topic see also paragraph 3.4 below).

Second, the Commission failed to indicate a threshold to establish when "a reduction in the competitors' ability to compete become serious enough to be anticompetitive"; moreover, on a more practical level, pure effects analysis fails to provide a much need guidance to help distinguish when self-preferencing can be anticompetitive[340].

Finally, on a different note, it was noted the high standards set by the decision in terms of voluminous calculations and graphic evidence in support of the case and which require time and substantial resources make it very difficult to replicate such types of findings at the national level[341].

Sharing these concerns, several scholars and commentators have therefore made the exercise of trying to lead the facts of the case back to the case law and the established theories of harm and applicable legal tests.

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identify a new "sub-type of abusive monopoly leveraging akin, but distinct from, the well-established other sub-types, namely tying, margin squeezes and (some) refusals to deal" See T. Höppner (2017), *Duty to Treat Downstream Rivals Equally, cit.,* p. 5.

[338] P. Ibáñez Colomo (2019), *Indispensability and Abuse, cit.,* pp. 31-32.

[339] See A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, p. 532. See also P. Ibáñez Colomo (2020), *Self-Preferencing, cit.*

[340] P. Caro de Sousa (2020), *What Shall We Do About Self-Preferencing?*, *cit*., p. 4-5.

[341] C. Bergqvist (2020), *Discrimination and Self-Favoring in the Digital Economy*, 4 February, https://ssrn.com/abstract=3531688 or http://dx.doi.org/10.2139/ssrn.3531688, pp. 7, 16.

3.3 Alternative theories of harm: bringing self-preferencing back on track

3.3.1 Google's conduct could have been qualified as constructive refusal to deal or unlawful discrimination

According to Graef, indeed, the Commission could have saved itself the trouble of establishing self-preferencing as an independent form of abuse, by analyzing *Google Shopping* as a so-called constructive refusal to deal or margin squeeze[342]. As a constructive refusal to deal occurs when, rather than an absolute refusal to supply, the dominant undertaking unduly delays or otherwise degrades the supply of the product or imposes unreasonable conditions in return for the supply[343], the Author upholds that Google's behavior could be qualified as such in that "the conditions under which rival comparison shopping services get access to the search results make Google's conduct allegedly anticompetitive"[344]. As the legal test for constructive refusal does not entail a rigid need to establish the indispensability of the input, such an approach would also have saved the Commission from demonstrating the absolute indispensability of Google Search and its results[345].

Also Colomo suggests that Google's behaviour could be seen as a constructive refusal to feature rival services in its search engine. However, the Authors stresses that since Google undertook an active conduct to demote rivals, the *Google Shopping* case shares more similarities with those precedents (such as like *Commercial Solvents* and *CBEM-Télémarketing*) involving the termination of a course of dealing (which is also an active behavior) and which require the Authority imposing a proactive remedy rather than precedents like *Slovak Telekom* which instead dealt with the imposition of unfair trading conditions which were understood as a constructive means to deny access to Slovak Telekom's infrastructure[346]. The difference is a substantial one, according to the Author, as

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[342] I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 477. More in general, in her paper, Graef suggests a sophisticated distinction between i) pure self-preferencing, ii) pure secondary line differentiation and iii) hybrid differentiation, pointing out that the main area where EU competition law currently does not offer effective protection is in the most far-reaching situation where a business is blocked from a platform without legitimate justification, and suggesting that, in order to address the harm in such cases, a stronger role should be attributed to economic dependence both within and outside EU competition law, possible measures building upon the Platform-to-Business (P2B) Regulation, as well as the notion of fairness of platform-to-business relations.

[343] European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 79.

[344] I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 477.

[345] *Ibid*.

[346] P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.*. The proactive remedies include, according to the Author, structural separation and positive obligations that amount to regulating the actual conditions of access. Reference is made to Joined cases 6 and 7-73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation, cit.*; Case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, ECLI:EU:C:1985:394; Case T-851/14, *Slovak Telekom, a.s. v European Commission*, ECLI:EU:T:2018:929, and

while in the former precedents dealing with the termination of existing relationship the indispensability was part of the legal test, it was absent in *Slovak Telekom* where the refusal took the form of unreasonable conditions for the access[347]; the Commission, however, failed to mention such case law and the reasoning based on which it decided to detach from the case law of refusal to deal in its variants[348].

Similarly, Dunne suggests interpreting self-preferencing as a form of constructive refusal to deal where the inapplicability of the Bronner criteria, and precisely of the indispensability condition, is rooted and justified in the fact that given the "rule-setting function" performed by digital platforms[349], they have a "overarching duty" – when dominant – to ensure that "competition on their platforms is fair, unbiased and pro-users". If limited to these situations, the limited scope of application of the rule against self-preferencing would somehow justify the abandonment of the indispensability requirement which typically serves as a threshold to avoid unduly restraining firms' freedom and thereby stifling the incentives to innovate. The duty of equal treatment would thus be confined as platform-specific and a manifestation of that "special responsibility" that is linked not only to the undertaking's position as a dominant undertaking, but also to its "gatekeeper" role within the wider digital ecosystem[350].

The reference to constructive refusal to deal – which may be considered as including a mix of exclusionary and discriminatory elements – paves the way to the overview of other theories of harm based on unlawful discrimination. Some authors indeed point out that a claim of "favouring" and a remedy based on "equal treatment" implies discrimination[351]. Among them,

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Case C-165/19 P *Slovak Telekom, a.s. v Commission*, pending. In *Slovak Telekom* the conditions were such as withholding the necessary information to gain effective access to the infrastructure and unjustifiably reducing the scope of its obligations under sector-specific regulation.

[347] According to Colomo and other scholars, even though indispensability was not expressly mentioned as an element of the legal test in *Commercial Solvents* it is undisputed that indispensability is an element of the legal test in the event of a termination. P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.,* pp. 23-24. Along the same lines, J. Faull and A. Nikpay (2013), *The EU Law of Competition*, 3rd Edition, Oxford University Press, p. 469 (explaining that there was no express reference to indispensability in *Commercial Solvents* but that the input was arguably indispensable on the facts); R. O'Donoghue and J. Padilla Jorge (2013), *The Law and Economics of Article 102 TFEU*, 2nd Edition, Hart Publishing, pp. 575-576 (showing that there is a common set of principles across the case law); and R. Whish and Da. Bailey (2018), *Competition Law*, cit., pp. 717-723 (interpreting *Commercial Solvents* in light of *Bronner* and thus as requiring indispensability). Instead, in *Google Shopping* the Commission followed the "grey area" of *Slovak Telekom* - strongly criticized by Colomo - in the context of which the abusive nature of a refusal to deal does not depend on a finding of indispensability. Dunne also criticizes the approach followed by the Court in *Slovak Telekom*. See N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 21 -23.

[348] P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.,* p. 23-24.

[349] Reference is made to the terms used by the Advisers to the European Commission in the Crémer Report.

[350] N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 23-25. As seen above, on a more general level, the Author also argues that the abonnement of the indispensability requirement in constructive refusal to deals, such as those at issues in in *Slovak Telekom* should not be endorsed.

[351] See R. Subiotto *et al.* (2018), *The Application of Article 102 TFEU*, *cit*., p. 478. Also Höppner *et al.* seem adopting this approach. See T. Höppner, F. Schaper and P. Westerhoff (2018), *Google Search (Shopping) as a*

Petit writing in 2015 pending the investigation, suggested that, despite its little application in the case law, Article 102 (c) could serve as "a straightforward legal basis for a theory of abusive self-preferencing"[352].

More recently, Bergqvist reads the case adopting a discrimination-based theory of harm and precisely a form of horizontal discrimination, while pointing out that the Commission missed a useful opportunity to provide clarity on some of the ambiguities that surround discriminatory abuses[353].

Intervening in the appeal brought forward by Google also the German Government and VDZ suggest that the as Google already provided competing comparison shopping services access to its general results pages, the case does not involve a problem of access to a service but rather a problem of discrimination in the provision of that service. Should the facts of the case be placed in the context of *Bronner*, "the situation would be akin to one whereby the distribution network in question had agree to deliver competing newspapers, but it did so later than its own newspapers"[354].

Approaches to self-preferencing based on discrimination, however, were not exempt from criticism. As search algorithms are by definition means to discriminate, rank and choose results, "discrimination" is somehow inherent to their proper functioning[355]. In addition, as traditionally interpreted the provision of Article 102 (c) has involved fairness considerations towards competitors more than consideration on leveraging of market power and exclusionary and welfare-reducing effects and may thus wrongly lead to focus on perceived "unfairness" towards smaller platforms rather than anticompetitive foreclosure[356]. Discrimination-based approaches to search pages may also lead antitrust authorities implementing a quasi-regulatory approach to self-preferencing discrimination by digital platforms[357].

Precedent for Disintermediation in Other Sectors – The Example of Google for Jobs, *Journal of European Competition Law & Practice,* 2018, Vol. 9, No. 10, pp. 629-630, 638.

[352] N. Petit (2015), *Theories of Self-Preferencing, cit.,* p. 3. According to the Author, also Article 102 (a) about unfair trading conditions could serve as a basis for abusive self-preferencing theory (see pp. 6-7).

[353] C. Bergqvist (2020), *Discrimination and Self-Favoring*, *cit*., p. 15.

[354] GCEU, Report for the Hearing, Case T-612/17, *Google and Alphabet v Commission*, February 2020, case pending, paras 336, 341. For Google's counterargument see paragraph 3.1.1 above.

[355] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*., pp. 20-21. See also P. Caro de Sousa (2020), *What Shall We Do About Self-Preferencing?*, *cit*., p. 7.

[356] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*., pp. 20-21.

[357] According to Caro de Sousa such concerns are similar to those flowing from the creation of a general duty not to engage in self-preferencing. P. Caro de Sousa (2020), *What Shall We Do About Self-Preferencing?*, *cit*., p. 7. Bergqvist argues that the case implements a rule akin to Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services. C. Bergqvist (2020), *Discrimination and Self-Favoring*, *cit*.

3.3.2 Google's conduct could have been qualified as an exclusionary abuse such as margin squeeze or tying

Moreover, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (the so-called margin squeeze[358]). As the facts of Google Shopping share some similarities with that of margin squeeze – not least the fact that this type of conduct is typical of vertically integrated firms, Graef argues that also margin squeeze could have been the theory of harm underlying the case, by giving a more prominent role to the "conditions of access" other than price which in the contest of digital markets is a less important parameter of competition (a sort of "margin squeeze 2.0")[359]. Also by reconducting the case to a margin squeeze type of abuse, the Commission would have escaped the "Bronner criteria", as the Court of Justice has recognized in *TeliaSonera* that margin squeeze constitutes "an independent form of abuse distinct from that of refusal to supply"[360]. By doing so, the ECJ has also acknowledged that should any conduct of a dominant undertaking in relation to its terms of trade meet the conditions of a refusal to supply to be regarded as abusive, the effectiveness of Article 102 TFEU would be unduly reduced[361].

According to Graef, a similar reasoning should apply to situations of self-preferencing, in that should self-preferencing be found abusive only when the dominant firm is under a duty to deal, the scope for competition interventions would be overly limited. Indeed, the strict interpretation of the indispensability requirement in Bronner would have likely prevented the Commission from taking action in *Google Shopping*[362].

Also Bostoen suggests that margin squeeze can serve as the analytical tool and theory of abuse capable to "fit" abusive practices by online multi-sided platforms. While the Author itself recognizes the difficulties of applying the margin squeeze test to the facts of the case, it suggests that the test under such a theory of harm should be whether a dominant platform could offer its own product and effectively compete for end-users if it has to pay the price that it charges as-efficient-rivals for prominence; in other words, the question to be ask would be

[358] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 80.
[359] In the Author's words "[b]y engaging in self-preferencing, a vertically integrated platform can squeeze out downstream rivals through the imposition of conditions that do not allow them to compete viably". See I. Graef (2019), *Differentiated Treatment*, *cit.*, pp. 477-478. On the contrary, according to Nazzini there was no space for margin squeeze in the Google Shopping case since "there is neither an upstream nor a downstream price, so there can be no margin squeeze". See R. Nazzini (2015), *Google and the (Ever-stretching) Boundaries*, *cit.*
[360] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 56.
[361] *Ibid*., para. 58.
[362] I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 478.

articulated as follows: "would Google Shopping be profitable if it had to pay Google Search to be listed in its current position, i.e. on top of the search results?"[363].

As for tying, it has been argued that Google is able to induce selection of its tied good (i.e. shopping services) merely by granting it visual prominence in its general search pages. This theory is supported by Iacobucci and Ducci according to whom Google's strategy of linking its proprietary vertical (or specialized) search platforms to its horizontal (or general) search platform through visual prominence, constitutes an "unconventional" form of tying. According to them, the facts of the case fulfill the legal conditions elaborated over the years by the case law on tying, and precisely, the dominance on the tying product market (general search), the existence of two different products, lack of consumer choice/coercion (even if the form of inducement given by the visual prominence to the tied good, given that discount are not available in the zero price side of the platform) and anticompetitive foreclosure (in the form of a reduction of innovation, lower quality of search and reduced consumer access to relevant service). Moreover, being a two-sided platforms Google had strong reasons to do so and mainly attract additional advertisers on its vertical search platforms that without a tie may have choose to advertise on competing websites. Embracing a tying theory of harm has also another major benefit of imposing a clear remedy (i.e. stop tying) rather than requiring regulated access[364].

3.3.3 Google's conduct and the manipulation of information as an antitrust infringement

Colangelo and Maggiolino stress another aspect of Google's conduct, namely the fact that the dominant firm abused its dominant market position by manipulating information[365]. Indeed, while overall the issue of manipulation of information as an antitrust infringement has – at least so far – not prevailed in the jurisprudence and academic debate, there are specific hypotheses in which behaviors amounting to the distortion of information were deemed to be abusive (because exclusionary and anticompetitive). One of these is the case of a company which would reproduce on a wider scale in the market a situation traditionally connected to the discipline of unfair competition, namely the denigration of the competitor, i.e. behavior

[363] F. Bostoen (2018), *Online Platforms and Vertical Integration*, cit., p. 19.

[364] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*. The Authors also point out that from an economic perspective, the two-sided nature of both horizontal and vertical search provides compelling reasons why foreclosure of competition may be profitable, and why the single monopoly profit theorem may fail in this context. See also N. Petit (2015), *Theories of Self-Preferencing, cit.,* pp. 5-7. According to Petit abusive self-preferring can also be based on "tying law" and Article 102 (d), pointing out that in the case-law "tying cases often feature the formulation of antitrust duties of non-preference" (see p. 5).

[365] M. Colangelo and M. Maggiolino (2018), *Manipulation of Information, cit*.

associated with both exclusionary effects and distortions in consumer welfare worthy of being pursued through antitrust law.

In this context, the Authors observe that traditionally Google Search allows users who enter a search query to retrieve information on the internet, to obtain at least three types of answers: sponsored, general and specialized results, all of which are cross-references to other websites. However, while the sponsored pages, which were correctly identified as a form of advertising, refer to web pages of individuals who paid for such pages to appear among the links connected to certain searches, the generic and specialized results, also referred to as "organic" results, were not labelled as sponsored and appeared to be "independently" (or quasi-independently) ranked. Generic results are usually called "blue links" and are accompanied by short snippets, selected according to the rules of the algorithm used by Google's search engine[366]. It was precisely against this background that the Commission held that Google Search engaged in exclusionary and anti-competitive conduct in that it increased the costs that its competitors had to pay in order to access a channel that Google Search required to display comparison sites, thereby increasing the difficulty of contesting the dominant position of Google Search in the market for price comparison search engines.

In particular, according to the Authors, the Commission has placed great attention on the fact that Google pursued this objective through a fraudulent conduct, by penalizing its competitors through a degradation of the ways and the order in which their pages were displayed to users. Google Search, indeed, only allowed Google Shopping to benefit from the graphics that attracted users' attention, while other price comparison websites were not given access to such features and were displayed to users in form of less appealing common traditional blue links[367], while being downgraded in the order of appearance visible to end users through the PANDA algorithms. This was done by Google without making consumers somehow aware of such a process and different set of rules applicable to Google Shopping and its comparison (for instance by recurring to the difference between organic and sponsored results). The Authors argue that "[a]s a matter of fact, some crucial elements emphasized by the

[366] The distinction between generic and specialized results depends on the categories of the algorithms that Google uses. Whereas generic algorithms search the web for general responses to return to the users and are therefore designed to categorize pages with any possible relevant content, specialized algorithms are optimized to specifically identify the most relevant results for a particular type of information, such as news, local business activities or product information. In this sense, Google Shopping is a specialized service which compares the prices of goods offered online and reviews the products offered by third-party websites which pay Google a fee to be featured among the result provided by the comparison shopping service. See M. Colangelo and M. Maggiolino (2019), *Manipulation of information*, *cit.*, pp. 10-11.

[367] *Decision*, paras 371 and 397.

Commission were the lack of transparency by Google about the positioning process and resulting user behaviour"[368].

Google instead transmitted the altered information to the end-user who would have used it precisely because of their prior reliance on that information. Moreover, the company's choice to lower the quality of its search engine product by showing consumers results that are less reliable without an appropriate disclosure as to the distortion of information presented constitutes a strategically rational strategy, difficult – if not impossible – to justify recurring to other argument rather than the advantages resulting from foreclosing competitors.

In addition, the Authors underline that by manipulating information, Google's conduct contributed to shape the demand, thereby impacting the cognitive profile of consumers' choices. This was possible because "search engines enjoy a high degree of credibility vis-à-vis the public, rooted in the belief that all unsponsored results are objective, independent and reasonably truthful. In addition, compared to a commodity such as 'search engine results', an individual's ability to discern between sound and poor information is limited or, at least, related to experience, which is why search engines benefit from a certain degree of trustworthiness. For these reasons Google Search's behaviour betrayed the faith of consumers by deceiving or not adequately informing consumers about the different measures employed"[369].

As deployed in the context of data economy, Google's conduct did not concern one specific piece of information that turned out to be false or deceptive, but a systematic and continuous manipulation of a way of producing all information[370].

To prove the leading role that the falsification of truth played in the assessment of the infringement is suffice to consider that had Google not manipulated its algorithm in an anticompetitive way, the search engine's results would have not been artificially organized to favor Google's properties; in other words, no antitrust infringement would have occurred if Google Shopping results had naturally appeared at the top of the Google Search page, as antitrust law does not persecute market positions achieved on the merit. However, the Commission proved that Google Shopping could not ascribe the preference received from

[368] M. Colangelo and M. Maggiolino (2019), *Manipulation of information*, *cit.*, p. 12.

[369] *Ibid.*, p. 18. Reference is expressly made to *Decision*, para 598 ("users tend to consider that search results that are ranked highly in generic search results on Google's general search results pages are the most relevant for their queries and click on them irrespective of whether other results would be more relevant for their queries") and para. 599 ("Google did not inform users that the Product Universal [of Google Shopping] was positioned and displayed in its general search results pages using different underlying mechanisms than those used to rank generic search results").

[370] M. Colangelo and M. Maggiolino (2019), *Manipulation of information*, *cit.*, p. 18-19.

consumers, and thus its increase in market share, to any sort of business strength, since consumers had made their own decisions based - precisely - on misleading information.

While referring also to other antitrust cases involving some sort of manipulation of information[371], the Authors outline a theory of harm that can apply to any firm which as a result of fraudulent and/or manipulative conduct reduces the quality and/or accuracy of information generated and, consequently, consumer welfare. A manipulative conduct can amount to an antitrust infringement if i) the information affected by the conduct (like search engine results) can be conceived of as a good in and of itself; ii) the information generating activity is recognized as "economic" for the purposes of antitrust law, iii) the market for such informational goods can be readily identified; and iv) it is acknowledged that the health of the market in question can be evaluated by looking to the welfare of the consumer of such informational goods[372].

3.4 Self-preferencing as a legal category potentially captures a too diverse range of practices

Finally, according to Colomo, one of the biggest issues with self-preferencing is that since there are many different mechanisms through which firms can favour their own services or products, self-preferencing captures a too diverse range of practices that differ in important respects from one another. According to the Author, almost all of the recent antitrust cases involving Big Tech can be qualified as self-preferencing, even where other types of abuses have actually been established. *Google Shopping* is the most obvious case, but also *Google Android* and the recent investigations opened by the Commission against *Apple* and *Amazon* involves practices whereby the dominant firm has favoured its own activities[373]. Indeed, the different mechanisms whereby a dominant (vertically integrated) firm can favour its own affiliates while discriminating against third parties encompass a wide range of conducts,

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[371] The other cases analyzed are *AstraZeneca* (Case C-457/10 P, *AstraZeneca v. Commission*, ECLI:EU:C:2012:770;), *Hoffman-La Roche* pursued by the Italian Competition Authority (see Decision of the Italian Antitrust Authority of 27 February 2014 no. 24823 case I760 - *Roche-Novartis/Farmaci Avastin e Lucentis*; TAR Lazio, Judgment of 2 December 2014, no. 12168; Consiglio di Stato, Judgment of 11 March, 2016, no. 966; Case C-179/16, *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:25) and the *Euribor* and *Libor* cases (European Commission, case AT.39914 – Euro Interest Rate Derivatives, decision of 4 December 2013 and case AT.39861, Yen Interest Rate Derivatives, decision of 4 December 2013).

[372] M. Colangelo and M. Maggiolino (2019), *Manipulation of information*, *cit.*, p. 19.

[373] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 3. European Commission, Case AT.40099 *Google Android*, decision of 18 July 2018; case 40437 Apple - App Store Practices (music streaming) and case 40652 Apple – App Store Practices (e-books/audiobooks), both ongoing; and European Commission (2019), *Antitrust: EC opens formal investigation against Amazon*, press release IP/19/4291, Brussels, 16 July. See chapter 3, paragraph 3.1. for an overview of these cases.

including refusal to supply its input, granting access at less advantageous terms and conditions, tying and bundling (either technical or through contractual mechanisms)[374].

Given the inherent diversity of self-preferencing conducts and the lack of meaningful criteria to narrow down the practices that should fall within new category[375], self-preferencing as an autonomous legal category is nor useful or sound – and indeed misleading and inherently flawed, because it overlaps, partially or totally, with several existing legal categories (and precisely tying and refusal to deal)[376].

Conceived as an autonomous category, it would end up applying to conducts that vary widely and that, for the same reason, are subject to legal tests that are also different: "self-preferencing, as an overarching, catch-all, concept, blurs the line between practices and raises questions about the appropriate legal test"[377]. According to the Author, in fact, there is no added value in introducing a new category where there is already a well-established body of case law (and different legal tests elaborated therein) applying to the very same conduct. Moreover, as there is no clear and distinct legal test applicable to self-preferencing, the new category inevitably leads to legal uncertainty, which not only constitutes a fundamental principle of the legal system, but it is also of great importance to incentivize firms to innovate[378].

Most importantly, as anticipated under paragraph 3.1.1 above the Author warns that self-preferencing as a label may lead to the abandonment of the case law without an appropriate examination of the logic underpinning it and without evaluating the negative consequences of departing from it[379]. The new category may in fact be used to circumvent the indispensability

[374] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 16-17.

[375] The Author suggests classifying self-preferencing cases along three variables, namely i) vertical *vs* horizontal integration of the two products or markets concerned, ii) the degree of favouritism, i.e. when rather than an outright refusal to deal there is some interaction with the rivals into adjacent markets and iii) the intervention that the cases demands. With regard to the latter criterion, he distinguishes cases demanding a cease and desist one off order, integrating a negative obligation and cases demanding proactive remedy imposing a positive obligation on the firm, either of behavioural or structural nature (the former including a change in the business model and the design of its products). However, none of these are meaningful ways to better define what practices should fall under the new category of self-preferencing. According to the Author the second criterion (i.e. the degree of favouritism) seems to be the direction taken by the Commission; however, there is no reason explaining while this should be crucial; moreover, this will lead to the paradoxical outcome of applying to the most extreme form of self-preferencing (i.e. refusal to deal) the most demanding legal test (including the indispensability requirement). See P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 17-25.

[376] *Ibid.* Also Caro de Sousa points out that: "Given that competition law is loath to impose a generic duty not to favor one's own products in the digital sphere, the main challenge concerns the identification of limiting principles that can provide guidance as to when self-preferencing is anticompetitive. The difficulties of such an exercise are apparent in the reactions to the Google Shopping decision by the European Commission". See P. Caro de Sousa (2020), *What Shall We Do About Self-Preferencing?*, *cit*., p.1.

[377] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 20.

[378] *Ibid.* At the same time, according to the Author, it would not be appropriate applying the same legal test (used for self-preferencing) to diverse conducts.

[379] *Ibid.*, p. 26.

requirement which was set up by the Court for a specific reason, namely to establish a high threshold when imposing a proactive remedies to refusal to deal type of abuse, imposing a positive obligation such as requesting the firm to transfer an asset or enter an agreement with entities to whom it has not chosen to contract, change its business model or the design of its products[380]; on the contrary, there is no need for such a requirement in "traditional" tying (or even margin squeeze) cases that generally demand a passive remedy imposing a merely negative obligation on the firm (i.e. a one-off cease and desist order)[381].

As a consequence, an extremely intrusive non-discrimination duty (which implies a proactive intervention changing the business model and/or the product design to accommodate - or even subsidise – rivals) can be imposed on the dominant firm, despite the absence of any truly exceptional circumstances to justify and filter such an intrusion against the firms' freedom to select their counterparts and freely dispose of their products and inputs[382].

As proactive remedies may damage dynamic competition, indispensability serves as a fundamental filter to avoid that antitrust authority do what they are not mandated nor well equipped to do, i.e. regulating the conducts beyond the sort of intervention of competition law. Indeed, abandoning the indispensability requirements leads to negative consequences, including more proactive intervention, less consistency and predictability in the enforcement and the application of a blurred legal test which may be instrumentally and discretionary used by the different stakeholders[383].

Even beyond the indispensability requirement, there is essentially a shared fear that new terminology could be used as a means to avoid the rigid liability conditions established in the legal framework and case law with regard to established categories of abuse without no justifying reason to do so, while at the same time lacking to provide a sound and reliable legal test[384].

Similarly, Dunne argues that the derogation from the Bronner criteria (and namely the indispensability requirement) in *Google Shopping* (as in *Slovak Telekom*) was led by the Commission's "desire to make its own life easier" at the cost of denying the very arguments it

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[380] The Author recalls the findings and principles established by the ECJ in *Van den Bergh Foods*. Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities*, ECLI:EU:T:2003:281.

[381] P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.*. See above chapter 2, paragraph 3.3.1 on the criteria to distinguish between different remedies.

[382] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 7-8, 27 and following.

[383] *Ibid.*, pp. 30-32.

[384] See for instance the opinions expressed by G. Gürkaynak in the context of the 2nd Webinar of the "4th Innovation Economics Conference" organized by Concurrences on 24 June 2020 (the transcript is available at https://www.concurrences.com/en/conferences/4th-innovation-economics-conference-for-antitrust-lawyers-2-self-preference-the).

has laid down in the Guidelines concerning the need to limit the anticompetitive nature of an otherwise legitimate right of freely dispose of its property.

Finally, as opposed to the Advisers' proposal referred to above, Colomo also sustainss the importance of an analysis of the effects, especially given the fact that self-preferencing is a manifestation of competition on the merit, i.e. inseparable from the procompetitive benefits deriving from vertical (or horizontal) integration of different activities under a common ownership, which is often the result of the innovation and investments that firms have sustained in the primary market[385]. Therefore, prosecting self-preferencing means contesting vertical integration and indeed, taken to its extreme, can lead to advocate – in the "hipster way" - the structural separation of the different activities in the value chain[386].

[385] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 9-10.

[386] The Author refers in particular to L. Khan (2019), *The Separation of Platforms and Commerce*, 119 Columbia Law Review 973.

CHAPTER 3

DEFINING THE BOUNDARIES OF ABUSIVE SELF-PREFERENCING

1. Self-preferencing as a stand-alone abuse

As seen in chapter 2, scholars have expressed different opinions about self-preferencing and the approach adopted by the Commission to assess and qualify the conduct at hand in the *Google Shopping* case. In the present chapter an effort will be made to argue that self-preferencing as an autonomous legal category can prove useful to tackle abuses taking place in the context of the digital economy. In order to do so, a clear definition of what self-preferencing is, its boundaries and the reasons why it detaches from the "branded conducts" so far identified in the practice and case law are preliminarily necessary, also to safeguard legal certainty in sight of its future application in unilateral conduct cases.

In other words, based on the literature described in chapter 2, the main challenge with regards to the establishment of self-preferencing as an autonomous category of abuse concerns the identification of limiting principles that can distinguish a self-preferencing type of conduct from other categories of abuse, as well as to provide clear guidance as to the legal test whereby self-preferencing can be deemed to be exclusionary and anticompetitive.

At the basis of the present exercise are the following considerations which lead to argue in favour of the establishment of self-preferencing as an autonomous theory of harm and form of abuse. First of all, as highlighted by many, antitrust law has developed over the years following a "substance-over-form principle"[387]. A conduct (and especially a non-pricing one) can be deemed to be abusive regardless of its legal categorization into any of the predefined forms of abuses and theories of harm, as long as the application of the two-prong general test shows that it is capable of excluding competitors and reducing consumer welfare (see chapter 2, paragraphs 3.13 and 3.2).

Moreover, it is a well-established principle of EU competition law that an abuse of dominance can take place regardless of the market(s) in which the dominance, the abuse and the effects take place. Namely, the fact that the adverse effects take place in a distinct market than the dominant one does not preclude the application of Article 102 TFEU. And, indeed, this is typical element when dealing "leveraging abuses", i.e. conducts whereby a dominant firms tries to leverage on the market power acquired in one market (the dominated or origin one) to influence the functioning of a separate and typically neighbouring one (whether adjacent or

[387] See for instance G. Bruzzone, M. Boccaccio (2009), *Identifying Infringements of Competition Rules: The Role of Economic and Legal Thinking*, In: Adriano Raffaelli (edited by), *Antitrust tra Diritto Nazionale e Diritto dei Consumatori*.

upstream/downstream) either to limit threat of entry from adjacent to primary market (defensive leveraging) or to extract a bigger rent by foreclose downstream rival to enhance upstream leverage or reinforce single-homing on one side, to extract surplus from other side (see chapter 1)[388]. This holds true with regards to established categories of, such as tying[389], refusal to supply[390], (price and non-price) discrimination[391], margin squeeze[392], and it is here believed for new types of abuse sharing that same leveraging structure, such as self-preferencing.

However, it is also believed that the implications stemming from the establishment of abusive self-preferencing as an autonomous abuse should be carefully taken into account, especially given the frequency self-preferencing types of conducts are – and probably will be – observed on digital markets. In particular, the concerns pointed out by Colomo about conceiving self-preferencing as a legal category (see chapter 2, paragraph 3.4) must be carefully taken into account in order to avoid coming up with "a new category" that ends up capturing a too diverse range of practices and thus ultimately blurring the lines among legal tests with negative consequences on legal certainty and firms' incentives to invest and innovate.

Therefore, the present paragraph will try to address some of the negative implications pointed out by the scholars to argue that those implications are actually less of an issue that it has been so far reported.

In this context, reflecting on the reasons why self-preferencing should detach from the logic and principles governing other forms of abuse, and mainly refusal to deal, is of utmost importance in order to identify clear boundaries for the new form of abuse and replying to the valuable arguments that self-preferencing as a legal category – and as pursued by the Commission in the *Google Shopping* case – may be instrumentally used to escape the indispensability requirement and hence the "filter" identified by the case law to limit the instances where firms are imposed positive obligations (such as a duty to deal, or – it is said –

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[388] See chapter 1. See also the opinions expressed by G. Federico in the context of the 2nd Webinar of the "4th Innovation Economics Conference" organized by Concurrences on 24 June 2020 (the transcript is available at https://www.concurrences.com/en/conferences/4th-innovation-economics-conference-for-antitrust-lawyers-2-self-preference-the).

[389] See for instance the cases *Microsoft* (tying) and *Tetra Pak II*; Case T-167/08, *Microsoft v European Commission*, ECLI:EU:T:2012:323 and Case C-333/94 P, *Tetra Pak International SA v Commission* [1996], ECLI:EU:C:1996:436.

[390] See for instance the cases *Commercial Solvents* and *Bronner*; Joined cases 6 and 7-73, *Istituto Chemioterapico Italiano, cit*., and Case C-7/97, *Oscar BronnerGmbH, cit.*

[391] See for instance the cases *Deutsche Bahn* and *GT Link*. Case T-229/94, *Deutsche Bahn AG v Commission of the European Communities*, ECLI:EU:T:1997:155; Case C-242/95, *GT-Link A/S v De Danske Statsbaner (DSB)*, ECLI:EU:C:1997:376.

[392] For instance, see cases *Deutsche Telekom* and *TeliaSonera*. Case C-280/08 P, *Deutsche Telekom AG v European Commission*, ECLI:EU:C:2010:603 and Case C-52/09, *Konkurrensverket v TeliaSonera, cit.*

a duty to treat competitors equally) capable of generating the aforementioned set of negative implications[393].

1.1 Why the alternative theories of harm do not fit

In this regard, it can be argued, in the first place, that the theories of harm suggested in the literature to bring self-preferencing "back on track", and precisely tying, margin squeeze, and discrimination, do not seem to capture the specific features of self-preferencing types of conduct (such as that at stake in *Google Shopping* and in more general terms described as envelopment – taking place in the form of self-preferencing – in chapter 1) and in any case require an uneasy and inconvenient adaptation to a different reality. For instance, while Google's conduct could be "read" as a form of "tying 2.0" – as brilliantly pointed out by Iacobucci and Ducci – conceiving self-preferencing as a form of tying would require interpreting coercion (typically a necessary condition to establish abusive tying) as the inducement given by the visual prominence to the tied good (Google Shopping in our example) by means of the tying good (Google Search)[394]. While such a reconstruction is conceptually sound and has the merit of avoiding imposing a regulated access to any input as a remedy (according to the Authors the remedy would simple be stop tying, or in other words, stop self-preferencing and consequently there is no need to justify it based on the indispensability of the input) it seems nevertheless a "curvy" road to take. In particular, this reconstruction does not fit into a contractual tying hypothesis as no contracts were in place in the *Google Shopping* case and hardly fits the technical tying scenario given the fact that the dominant firm did not use incompatibility as part of its strategy[395]. Therefore, it is difficult to see how qualifying the conduct as a tying can be more convenient and any less complicated than interpreting self-preferencing as a new form of abuse, especially given the fact that establishing the proposed form of "unconventional tying" does not seem less burdensome than clearly identifying self-preferencing as a stand-alone form of abuse. This is turn will probably generate critics related to legal certainty of the conduct and the legal test, while it can be argued that such an approach would be particularly difficult to replicate at the national level.

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[393] As seen in chapter 2, those negative implications range from stifling incentives to innovate and compete, requesting competition authorities to do what they are not equipped to do (i.e. regulate the market), imposing an equally levelled playing field contrary to the very goal of competition law and etc.

[394] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*. On this topic see also chapter 2, paragraph 3.3.2.

[395] Incompatibility was at the heart of the Microsoft (tying) case which represents a key precedent for technical tying (Case T-167/08, *Microsoft v European Commission*, *cit.*).

The above holds true for margin squeeze as well, with the additional problem that – by its very nature – margin squeeze identifies pricing conducts and adapting it to fit the non-pricing self-preference type of conducts of digital platforms would make it even more difficult. Also in this case, indeed, the exercise requires identifying a very unconventional form of margin squeeze where the exclusion of competitors in the downstream market is not due to the price charged by the dominant firm at the wholesale level, but depends instead on the "conditions of access" or – to put in another way – on the capability of the service provided by the dominant firm on the downstream market to survive, should the same treatment it applied to its competitors would apply to its own service[396]. In addition, more complicated issues would arise with regards to the applicability of the economic test elaborated by the Commission and validated by the Courts to detect whether the excluded competitors are as efficient as the dominant firm, as otherwise the conduct would be deemed to constitute a legitimate expression of competition on the merits. While the test's benchmark relies on the costs of an equally efficient competitor (as indicated by the LRAIC of the downstream division of the integrated dominant undertaking[397]) the absence of a price charged by the dominant firm would make the test inapplicable to non-pricing conducts, thus paving the way to objections on the applicable legal test. Therefore, also in this case coming up with self-preferencing as new category may seem not less convenient than reinventing margin squeeze completely[398].

Moreover, it seems quite peculiar that discrimination has been often invoked as a way out to the strict liability conditions of refusal to deal, especially given the fact that also discrimination – as laid down in letter c) of Article 102 TFEU – also mandates the existence of three cumulative conditions which in cases alike *Google Shopping* are difficult to apply given primarily the absence of "other trading parties"[399]. In light of the textual requirements provided by letter c), even considering such provision as a general prohibition on discrimination, it has been traditionally interpreted as being limited to discrimination directed at other undertakings, primarily secondary line injury cases focused on discrimination among downstream customers of a non-vertically integrated dominant undertaking[400].

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[396] See respectively, I. Graef (2019), *Differentiated Treatment*, *cit.* and F. Bostoen (2018), *Online Platforms and Vertical Integration*, *cit.* On this topic see also chapter 2, paragraph 3.3.2.

[397] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 80.

[398] Bostoen elaborated on the difficulties of applying the margin squeeze test to other type of conducts. See F. Bostoen (2018), *Online Platforms and Vertical Integration*, *cit.*

[399] This is because there is not business relationship in place between Google and competing comparison shopping services and because Google is not discriminating between different trading parties but between itself and others. See P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 329-330 and T. Höppner, Thomas (2017), *Duty to Treat Downstream Rivals Equally, cit.,* p.4. On this topic see also chapter 2, paragraph 3.1.2

[400] See, among others, A. Jones *et al.* (2019), *EU Competition Law*, *cit.*, pp. 550-559; E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*., p. 20; I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 474.

Other problems with discrimination concern the meaning of "competitive disadvantage" in the context of horizontal search rankings given that by definition algorithms are mechanisms aimed at distinguishing (or discriminating) results[401], but most importantly Article 102 (c) does not involve issues of leveraging market power which is the core of the *Google Shopping* case. And indeed, while the Commission's statement according to which leveraging constitutes "a well-established, independent, form of abuse" has been strongly criticized in that leveraging constitutes a broad strategy rather than a "form of abuse", nobody has so far claimed that it wasn't a leveraging case[402], which in fact it is precisely the case. In this sense, one could argue that the main problem with discrimination is that since it mainly pivots around considerations of fairness towards competitors, it is not well suited to deal with strategies entailing leveraging of market power and potentially causing the marginalization of competitors and welfare reduction[403].

Similarly, resorting to a theory of harm based on the manipulation of information as an antitrust abuse can prove challenging given the "manipulation" of results inherent by their very definition in the activity of search ranking tools and the fact that this road is only viable if it is proved that consumers do somehow rely on such information. This latter aspect entails – as seen – to establish that the platform has come to enjoy a high degree of credibility to its public (at least on the user side) which it then "betrayed" due to the lack of transparency linked to its very functioning mechanisms. This is reflected in the theory of harm envisaged of this type of conducts which requires among other, than the information affected by the conduct (like search engine results) can be conceived of as a good in and of itself and that the health of the market in question can be evaluated by looking to the welfare of the consumer of such informational goods.

While in principle those theories are all very accurate and certainly plausible and have the merit to highlight certain aspects related to the peculiar features of self-preferencing behaviours carried out by digital platforms they seem to fit not perfectly well the very features

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[401] Recently, the Court of Justice provided more clarity the on the meaning of "competitive disadvantage" under Article 102(c) TFEU in *MEO*. In that judgement the Court also made clear that Article 102(c) TFEU cannot be read as a general anti-discrimination rule. Furthermore, in line with *Post Danmark I* and *Intel*, the Court of Justice in MEO provides a clear distinction – clearer than previously in the Article 102(c) case law – between harm to competitors and harm to competition, reminding that not every exclusionary effect is necessarily detrimental to competition. In this context, the Court clarified that it is necessary to assess whether the trading partners that are possibly foreclosed are efficient competitors, i.e., whether they are important for the competitive process on the downstream market and for customers further downstream. Case C-525/16, *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, ECLI:EU:C:2018:270. See on this topic R. Horvath, L. Peeperkorn, and E. Rousseva (2020), *The Preliminary Ruling in MEO: Closing the Circle of Article 102 TFEU*, *Journal of European Competition Law & Practice*, Vol. 11, No. 1–2.

[402] *Decision*, para 649.

[403] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*., pp. 20-21.

of the conducts under scrutiny and require a certain "adaptation" effort, as a sort of plan B. Such aspect will be further discussed below in paragraph 3.2.2 in light of the analysis of the cases used to test the consideration provided therein.

In light of the above, it is believed that in order to "elevate" self-preferencing as a stand-alone conduct in light of its peculiar features and thus requiring its own test, the major defining efforts concerns the differences with refusal to deal in all its forms. This is because not only constructive refusal to deal seems the closest category to self-preferencing, at least for what concerns the material conduct,[404] but also because it is not unfounded the concern of those who argue that lowering the threshold of indispensability can have devastating consequences, in particular because antitrust authorities would be more frequently authorize to impose proactive remedies (such as the equal treatment in *Google Shopping*) capable of distorting firms' incentives to invest and innovate, while difficult and expensive to monitor[405].

In this context, the reality surrounding the actual implementation of the remedy by Google is not of help: Google did change the design of its products (Universal Search and Shopping Units) – therefore demonstrating the extremely intrusive nature of the remedy, comparable to a duty to deal – but in a way that leads competitors totally unsatisfied. As mentioned in chapter 2 (paragraph 2.4), indeed, it is argued that the competitive pay-for-placement auction set up by Google has raised the cost of being featured on top of the search results (i.e. in the Shopping Units); moreover, Google always wins either because its own service Google Comparison Shopping wins the auction or because rival comparison shopping services win the auction and Google receives a remuneration for that win[406]. Moreover, the fact that

[404] According to Dunne "self-preferencing resembles refusal to deal insofar as it implies that suppliers of rival products which interact with the dominant firm's platform are entitled to a degree of equal treatment when compared with competing products provided by the dominant firm itself". N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, p. 24.

[405] On this aspect see also OECD (2020), *Abuse of dominance in digital markets*, www.oecd.org/competition/globalforum/abuse-of-dominance-in-digital-markets.htm, p. 53 where it is argued that "[self-preferencing] theories of harm bear some similarities to refusal to deal theories of harm (since they relate to an important input). In particular, a firm may use leveraging to de facto foreclose competitors, rather than explicitly doing so and triggering a refusal to deal case. For example, a firm may take advantage of consumer behavioural biases, such as default bias, or a tendency to select more visible options, in order to foreclose competitors."

[406] See F. Bostoen (2018), *Online Platforms and Vertical Integration*, *cit.*, p. 20. Geradin also points out that "the remedy offered by Google in response to the Commission's Shopping decision seems to do little to address the concerns expressed by the vertical search engines competing with Google. Thus, the approach of the Commission to essentially leave it to Google to offer a remedy responding to the finding of infringement was not successful" and that "the adoption of behavioral remedies raises a variety of issues when applied to platforms operating intermediation services not only in terms of design, but also with respect to implementation and monitoring. This is why, although they are often depicted as extreme, structural remedies may present advantages, especially when, as noted above, these platforms not only control access to their own products and services, but also to third-parties' product and services". D. Geradin (2018), *What Should EU Competition Policy, cit.*, p. 7.

Google doesn't seem to have particular problems with the remedy suggests that the remedy didn't actually cause much discomfort to the platform[407].

In this respect, while one may argue about the need to maintain a strict separation between the issues of antitrust liability on the one hand, and the remedy to be administered on the other[408], there is no denying that the duty imposed seems "to gravitate towards an essential facility-like non-discriminatory access requirement"[409], despite the "light" form in which the remedy was shaped (a mere principle of equal treatment, leaving the firm free to choose how to implement it, as the Commission put it). It is therefore essential to explain why self-preferencing can detach from the case law on refusal to deal and the indispensability requirement and why such a detachment isn't dangerous for innovation and investments. Before doing so, considering *Google Shopping* as the key precedent, an attempt will be made to identify a narrow definition of self-preferencing.

2. Self-preferencing: a narrow definition

The attempt to identify a narrow definition of self-preferencing should in the first place refer to the *Google Shopping* case where the Commission has *de facto* established self-preferencing as a new form of abuse. Contrary to what Colomo suggests – namely that all recent cases concerning Big Tech can be seen as cases of self-preferencing (see chapter 2, paragraph 3.4 and *infra*) – it is here believed that self-preferencing as identified in *Google Shopping* has unique characteristics that distinguishes the conduct at hand from other practices involving Big Tech, such as, for instance, the *Google Android* case where in fact the Commission relied on a different theory of harm, namely tying (see *infra*).

The fact that the Commission has focused on establishing the effects of the conduct (precisely the anticompetitive foreclosure) and that it did not rely on any established category of abuse, indeed, are strong pieces of evidence suggesting that the Commission wanted to identify the conduct as a new form abuse, rather than categorize it according to predefined theories of harm. In this regard, it is possible to assume that being very aware of the fact that its decision would have undergone further scrutiny from the Courts, it is likely to believe that the Commission itself would have preferred to rely on a traditional theory of harm and its related

[407] See T. Graf, H. Mostyn (2020), *Do We Need to Regulate Equal, cit.* The Authors argue that the "criticism raised by some complainants against the equal treatment remedy in Google Shopping […] does not indicate deficiencies of the remedy [..]" (p.1). While expressing their own views, the Authors work at Cleary Gottlieb Steen and Hamilton LLP and represent Alphabet Inc. and Google LLC in the Shopping case.

[408] See chapter 2, paragraph 3.1.1.

[409] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*., p. 23.

legal test, and would have found relief in securely anchor its assessment on the basis of well-established case law, but it could not do so since the conduct was atypical and unprecedent.
And indeed, the mere finding of an abuse based on its effects according to the general two-prong test was deemed to be "unusual" and has been strongly criticized[410], imagine if the Commission had expressly established a new and unprecedented abuse detaching from traditional analysis. The Commission, instead, did recognize the novelty of self-preferencing ultimately refraining from using a new label to classify the conduct, which indeed, at a closer look was not necessary, and it's more likely a Court's or a scholarly activity, if anything.
The way the Commission has framed the abuse, by paying great attention to the anticompetitive effects through the analysis of traffic diversion, consumer behaviour and exclusionary effects on the markets affected, not only delivered a "modern" competitive assessment[411], but also placed under the spotlight and targeted one of the most recurrent and serious leveraging practices in digital markets, thus contributing to the "adjustment" and "advancing" of traditional competition law and analysis in the new economy.
The Commission, however, could have done a more thoughtful weighting of the words used to make such an exercise, and precisely avoiding to name leveraging as a "well-established, independent, form of abuse". While considering self-preferencing as a leveraging abuse, is certainly correct, it is common ground that leveraging is more a strategy than a form (or category) of abuse and it is a much wider box capable of including many different forms of abuses, whether "branded" or not (see chapter 2 paragraph 3).
That being said, a narrow definition of self-preferencing is already present in point of fact in the *Google Shopping* decision where the material conduct identified in the case distinguishes itself because of its two-fold nature resulting from the combination of two different elements.
Those elements are i) the preferential treatment given by Google to its comparison shopping service achieved by prominently displaying the results generated by Google Shopping with a rich format in the Shopping Unit and ii) the actual demotion of competing services; the demotion in turn was achieved in two different ways: a) not only competitors could appear only in the generic search results, given that the very design of Universal Search allowed the

[410] Bergqvist points out that: "[…] further, for completeness it should be noted how art. 102 covers, in principle, all forms of behaviors detrimental to competition and the functioning of the market. Thus, linking a problematic behavior to a specific and predefined abuse standard is not required, making it possible to develop new abusive standards. However, it still remains somewhat unusual for the Commission to advance a decision, not to mention doling out the biggest fine ever, without having a basket of cases upon which to rely in support of why the demonstrated behavior clearly infringes art. 102 and generally accepted commercial practice." C. Bergqvist (2020), *Discrimination and Self-Favoring*, *cit*., p. 149. On a more general note, it has been argued that competition authorities tend to be conservative institutions, which means they prefer to rely on tested theories of harm. See D. Geradin (2020), *Competition law and digital gatekeepers, cit.*
[411] C. Koenig (2019), *Form, effects, or both? - The more economic approach and the European Commission's decision in Google Search*, *European Law Review*, 44(5), p. 693.

prominent display in the Shopping Unit only of the results generated by Google Shopping itself; b) they were also subject to adjustment algorithms systematically preventing them from reaching the first page of the generic search results (or even the first few results pages)[412].

Therefore, identifying self-preferencing as the practice of an (integrated) undertaking favouring its own products or services over those competing products/services offered by other (typically non-integrated) firms[413] is not completely correct as it is just a partial definition lacking one crucial point, namely the fact that the preferential treatment to one's own products (point i) above) would not be sufficient to the finding of an abusive conduct without the presence of an active behaviour aimed at damaging competitors, which in the case at hand was the conduct referred to under point ii), and precisely the active demotion of competitors, and which does not take the shape of a "traditional" conduct (or any "branded practice") but it implies using atypical and unprecedent schemes to actively damaging competitors, as the *Amazon* case discussed below will also show.

The main self-preferencing feature indeed is the combination of a preferential treatment with an active and somehow "unconventional" behaviour "against" competitors. Should that second conduct, and precisely the active demotion of competitors through adjustment mechanisms, be absent in *Google Shopping*, the case would have probably not existed, or it would have been framed in a completely different way.

Recognizing that is of utmost importance since differently from refusal to deal where the active conduct of the dominant firm is actually the exercise of a fundamental right granted by the legal system (that of freely determine its course of business, including if and at what conditions establish business partnerships), in self-preferencing the active conduct does not entail only the favouring of the dominant firm's products or services, but – and most importantly for the purpose of this reasoning – it entails a behaviour that is far from being a manifestation of any sort of right, as it instead constitutes a deliberate act against competitors with the sole aim of placing them at a competitive disadvantage.

At this point one could argue that gaining advantages over competitors is the essence of the competitive game and the very manifestation of a healthy competition on the market. However, in the case at hand it is evident that Google's alteration of its search algorithms – and consequently the lowering of the quality of the search results – was not rational but for

[412] In this respect see also GCEU, Report for the Hearing, Case T-612/17, *Google and Alphabet v Commission*, cit., para 340 (at p. 90).

[413] This is the most recurrent notion of self-preferencing used in the literature on the topic. See for instance P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 2, and J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 7.

the exclusion of its rivals on the downstream market[414]. In other words, Google did not possibly have any interest in worsening its search algorithms which is at the very basis of its success in the field of search engine and which led Google to obtain and enjoy a dominant position in that market. If anything, that could be perceived as dangerous for the very success of Google Search engine. Evidently, the reason which led Google deteriorating the quality of its precious search algorithms was the benefits it envisaged in foreclosing competitors from the market of comparison shopping services, which when the conduct started was in the very early stage of its development as the first comparison services were created[415].

It follows from the above, that while extreme caution is needed when ascertaining the abusive nature of a refusal to deal, that same extreme caution is less of a necessity when dealing with positive conducts which not only are not the exercise of any right, but amount to clear-cut – and otherwise irrational – behaviours against competitors. And indeed, it appears evident from the analysis provided above of the facts of the *Google Shopping* case (see chapter 2) that Google could not possibly have any interest in deteriorating the quality of its search algorithms – which are the very basis of Google's success as a search engine – even irrespective of users' reliance on the truthfulness of the results it provides[416]. In other words, as the demotion of competitors entails necessarily an alteration of the algorithms which would thus fail to provide the most pertinent and relevant result to the usher's query (precisely because they were altered to consider criteria different from the best results for the user query, i.e. demoting competitors), it would have not be rational for Google to intentionally downgrading the quality of users' search, if not for if not for the advantages resulting from foreclosing competitors.

Against this background, "self-preferencing" constitutes somehow a misleading expression as it only focuses on the first and "less serious" element of the conduct, and perhaps a different term could help capturing the element which instead represents the actual disvalue of the conduct.

It should also be noted that self-preferencing can take many different forms with regard to the actual active conduct aiming at damaging competitors, as well as the actual mechanisms whereby the conduct is implemented (in *Google Shopping* that was integrated by the demotion of competitors and the technical means was the application of adjustment

[414] See M. Colangelo and M. Maggiolino (2018), *Manipulation of Information*, *cit.*

[415] Because of these reasons, Google's conduct constitutes an anticompetitive strategy.

[416] As seen in chapter 2 (paragraph 3.3.3), according to Colangelo and Maggiolino, Google's conduct constitutes a strategy given that fact that "betraying" consumers' reliance on Google's search results (and their truthfulness) was irrational for Google, if not for the advantages resulting from foreclosing competitors (and thus constituting an anticompetitive strategy). M. Colangelo and M. Maggiolino (2019), *Manipulation of information*, *cit.*

mechanism, such as the Panda), as well as the actual prominent placement or display of the dominant firm's services (the Shopping Unit placed in rich format at the top of the first results page is just one example). However, a line should be drawn between actual self-preferencing practices and other abusive conducts that while entailing some sort of favouring of the dominant firm's product or service, do not qualify as actual self-preferencing.

And indeed, it is true – as pointed out by Colomo – that every case regarding Big Tech, and also perhaps any antitrust case under Article 102 TFEU in general, entails a conduct whereby a dominant firm favours itself at the expenses of rivals (that is for instance the case of tying, discounts and rebates, exclusivity clauses and so on); however, not every Big Tech case nor any 102 case involves "pure" self-preferencing (as defined above).

Arguing the opposite and thus claiming that self-preferencing is just a new label for old traditional conducts aimed at bypassing the case law[417] is quite dangerous, other than incorrect, as denying the existence of self-preferencing as a stand-alone conduct risks relegating antitrust law in the past without being able to effectively capture the evolution of firms' envelopment strategies aimed at leveraging their market power in digital markets, with the sole exception of tying which – in fact – is the other form in which envelopment can typically take place[418].

In this regard, the Author also claims that the *Google Android* case represents an example of self-preferencing and can be included in the "past and ongoing investigations against Big Tech firms [that] are variations on the theme of self-preferencing"[419] in support of the argument denying self-preference as an autonomous form of abuse.

However, there is no need to invoke self-preferencing – at least as narrowly defined above – in the context of the *Android* case[420], which although it implied some sort of self-favouring by the dominant firm, it was not a "pure self-preferencing case" given that the conduct carried out by Google involved the imposition of restrictions on mobile device manufacturers (so called OEMs) and mobile network operators.

More in details, the investigation focused on three contractual agreements, namely i) tying of Chrome (browser app) and Google Search (respectively Google's browser and search app)

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[417] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 2). In particular, according to the Author not only the recent cases involving Big Tech, including *Android*, as well as the ongoing investigations concerning Amazon and Apple (see *infra*), but also "[…] conduct that would now be labelled as self-preferencing has been scrutinized by courts and authorities virtually since the inception of the discipline. Some of the oldest abuse of dominance cases concerns instances in which vertically-integrated firms engage in raising rivals' costs strategies against rivals on adjacent markets." Colomo refers in particular to *Commercial Solvents* (Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation*, *cit.)* and *Télémarketing (*Case 311/84, *Centre belge d'études de marché – Télémarketing*, *cit.)*. See also chapter 2, paragraph 3.4.

[418] See chapter 1, paragraph 3.2.

[419] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 3.

[420] European Commission, Case AT.40099, *Google Android*, *cit.*

with the Play Store (Google's app store) – as Google required manufacturers to pre-install Google Search and Chrome as a condition for licensing the Play Store itself; ii) exclusivity clauses: through the so called revenue share agreements (RSAs) Google offered a share of internet search revenues to device manufacturers and mobile network operators on the condition that they exclusively pre-installed Google Search on their devices; and iii) a ban on sales: though the anti-fragmentation agreements (AFAs) Google prevented manufacturers that wanted to pre-install Google apps from selling even a single smart mobile device that ran on alternative versions of Android (so called "Android forks") not approved by Google[421]. The agreements pursued all the same objective, namely protecting and strengthening Google's market power in general search and, therefore, its search advertising revenues.

The presence of contractual obligations in the forms of tying, exclusivity clauses and ban on sales is indicative of the fact that there is no need to invoke self-preferencing to effectively dealing with such practices as the traditional analysis, theories of harms and case law are well equipped for the job. Actually, bringing up self-preferencing in the *Android* case would have been useless and even counterproductive. While a thought analysis of the case falls outside the scope of the present work, it constitutes an accurate example of the fact that the "self-preferencing label" should be reserved to instances where the dominant firm favours its own products or services and simultaneously enacts active behaviours against competitors in unprecedent and atypical forms. Moreover, the facts of the case did not involve Google in its quality of vertical integrated firm: Google indeed is not active at every single level the whole value chain and had to impose contractual restrains on OEMs in order to oblige them to favour its own apps. The fact that also in *Android* the Commission highlighted that the potential foreclosure of competing general search service providers arose from the nature of Google's business model, which relies on indirect monetisation through search advertising[422] should not suffice to argue that the case is similar to *Google Shopping*.

That said with regard to the distinctive nature of self-preferencing and other "more traditional" cases (*Andoroid* being an example) it should be noted that the capability of self-preferencing type of conducts – as narrowly defined – to cause exclusionary and anticompetitive effects is directly linked to the unique role performed by (dominant) digital platforms. Regardless of whether they fit the still blurred definition of "gatekeeper" (as discussed in chapter 1, paragraph 2.4), what should be noted is that in light of the business

[421] R.Kotzeva, D.Kovo, S.Lorincz, G.Sapi, Ll. Sauri, T. Valletti (2019), *Recent Developments at DG Competition: 2018/2019*, *Review of Industrial Organization* 55, pp. 551-578 https://doi.org/10.1007/s11151-019-09739-w, p. 562-568.

[422] *Ibid.*, p. 568.

model adopted by digital platforms (including Google), they have the actual capability thanks to their intermediary role (or "intermediation power") of foreclosing competitors by enacting atypical conducts (such as applying different algorithms to different entities operating on the "network"), a foreclosure which in turn may also be anticompetitive (i.e. detrimental for consumer welfare) and thus relevant for antitrust law. In other words, a self-preferencing type of conduct – encompassing the two elements described above – is very likely to have a negative impact on competition when the dominant firm acts like an intermediary or a two-sided platform, in the sense that its business model of "network orchestrators (as defined in chapter 1, paragraph 2.1) entails creating value by putting together inputs, information and other goods gathered by one group of users (i.e. one side of the market) to make it available to the other group on another side of the market. In this context, what makes an otherwise irrelevant conduct (such as applying different algorithms to competitors) worth of undergoing antitrust scrutiny is the peculiar business model adopted by the dominant company and which makes a self-preferencing type of conduct particularly prone to result in the foreclosure of competitors.

And indeed, as discussed in chapter 1, business models have acquired more importance in industrial economics[423]. Similarly, the business models adopted by platforms should be taken into account when analysing a conduct in the perspective of competition law. In other words, it can be argued that a self-preferencing type of conduct (as narrowly defined) has the capability of amounting to a breach of Article 102 TFEU in that in light of the business model adopted by the dominant firm an atypical behaviour – otherwise incapable of generating any negative effects – allows the firms itself to exercise its market power in a way that can be detrimental for the market.

2.1 No need for the indispensability requirement

Defined as such, letting go of the indispensably requirement for self-preferencing type of conducts should not be problematic.

First of all, since self-preferencing does not limit the dominant firm's exercise of a legitimate right attributed to it, there is no need for a "filter" aiming at limiting the circumstances in which a duty not to self-favour (which is actually a duty not to take proactive actions against competitors) can be imposed. Given the different starting point (as discussed in the previous

[423] See for instance the work of Libert, Beck and Wind which refers to the need of classifying companies based on their business model, regardless of their specific activities. According to the Authors the subjects whose business model is that of facilitating transactions and interactions within a network are referred to as "network orchestrators" (see chapter 1, paragraph 2.1).

paragraph), such a duty is typically not capable of negatively affecting the dominant firm's incentives to invest and innovate.

Second, the argument according to which the burdensome nature of the remedy imposed in self-preferencing cases (i.e. the duty of equal treatment) postulates that it can only be adopted on strict conditions, such as the high threshold of indispensability, is irremediably flawed. More in details, as seen in chapter 2 (paragraph 3.1.1), the argument goes on stressing that as a duty of equal treatment does not exist in the EU regime it should be considered as a last resort (or *extrema ratio*) remedy only in exceptional circumstances that the case law has identified by requesting the high threshold of indispensability when imposing the similar burdensome duty to deal; lowering the established threshold could be detrimental for the market well-functioning in that it would neutralize a dominant firm's competitive advantage, by requesting it to share it with rivals and thus lower the firm's incentive to invest and innovate.

However, not only the remedy to an abusive self-preferencing is far from resembling a duty to deal, but also the approach according to which the assessment of antitrust liability should be based on the remedy to be imposed is inherently wrong.

As for the first aspect, it should be noted that, at a closer look, the remedy imposed on Google does not seem different from a one-off cease and desist order (such as stop self-preferencing). Should the Commission have simply imposed that – and refrain from imposing the principle of equal treatment – the result would have not differed, also in light of the fact that Google was left free to decide how to actually implement the principle. The principle of equal treatment in fact would have be implicit in the order to stop the conduct.

However, it has been argued that while formally the Commission requested to stop the abuse and merely imposed a principle of equal treatment, without imposing a particular way to implement it, the remedy package was indeed very complex and far-reaching and thus very similar to the positive obligations introduced in cases of refusal to deal[424], and indeed Google at the end did change the design of its products (Universal Search and Shopping Units). Nevertheless, it should be stressed that requesting a platform not to actively damaging competitors (for instance by adopting ad hoc demoting mechanism applying only to competitors) is very much different than requesting a firm to actively and equally promoting the products or services of its competitors. Indeed, many criticisms to the Google Shopping decision are based on this misunderstanding of the difference between these two duties and criticise the emergence of a novel kind of abuse in the form of self-preferencing arguing that

[424] P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.,* p. 31-32.

any such obligation requesting a firm to actively do something in favour of its competitors, would deprive the dominant company of its right to compete effectively, and would create a distortion in the market, to the detriment of consumers and innovation[425].

While we can argue that there is a thin line between such duties, such line exists, and it is a substantial one. While requesting a firm to promote its rivals' service is clearly outside the scope of EU competition law and thus resembles the duty to deal[426], imposing a duty to refrain from actively damaging competitors by leveraging on the platform's unique ability to interfere with the rules in the marketplace, being itself the marketplace's manager, can instead be considered as a variation of that special responsibility which is traditionally placed upon dominant firms and it is thus coherent with the traditional interpretation of EU competition law[427], especially as it has been affirmed several times that the scope of the special responsibility has to be considered in light of the specific circumstance of the case[428]. However, many commentators who criticise the Commission's approach in Google Shopping do not see this distinction[429]. Those reasonings, however, seem unable to capture a substantial part of the issue. And indeed, the Commission has punished first and foremost an active behaviour against competitors: the actual demotion of competitors' comparison shopping search sites; the fact that while doing so the platform was also actively promoting and favouring its own service is certainly an element of the conduct, but not sufficient to trigger alone (absent the demotion) this kind of remedy.

Moreover, as recalled above in this chapter, the competitive pay-for-placement auction set up by Google was deemed to be pretty convenient for the platform (it wins either because its own service Google Comparison Shopping wins the auction or because rival comparison shopping services win the auction and Google receive a remuneration for that) and left competitors

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[425] See, among others, I. Kokkoris (2018), *The Google Saga, cit*., p. 471.

[426] This not only because antitrust intervention is different for regulation, but also because it requires a type of intervention that is proportionate and strictly necessary to bring the infringement to an end. See art. 7 of the 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, OJ L 1, 4.1.2003, p. 1–25.

[427] See for instance Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para 57; Case C-209/10, *Post Danmark*, *cit.*, para 23; Case C-457/10 P, *AstraZeneca v Commission*, *cit.*, para 134; Case T-286/09, *Intel v Commission*, *cit*., para 205.

[428] See for instance Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, para 114 and Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, *cit*., para 84. This thesis somehow reflects the view endorsed by Dunne according to whom, given the "rule-setting function" performed by digital platforms, they have a "overarching duty" – when dominant – to ensure that "competition on their platforms is fair, unbiased and pro-users". The duty of equal treatment would thus be confined as platform-specific and a manifestation of that "special responsibility" that is linked not only to the undertaking's position as a dominant undertaking, but also to its "gatekeeper" role within the wider digital ecosystem. According to the Author, however, self-preferencing is not a stand-alone abuse but rather it should be interpreted as a form of constructive refusal to deal. See N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 23-25

[429] See for instance I. Kokkoris (2018), *The Google Saga, cit*., p. 471.

largely unsatisfied[430], thereby suggesting that also in practice the burdensome and invasive nature was not that evident after all.

And there is more. It can be argued that the anticompetitive foreclosure ascertained in the decision could have probably been overcome even if Google had decided – exercising its freedom – to remedy the breach by reserving all for itself the visually rich window of the Shopping Unit (i.e. displaying only Google Shopping results in the Shopping Unit) on the condition that it stopped applying the adjustment algorithms to its competitors and that it disclosed that the visual prominence attributed to Google Shopping results is not the outcome of any ranking mechanisms between results offered by other comparison shopping sites[431]. This would have the benefit of making consumers aware that the results in the Shopping Unit are provided by Google and Google only (and therefore are not filtered and selected based on meaningful criteria) and of allowing competitors offering a good comparison shopping service to emerge and be placed among the first positions among the non-sponsored blue links that are the "standard" generic search results and to which consumers attributed great credit, as shown in the decision.

Therefore, if anything, it can be argued – at least in principle – that the Commission could have avoided requesting Google to implement the equal treatment principle, as the same result (i.e. bringing the infringement to an end) could have been achieved, indeed, by simply requesting Google to stop self-preferencing, meaning to stop actively demoting competitors through the application of *ad hoc* mechanisms to its search algorithms (and nothing more). Indeed, a principle of equal treatment would have been implicit in that order and Google would have probably adopted a similar remedy to the one it actually implemented.

All in all, while the remedy of equal treatment could *prima facie* resemble a duty to deal given the far-reaching implications it ended up entailing, the analysis of the specific circumstances of the case shows that in fact the principle imposed by the Commission cannot be interpreted as having the same proactive and invasive nature of that of a duty to deal.

Moreover, the remedy to impose to stop the abuse should not play a decisive role in determining the theory of antitrust liability to apply in a given case. As it was noted in some scholarly work, doing so would requires to "put the horse before the cart" requesting the Commission to decide upon preferred remedies before identifying the legal test" and therefore even before reaching a conclusion on whether an abuse has been committed. Indeed, while the

[430] See in particular F. Bostoen (2018), *Online Platforms and Vertical Integration*, *cit.*, p. 20, and T. Graf, H. Mostyn (2020), *Do We Need to Regulate Equal, cit.*

[431] Such consideration follows from the analysis provided by Colangelo and Maggiolino according to whom the anticompetitive nature of Google's conduct manly relies in the fact that it manipulated information on which consumers rely, lacking any form of transparency about the ranking processing. See chapter 2, paragraph 3.3.3.

remedy must be proportionate to the offence (and it should therefore be considered when framing the offence), it should not constitute the main factor driving the theory of antitrust liability to be applied in a given case. Moreover, such an approach presumes a clear distinction between "proactive" remedies (triggering the "Bronner criteria") and mere prohibitive ones (excluding those criteria), while as the reality of *Google Shopping* well illustrates, such a distinction is often blurred in practice, and constraints the remedial freedom attributed to the Commission.

Finally, as a matter of facts, the circumstance according to which active "demoting" behaviours can be effective where the dominant firm is a platform with "intermediation power" somehow acts as natural filter: indeed, as seen above, the fact that negative effects on competition can result as a consequence of self-preferencing *de facto* only where the business model of the dominant firm is that of a "network orchestrator" in practice limits the circumstances in which a dominant firm can be held liable for favouring its own products or services[432], with the benefit that a platform in such a position would definitely be aware of that and of its duty to abstain from self-preferencing (interpreted following the narrow definition).

Arguing about the need to meet a legal test centred on indispensability under these circumstances is not only inherently artificial and unnecessary but it would also limit the effectiveness of antitrust law imposing "brick-and-mortar lenses" to address behaviour taking place in a new digital realty, and ultimately the incapability of antitrust law to effectively address the leveraging of market power in digital markets.

And indeed, the Court has already endorsed independent forms of abuses distinct from refusal to supply irrespective of whether a duty to deal existed under the "Bronner criteria". In particular, both in cases of constructive refusal to deal and margin squeeze the input's indispensability is not a requirement for the practice to be found abusive[433]. On the contrary, applying the Bronner criteria to any conduct in relation to the dominant firm's terms of trade "would unduly reduce the effectiveness of Article 102 TFEU"[434]. Therefore, establishing that

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[432] Of course, those are practical considerations while the indispensability requirement acts as legal conditions to establish antitrust liability.

[433] Upholding the interpretation given by the Court not requesting indispensability see I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 477 and following.

[434] Case C-52/09, *Konkurrensverket v TeliaSoneraSverige AB*, *cit.*, para. 58. See I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 478: "A similar reasoning arguably applies to situations of self-preferencing: if self-preferencing can only be abusive when the dominant firm is under a duty to deal, the scope for competition interventions is limited. In particular, the strict interpretation of the indispensability requirement in Bronner (if still valid after Microsoft) would have likely prevented the Commission from taking action in Google Shopping", and p. 499: "The leveraging theory of the Commission may not be convincing but, as submitted above, its approach to assess anticompetitive effects without applying the indispensability requirement does find

the indispensability requirement does not apply to self-preferencing is in line with the case law of the Court.

If anything, an alternative way to preserve the effectiveness of antitrust law could be that of consider it as a form of refusal to deal (thus giving up self-preferencing as an autonomous form of abuse) and at the same type revising the notion of "indispensability" to include inputs that while admitting alternatives, only admits far less advantaged alternatives that do not allow competitors to compete effectively with the dominant firm. Indeed, should the notion of indispensability be interpreted as in the traditional case law on refusals, meaning that there are no other alternatives whatsoever for the input required – assuming that the issue concerning the identification of the input is solved[435] – and therefore lacking access to that input would make it impossible or unreasonably difficult to compete on an adjacent market[436], Google's conduct would have not passed the test (see chapter 2, paragraph 3.1.1) and thus it would be held lawful, ultimately resulting in underenforcement and most importantly – in the inability of antitrust law to see and reach certain serious forms of exercise of market power in the digital sphere. In other words, in order to avoid such result and preserve the effectiveness of Article 102 TFEU applying the theory of harm of refusal to deal – in the absence of self-preferencing as an new theory of harm and abuse – would have required some alternative adjustments, namely either to argue that the conduct represented a form of constructive refusal to deal, as such not subject to the indispensability requirement or more realistically – also in light of the many criticisms to such an approach[437] – that the conduct represented an actual refusal to deal subject to indispensability requirement and "stretch" the concept of indispensability beyond the literal interpretation in *Bronner* and *Magill*, embracing a wider notion according to which an input is considered indispensable when it is necessary to *effectively* compete on the market. However, sustaining such alternative approaches would have been complex and would require adapting a theory that was designed to address other type of conduct, without any actual counterbalancing positive implications compared to the finding of abusive self-preferencing. If anything, that approach would have required to distort the notion of refusal to deal to the detriment of legal certainty. Self-preferencing instead is

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support in the assessment of constructive refusals to deal, such as the margin squeeze at stake in TeliaSonera". See also chapter 2, paragraph 3.3.2.

[435] As pointed out by Akman it would not be easy identifying the indispensable input in the Google Shopping case; would that be access to Google Search? Or to the Shopping Unit? Or to a certain ranking in the search results? See P. Akman (2016), *The Theory of Abuse in Google Search, cit.,* pp. 311-317.

[436] See, *ex multis*, N. Dunne (2019), *Dispensing with Indispensability*, *cit.*; P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.* and P. Ibáñez Colomo (2020), *Self-Preferencing, cit.*

[437] Scholars have strongly criticized the approach according to which constructive refusals to deal are subject to a legal test which does not require indispensability. See, *ex multis*, N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 17-25; P. Ibáñez Colomo (2019), *Indispensability and Abuse of Dominance, cit.*

capable of capturing the specific features of platforms' business model and competitive dynamics and it thus designed to capture exactly those type of leveraging conducts that they have incentives to undertake.

All in all, as anticipated, imposing a ban on self-preferencing (as narrowly defined) on dominant platforms operating an intermediatory business model can be considered as a variation of that special responsibility which is traditionally placed upon dominant firms and it is thus coherent with the traditional interpretation of EU competition law, especially as it has been affirmed several times that the scope of the special responsibility has to be considered in light of the specific circumstance of the case. The variation, indeed, originates from the peculiar competitive dynamics occurring in digital market requiring high consideration when assessing – from an antitrust point of view – the conducts that take place on those markets.

Recognising that atypical active behaviours aimed at damaging competitors in the context of digital markets can be relevant under antitrust law given the peculiar role played by platforms in these contexts, however, does not mean that in self-preferencing cases a rebuttable presumption of anti-competitiveness should operate reversing the burden of the proof, nor that the conduct should be found *prima facie* abusive as suggested in the Crèmer Report (on this topic see chapter 2, paragraph 3).

2.2 Self-preferencing: some considerations with regards to the legal test

In light of the above, the legal test for self-preferencing – where the material conduct is the combination of actual self-preferencing and of an active conduct aimed at damaging competitors – should focus on the two elements of the general two-prong test according to the general theory on exclusionary abuses – as there is no doubt that self-preferencing does qualify as an exclusionary practice, given its capability to exclude rivals and to cause anticompetitive effects on the market[438].

[438] Aside from the dominant position at least in one market constituting the structural element of any abusive conduct. The aforementioned elements resemble to a certain extent the three-step test that according to informal reports (including those published by MLex) has been identified by the Commission in the context of the ongoing appeal before the European Court of Justice. According to such sources, the Commission's test mandates that a conduct of a dominant company treating its own service differently to the way it treats a rival's similar service can be abusive if: (i) the difference in treatment has a significant impact on an important parameter of competition; (ii) the significant impact is capable of having an anti-competitive effect; and (iii) the dominant company has no objective justification for the difference in treatment. See the presentation of R. Carlton during the 2nd Webinar of the "4th Innovation Economics Conference" on "Self-preferencing: the gatekeeper role" held on 24 June 2020 (the material is available at https://www.concurrences.com/en/conferences/4th-innovation-economics-conference-for-antitrust-lawyers-2-self-preference-the). The speaker refers to reports courtesy of M-Lex and another press service.

While the test is necessarily case specific, an attempt can be made to better articulate on the "conditions" of the legal test as recalled in chapter 2 (paragraph 1) to highlight certain specific features that apply in the context of self-preferencing in digital markets.

As for the first prong of the general test, being self-preferencing a type of exclusionary conduct, a "difference in treatment" cannot amount to an abuse unless it allows the dominant firm (at least potentially) to strengthen its market power. As mentioned in chapter 2 (paragraph 1), this happens not only when the conduct is capable of excluding actual rivals, but also – and most importantly in dynamic context such as the digital environment – when the conduct is capable of marginalizing actual rivals to a niche of the market and/or preventing potential rivals from entering the market (as in this latter hypothesis the dominant firm is able to create new barriers to entry or to reinforce existing ones). In order to "exclude rivals" (in the broad sense stated above), a dominant firm may typically undertake several strategies, including foreclosing strategies (that is when the dominant firm subtracts relevant suppliers and relevant customers to its horizontal rivals) and/or pre-emptive strategies (when the dominant firm subtracts competitive spaces to its horizontal rivals)[439]. An in-depth analysis of such effects should also carefully consider the stage of the target market in that given the high speed of digital markets it may happen that those effects are anticipated at an early stage of market development, as part of the Big Tech's strategies of "guarding" market to avoid that operators active in adjacent (and almost not existing) segments can start offering a new service that would potentially question their position.

In its decision the Commission provided consistent evidence of such exclusionary effects, by showing how Google's behaviour provoke a sharply decrease in internet traffic for its downstream competitors which in turn resulted in a sharply decrease in visibility in all the 13 national markets affected by the conduct[440] thereby concluding that "generic search traffic from Google's general search results pages accounts for a large proportion of traffic to competing comparison shopping services and cannot be effectively replaced by other sources currently available to comparison shopping services"[441]. Building on this precedent, an

[439] Others include pricing strategies predatory strategies, when the dominant firm accepts to suffer the long run gains that it will collect after rivals' exclusion and raising rivals' costs strategies, when the dominant firm obliges its rivals to be less efficient and, hence, less competitive than it is.
With specific regards to pre-emption, Ghezzi and Oliveri specify that this occurs when i) in a context of related markets, ii) the firm is dominant in only one given market; and iii) the abusive conduct happens instead on the related market. In particular, preventing or hindering the entry of new competitors in a different but related market (both vertically and horizontally) with respect to the market dominated by the incumbent is considered a typical abusive conduct and as such sanctioned by antitrust law. F. Ghezzi and G. Olivieri (2019), *Diritto Antitrust*, cit., pp. 189-190.

[440] As indicated also by the vast number of charts and evidence regarding data on internet traffic provided in the decision.

[441] *Decision*, para 591.

accurate description of the conduct and of the specific context and competitive dynamics in which it takes place, as well as an in-depth analysis of its effects on competitors would – and must – be a key part of any future finding of abusive self-preferencing.

As seen in *Google Shopping*, those exclusionary effects may well occur given the fact that the "difference in treatment" imposed by the dominant "network orchestrator" is capable of impeding – even to the most efficient competitor – to be on the marketplace and compete there based on the quality of its products. In this respect, it can be argued that a conduct's capability to cause exclusionary effects is connected to the very business model adopted the dominant firm/platform and its "intermediatory role".

However, while such exclusionary effects are necessary in order to ascertain the abusive nature of any conduct – and hence also of self-preferencing – those are not sufficient. As already recalled in chapter 2 (paragraph 1), a conduct, even if different from those expressly provided for in paragraphs b) to d) of Articles 102, is said to be exclusionary and anti-competitive when it strengthens the market power of the company in a dominant position (or has the potential to do so) and – at the same time – it harms (or may harm) consumer welfare. That is because, as recalled in chapter 2 (paragraph 1), it is a well-established principle of competition law that an undertaking in a dominant position can certainly grow its market power, consolidate it and even make it persistent if it does so through a conduct that increases the quantity, quality or degree of innovation of the goods or services available on the market. Such circumstance in fact cannot be considered contrary to the normal functioning of the market that operates as a selective mechanism to protect meritorious undertakings[442].

Therefore, proving that a self-preferencing type of conduct has exclusionary effects to the detriment of competitors is just the first step of the analysis. In order to assess whether such a self-preferencing conduct can found to be abusive it is thus essential to focus the analysis on the anticompetitive effects it can provoke on the market. In other words, assessing whether or not the marginalization of competitors is detrimental for consumers – and more precisely for consumer welfare – becomes paramount to establish if a self-preferencing type of conduct is abusive or not. Indeed, if the conduct does (or is likely to) have negative effects on consumer welfare, it results in anticompetitive foreclosure and, absent of any objective justification, it constitutes an abuse.

As stated by the European Court of Justice in the *Intel* and *Post Danmark* judgments[443], any exclusionary conduct (thus including self-preferencing) can be deemed abusive and therefore prohibited pursuant to Article 102 TFEU where it is capable of decreasing consumer welfare

[442] See chapter 2, paragraph 1.1.

[443] Case C-413/14 P, *Intel Corp., cit.* and Case C-209/10, *Post Danmark*, *cit.*

which serves as a benchmark to assess the market well-functioning (see Introduction and chapter 2, paragraph 1). According to the economic literature that has traditionally been endorsed under competition law, such a decrease occurs when the practice has the effects of limiting output and increasing market price (the so called "short run effects") as well as those of worsening product quality, consumers' choice (that is product variety), and lowering innovation rate (the "long run effects").

Therefore, while some authors warn against a common tendency to equate a competitive disadvantage suffered by competitors with anticompetitive effects, it should be noted that – as clarified by the case law over the years – following a proper analysis of the conduct based on the general test, placing competitors at a competitive disadvantage (and/or limiting their freedom of action) should not qualify as actual anticompetitive effects (meaning an harm to consumer welfare)[444], but rather as elements to assess the exclusionary nature of the conduct. In other words, that competitive disadvantage suffered by competitors is abusive only if it also causes anticompetitive effects.

Moreover, as anticipated in chapter 2, the proposal put forward by the Commission's Advisers concerning the introduction of a new rebuttable presumption of anticompetitive effects caused by the practices of dominant platforms should be firmly rejected. While the fears which moved the proposal can be shared[445], implementing such a drastic change in the legal test as well as in the standard and burden of proof would have detrimental effects. Not just because it would unjustifiably take antitrust analysis back in time, but because given the still little understanding of the digital world's dynamics and its effects on the parameter of competition and consumer welfare, embracing such an approach may lead to consider as anticompetitive practices which instead are beneficial for consumer welfare. Moreover, bypassing the effects analysis would impede antitrust analysis to assess the impact of conducts on the long-term parameters of consumer welfare, that while being typically the most affected in the digital sphere, are among the least developed aspects of competition law analysis[446].

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[444] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 34-5. The Authors warns that: "If the notion of anticompetitive effects were equated with a competitive disadvantage, then self-preferencing would become, de facto and by definition, prima facie unlawful."

[445] The fears highlighted in the Report include the difficulties of computing "with a high degree of probability" the "expected" consumer welfare in the digital world "where the future is more uncertain and less understood", as well as the negative consequences of underenforcement which "in the digital era [it] will be of particular concern, all the more as the harm will presumably be longer term than in traditional markets because of the stickiness of market power caused by the factors discussed in Chapter 2." J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 42.

[446] P. Akman (2019), *An Agenda for Competition Law*, *cit.*

Therefore, conducting an in-depth analysis of anti and pro-competitive effects in digital economy cases is of utmost importance and anticompetitive effects should be proved with (virtual) certainty, and not just as a plausible outcome of the practice, because failure to do so, would have a negative impact on the reliability of the legal test, leading to a potential too easy and frequent finding of abusive practices, including self-preferencing[447].

In this regard, the quasi-per se approach of illegality of self-preferencing adopted in the Draft DMA (see Introduction, paragraph 2) would prove harmful not only for the better understanding of the effects of certain practices on digital markets, but also because – even if outside the perimeter of antitrust law given the regulatory nature of the DMA – disregarding a side of the coin (i.e. the procompetitive effects that a conduct may cause in a specific circumstance) may pose the risk of unwanted side effects, such as prohibiting conduct that in specific circumstance may actually be beneficial for consumer welfare.

In addition, on the basis of the very principles established in *Intel* and *Post Danmark*, when dealing with a non-pricing practice such as that of self-preferencing, assessing a damage for consumer welfare becomes paramount in order to avoid prosecuting practices which exclude from the market competitors that are less efficient than the undertaking in the dominant position. Indeed, with regards to pricing practicing, assessing whether the exclusion of competitors derives from competition on the merit or not can be done thought the "equally efficient competitor test" which allows to verify whether the exclusion results from efficiency or innovation and thus to distinguish between "good" or "bad" exclusion. For non-pricing practices given the impossibility to apply the equally efficient test, that exercise can only be made looking at the effects on the practice on consumer welfare, to assess whether it increases or not.

By applying the same reasoning to abusive self-preferencing, it follows that should the preferential treatment causes the exclusion of competitors that are not as efficient as the dominant firm, for instance as they offer a service whose quality or grade of innovation is inferior to that of the dominant firm, the practice should not be deemed abusive. Being a non-pricing practice and given the intrinsic features of digital markets and the changes in business models, it becomes pivotal to better understand and frame dynamic non-price theory of harm as well as long-term parameters of consumer welfare developing sound theory of harm based on quality, variety and innovation in order to better enforce Article 102 in digital markets[448].

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[447] P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 34. See the case law on margin squeeze (Case C-280/08 P, *Deutsche Telekom cit.,* and Case C-52/09, *Konkurrensverket v TeliaSonera, cit.*).

[448] The analysis of the Commission's decision provided in chapter 2 shows that the effects analysis mainly focused on innovation and variety, while at the same time it also took into great account the effects on prices.

In this light, an in-depth assessment of whether consumer welfare increases or decreases due to the practice is key in any antitrust analysis on the basis of the Commission' findings as well as the procompetitive effects (i.e. justifications) eventually proved by the dominant firm.

Moreover, as the long-term parameters of consumer welfare do pose some interpretative and measurement issues (also due to the fact that they haven't played a decisive role in the vast majority of cases concluded in the past, at least not without being accompanied with considerations on prices and quantities)[449], substantial evidence becomes of great importance to show if and how the conduct under scrutiny had or is likely to have negative effects on those variables given the concrete and specific circumstances of the case. Therefore, investigations and hearings tend to depend more on facts than theories and this is why it is also crucial to ensure due process, full consideration of the evidence and an appropriate balancing of the assessment of competitive harms and any pleaded efficiencies or other justifications[450].

Such issues have been well evident in the case concerning Google Shopping where two different enforcers reached opposite assessment with regard to the question "does Google's conduct provoke a decrease in the quality of the services available to consumers?".

While the European Commission disregarded Google's claim that the conduct (and specifically the technologies underlying the Product Universals and Shopping Units) improved the quality of Google's search service[451], the FTC concluded that the same practice was the "by-product" of a quality improvement in online search designed by Google (i.e. the Universal Search Box), which would be beneficial for consumers and consumer welfare. Moreover, according to the FTC, the quality improvement was the result of the strong innovation drive that Google applied in product design which represents an important dimension of competition (and concluded that "condemning legitimate product improvements" would risk causing consumer harm), while the European Commission concluded that Google denied other companies the chance to compete on the merits and to innovate, thereby depriving consumers of "the full benefit of innovation"[452].

On the need to consider and developed theory of harm based on the long-term parameter of competition see J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 39-40: "We need a new thinking on plausible theories of harm backed up by an increasing theoretical understanding of the specificities of digitisation and empirical evidence" and P. Marsden (2018), *Who should trust-bust?, cit.* On the importance of quality, innovation and choice in assessing competition in digital markets see also I. Kokkoris (2018), *The Google Saga, cit*.

[449] While there are well-established economic models and tests showing and measure the effects on price and output, the same does not hold true with respect to the other variables of consumer welfare. Therefore, assessing those variables is not as straightforward.

[450] P. Marsden (2018), *Who should trust-bust?, cit*.

[451] *Decision*, para 656.

[452] European Commission (2017), *Antitrust: Commission fines Google €2.42 billion*, *cit.*

The above shows that when it comes to assessing the quality of the products and services provided to consumers there are no theoretical models to use as a reference and the exercise can leave room for great discretion. Nevertheless, the exercise must be done on a case-by-case basis, ultimately requesting firms and authorities a heavy burden of proof to show the efficiencies and the justifications they claim. Developing such type of analysis will also help understanding the dynamics taking place in digital markets and help streamline future investigations in the field which will rely of stronger theory of harm.

Such considerations should be carefully assessed when applying the legal test especially to "unbranded" conducts (i.e. conducts for which the practice and case law have not yet established clear liability conditions) since the lawfulness of the practice derives from the analysis of the competitive effects on the one hand, and on the justifications, if any, that the firm under scrutiny is capable of demonstrating. Indeed, while Article 102 TFUE does not contain a paragraph equivalent to Article 101(3) whereby an agreement that restricts competition can nevertheless be permitted because it produces economic efficiencies, the decisional practice of the Commission and the CJEU's case law over the years have recognised that some conduct, although presumptively abusive, did not amount to a violation of Article 102 because it had an "objective justification". The Guidance on Article 102 Enforcement Priorities expressly state that the Commission considers claims put forward by a dominant undertaking that its behaviour is objectively necessary or produces substantial efficiencies that outweigh any anti-competitive effects on consumers (the efficiency defence)[453]. As for the burden on proof, it is for the dominant undertaking to raise any plea of objective justification and to support it with arguments and evidence[454].

In particular, as for objective necessity, no balancing exercise is necessary, but the firm should demonstrate that the conduct was needed to achieve a particular objective or imposed by a factor, both external to the dominant undertaking, such as health and safety[455]. As for the efficiency defence to be successful, instead, the firm should demonstrate that the negative effects on competition are lower than the benefits in efficiency. Those justifications may be accepted if the conduct is somehow proportionate, meaning that the efficiencies would have to be realised, or be likely to be realised, the efficiency gains can only be achieved by the conduct (which is thus indispensable to their realisation), the efficiencies would have to

[453]European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit*., paras 28-31. See, among others, Case C-209/10, *Post Danmark*, *cit.,* paras 40-41.

[454] Among others, see Case T-201/04, *Microsoft v Commission*, cit., para 688.

[455] European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit.,* para 29. See also, R. Whish and D. Bailey David (2012), *Competition Law*, Seventh Edition, Oxford University Press, p. 211 and W. Frenz (2016), *Handbook of EU Competition Law*, Springer, p. 813.

outweigh any negative effects on competition and consumer welfare in the affected markets without eliminating all effective competition from the market[456]. While the objective necessity may not be so relevant in self-preferencing cases, the efficiency defence may instead play a role and therefore within the legal test the balancing exercise becomes extremely relevant for the assessment of the conduct.

3. Other potential self-preferencing cases: focus on the Italian *Amazon* and *Google (Android Auto)* cases

If *Google Shopping* can be considered as the forerunner, other cases currently under investigation pivot around conducts whereby firms have allegedly favoured their activities at one level of the value chain to the detriment of competitors and which thus, according to some scholars, can potentially qualify as self-preferencing, if broadly defined. The present paragraph provides an overview of such ongoing cases both at the European and Italian level[457]. Moreover, an attempt will be made to apply the narrow definition and the legal test envisaged in the paragraphs above to two of the current cases currently under scrutiny of the Italian Competition Authority ("Autorità Garante della Concorrenza e del Mercato"), involving Amazon and Google and which can qualify, respectively, as abusive self-preferencing and refusal to deal. The choice to provide a more in dept analysis of two of the relevant Italian cases is due to the information available as the Italian Authority has published the decisions to start the proceeding which contain some information about the conducts under scrutiny and the approach taken by the Authority, other than the geographical proximity.

3.1 Overview of potential self-preferencing cases

At the time of writing, Amazon is currently facing antitrust attention at the EU level and in Italy.

In July 2019 the European Commission opened an investigation into Amazon's use of sensitive data from independent retailers who sell on its marketplace, investigating whether the company – being a vertically-integrated firm acting both as marketplace and as a retailer–

[456] European Commission (2009), *Guidance on the Commission's enforcement priorities*, *cit.,* para 30. See R. Whish and D. Bailey David (2012), *Competition Law, cit.,* p. 211.

[457] For an overview of the ongoing investigations see also I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 449 and following.

may benefit its own retail arm by making available to it all the information gathered on the marketplace itself[458].

As mentioned, Amazon is also subject starting from April 2019 to the scrutiny of the Italian Competition Authority which is investigating whether Amazon offers certain advantages in terms of visibility and ranking only to third party sellers who use its own logistics services (by subscribing to "Amazon Logistics" or "Fulfilment by Amazon" ("FBA")) thus discriminating against those who are not Amazon Logistics customers[459].

Following a complaints lodged by Spotify and by an e-book/audiobook distributor, in June 2020 the Commission has also opened two formal investigations into Apple's conducts with the aim of ascertaining whether the company (also a vertically integrated firm running the iOS operating system while at the same time providing apps for the iOS) has shield its own apps Apple Music and Apple Book from competition to the detriment of rivals, such as Spotify and others (the case is also known as *Apple App store* case)[460]. In particular, given the "gatekeeper" role played by Apple when it comes to the distribution of apps and content to users of Apple's devices (iPhone and iPad), the investigation will focus on two restrictions imposed by Apple in its agreements with app developers wishing to distribute their apps on the Apple's App Store whereby Apple charged app developers a 30% commission on all subscription fees through the Apple in-app purchase system ("IAP") for the distribution of paid digital content, whose use its mandatory on the Apple Store. Not only the use of IAP is mandatory but Apple's rules also prevent developers from informing users about such purchasing possibilities, which are usually cheaper. As a consequence, competitors on the downstream markets of music and audiobook services have either decided to disable the in-app subscription possibility altogether or have raised their subscription prices in the app and passed on Apple's fee to consumers, raising serious anticompetitive concerns in the view of the Commission[461].

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[458] European Commission (2019), *Antitrust: EC opens formal investigation against Amazon*, press release IP/19/4291, Brussels, 16 July, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291.

[459] Italian Competition Authority (2019), *A528-Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services*, press release, 16 April, https://en.agcm.it/en/media/press-releases/2019/4/A528.

[460] European Commission (2020), *Antitrust: Commission opens investigations into Apple's App Store rules*, press release, Brussels, 16 June, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073. See case 40437 Apple - App Store Practices (music streaming) and case 40652 Apple – App Store Practices (e-books/audiobooks).

[461] Spotify created a website where it explains its complaint to the European Commission: https://www.timetoplayfair.com/. On this topic see D. Geradin and D. Katsifis, (2020) *The Antitrust Case Against the Apple App Store*, 22 April.

In addition, intervening in a webinar organized by Concurrences Harry Clarke (Spotify's Associate General Counsel) argued that competition law proceedings tend to be very time-consuming (7 to 10 years is the average length of cases) and quite expensive; while on the contrary the competitors suffering from the abuses don't even

The *Apple App store* case should be kept separate from the *Apple Pay* case opened on the very same day (16 June 2020) by the European Commission to assess whether Apple's App Store can legitimately require software developers to use its own purchase system for the distribution of paid-for content without breaching Article 102 TFEU[462]. More in details, "the investigation concerns Apple's terms, conditions and other measures for integrating Apple Pay in merchant apps and websites on iPhones and iPads, Apple's limitation of access to the Near Field Communication (NFC) functionality ("tap and go") on iPhones for payments in stores, and alleged refusals of access to Apple Pay"[463].

For what concerns Google, finally, the saga is not over yet, at least in Italy where the company has been under investigation for another allegedly abusive practice involving Android Auto (the extension of its operating system for cars) and Google Maps[464] (see paragraph 3.3 below) as well as, since very recently, for its practices in the market of digital advertising[465]. Moreover, other complaints regarding Google have been brought to the attention of the European Commission. To name a few, with a letter dated February 2020 a number of trade association and primary companies active in the travel and tourism industry (including Expedia and Tripadvisor) has complained against Google's unfair promotion of its own new holiday rental search engine Google Vacation Rentals (officially announced on 5 October 2019) which displays vacation rentals from a variety of partners (including those of some claimants) and allows to search for, compare and book the rental services[466]. Referring to the *Google Shopping* case, the claimants contest "the fact that Google features its new product in a visually-rich OneBox at the top of its general search results pages – a ranking and display that Google reserves only for its own specialised search service. The prominent feature includes pictures, a map preview, ratings and prices – a user experience like any other

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know if they are will still exist in that timeframe. He thus urged for a more rapid enforcement of competition law. See the transcript of the webinar "Innovation economics conference for antitrust lawyers: the connected economy", organized by Concurrences and held on 26 June 2020.

[462] See P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* pp. 6, 26.

[463] European Commission (2020), *Antitrust: Commission opens investigation into Apple practices regarding Apple Pay*, press release IP/20/1075, Brussels, 16 June, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075.

[464] Italian Competition Authority (2019), *A529 - ICA: investigation launched against Google for alleged abuse of a dominant position*, press release of 17 May, https://en.agcm.it/en/media/press-releases/2019/5/A529 (eng). The case – opened in May 2019 – was closed on 13 May 2021 by the ICA with a decision ascertaining the abuse of dominant position and fining Google for over 100 million euro.

[465] Italian Competition Authority (2020), *A542 - ICA: investigation opened against Google for an alleged abuse of dominant position in the Italian market for display advertising*, press release of 28 October, https://en.agcm.it/en/media/press-releases/2020/10/A542 (eng).

[466] Asociación Española de Plataformas Digitales de Alquiler Temporal (PAT) *et al.* (2020), *Our concerns about Google's preferencing and tying of its new product Google Vacation Rentals within general search results pages*, Letter to the European Commission, 10 February 2020. The letter is available at the following link: https://www.deutscher-ferienhausverband.de/wp-content/uploads/2020/02/Travel-Sector-Raises-Concerns-Against-Favouring-of-Google-Vacation-Rentals_10-02-2020.pdf.

vacation rentals search service."[467] They argue that Google's strategy is that of "reduc[ing] us and our industry to mere content providers for the "one-stop-shop" of Google's new product"[468]. As a consequence, they claimed to be prevented "from gathering the data required to enhance their search and matching algorithms, to identify user needs and to improve the user experience"[469]. In addition, they report that Google discriminates amongst competitors regarding the very participation in Google Vacation Rentals as only a few big companies have been selected by Google to share their content on its new service, according to Google given the lack of staff and technical issues that do not allow to involve all businesses immediately[470]. The Commission, however, has not launched a formal investigation.

Similarly, the European Commission said to be conducting a preliminary antitrust investigation into Google's job search tool "Google for Jobs." The way Google has promoted its new service allegedly share many similarities with what it did to promote its comparison shopping service[471]. Finally, while outside of the scope of the present work, it is worth mentioning that the U.S. Justice Department has finally filed in October 2020 (after years of hearings and investigations) an antitrust lawsuit against Google, alleging that the company is "for unlawfully maintaining a monopoly in general search services and search advertising in violation of section two of the Sherman Act" [472], referred to by Attorney General William P. Barr as "a monumental case for the Department of Justice and, more importantly, for the American consumer"[473].

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[467] *Ibid*., p. 2.
[468] *Ibid*., p. 2.
[469] *Ibid*., p. 3.
[470] As a result, they claim, "SMBs suffer twofold. They are excluded from the traffic generated by Google Vacation Rentals and the OneBox severely reduces the traffic from organic or paid search results to their sites".
[471] Rival job search companies sent a letter to Vestager in August 2019 urging a formal antitrust investigation. Google said it has made a number of changes to the tool to address "feedback" it has received in Europe. See the press articles: F. Y. Chee, P. Dave (2019), *Exclusive: Google's jobs search draws antitrust complaints from rivals*, Reuters.com, 13 August, https://uk.reuters.com/article/uk-eu-google-antitrust-exclusive/exclusive-googles-jobs-search-draws-antitrust-complaints-from-rivals-idUKKCN1V30IL and E. Schulze (2019), *Google is facing another EU antitrust probe, this time over its jobs search tool*, CNBC, 28 August, https://www.cnbc.com/2019/08/28/google-faces-eu-antitrust-probe-over-jobs-search-tool.html. For a detail analysis of the antitrust issues involved in Google Jobs see T. Höppner *et. al.* (2018), *Google Search (Shopping) as a Precedent for Disintermediation in Other Sectors, cit*.
[472] U.S. Department of Justice (2020), *Introductory Remarks of Deputy Attorney General at Announcement of Civil Antitrust Lawsuit Filed Against Google*, Washington DC, 20 October, https://www.justice.gov/opa/speech/introductory-remarks-deputy-attorney-general-announcement-civil-antitrust-lawsuit-filed; U.S. Department of Justice et al. (2020), *Complaint v. Google LLC*, Case 1:20-cv-03010, 20 October, https://www.justice.gov/opa/press-release/file/1328941/download.
[473] U.S. Department of Justice (2020), *Statement of the Attorney General on the Announcement Of Civil Antitrust Lawsuit Filed Against Google*, 20 October, https://www.justice.gov/opa/pr/statement-attorney-general-announcement-civil-antitrust-lawsuit-filed-against-google.

3.2 The (Italian) Amazon case

3.2.1 The facts

As already mentioned, in April 2019 the Italian Competition Authority opened a formal investigation on Amazon's practices taking place in the markets of online marketplaces and logistic services, as the e-commerce platform has allegedly offered certain advantages in terms of visibility and ranking only to third party sellers who use its own logistics services by subscribing to "Amazon Logistics" or "Fulfilment by Amazon" ("FBA"))[474]. As stated in the press release, "[s]uch practice seems to be outside competition on the merits, as the benefits are not necessarily related to the efficiency and quality of the service provided by the seller and are only based on its subscription to Amazon's FBA ('self-preferencing')"[475]. Moreover, as through the practice Amazon discriminate against those sellers that do not use Amazon's logistics, the Authority has also highlighted that the practices under scrutiny appear to be the result of "Amazon's ability to discriminate on the basis of whether or not Amazon's marketplace sellers adhere to its FBA logistics service ('self- preferencing')"[476].

Through such conduct, according to the Authority, Amazon would be able to unduly exploit its dominant position in the market for intermediary services on e-commerce platforms with the aim of significantly restricting competition in the logistics market, as well as – potentially – in the market for intermediation services, to the detriment of final consumers"[477].

Before analysing more in-depth the conduct under scrutiny, it is useful to recall the preliminary findings of the Authority with regards to the markets and Amazon's position. As for the product markets, the Authority identifies the market for intermediation services on marketplaces (including only e-commerce platforms, and not also the sellers' e-commerce websites[478]) and the logistics services for e-commerce (including warehouse management and

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[474] Italian Competition Authority (2019), *A528-Amazon: investigation launched, cit*; Italian Competition Authority (2019), *A528 - FBA AMAZON*, Decision no. 27623 of 10 April 2019 concerning the opening of the proceedings, https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/654825859D3EE288C12583E50053D451/$File/p27623.pdf (italian only).
The investigation is addressed to Amazon Services Europe S.à r.l., Amazon Europe Core S.à r.l., Amazon EU S.à r.l., Amazon Italia Services S.r.l. and Amazon Italia Logistica S.r.l. There are no complainants. The deadline to close the case is April 2021.

[475] Italian Competition Authority (2019), *A528-Amazon: investigation launched, cit*.

[476] Italian Competition Authority (2019), *A528 - FBA AMAZON*, Decision no. 27623, *cit.*, para 3.

[477] *Ibid.*

[478] *Ibid.*, paras 39-55. The Authority also recalls that – from an economic perspective - marketplaces are an example of two-sided markets characterized by strong indirect network effects and that Amazon.com is a two-sided platform despite it adopted an "hybrid" or "dual" model, whereby it operates as the same time as the platforms' manager and sellers on the platform. (see in particular paras 41 and 46). The Authority also distinguishes between vertical and horizontal (or full range) marketplaces, the former including websites specialized in specific category of products such as Zalando, Lion's Home and AutoScout24 and the latter including Amazon.com, e-Bay, ePrice, CDiscount, Wish, Etsy, Alibaba.

shipping services for e-commerce operators), which represent a distinct while complementary market. In a broader meaning, defined "fulfilment", logistics can also include the upstream activity of warehousing (such as the supplying of the goods and the control of the suppliers) and the downstream activity (the delivery of the product, the management of returns and after-sales service), thus covering the complete management of a customer's order, from receiving the order to its completion. Both markets are national in scope.

As for Amazon position, the platform is the leader on the market for intermediation services on e-commerce platforms in light of its market shares, as well as the fact that half of Italian users searching for a product to buy start their research on Amazon.it[479], the fame and influential nature of the brand Amazon, the large amount of personal data on consumers and sellers and which grants Amazon "an unparalleled ability to 'profile' users to facilitate their search and maximize the likelihood of matching consumer and vendor preferences"[480], as well as the multiple roles performed by Amazon. On this latter aspect, the Authority stresses that Amazon constitutes a "complete ecosystem", being the operator running the marketplace which fixes the rules and the fees for third-party sellers and, at the same time, it is a seller itself, engaged directly in the activity of wholesale purchase from suppliers and in the successive retail sale and shipment of the goods to the final consumers; finally, Amazon supplies a series of accessory services to the sellers on the marketplace, like the service of "fulfilment" (as described above). Amazon's market power is not counterbalanced by any seller and its destined to become even stronger due to significant barriers to entry, namely economies of scale and strong network effects[481].

With specific regard to the conduct allegedly in breach of Article 102 TFEU, the evidence gathered indicates the existence of various benefits granted by Amazon to the sellers who use Amazon Logistics, to the detriment of those who manage their orders independently or rely on a third-party provider of logistics services[482].

The benefits provided to the sellers using Amazon Logistics include: i) different and more favourable interpretation of performance indicators – which is one of the parameter used by Amazon to assess the reliability of third-party sellers[483]; ii) better ranking and greater visibility in the search results page due to the fact that only the products manged through

[479] *Ibid.*, paras 53, 67. The Authority refers to the survey published on Geekwire.com; see T. Soper (2017), Amazon continues to grow lead over Google as starting point for online shoppers, 13 January, https://www.geekwire.com/2017/amazon-continues-grow-lead-google-starting-point-online-shoppers/.
[480] Italian Competition Authority (2019), *A528 - FBA AMAZON*, Decision no. 27623, *cit.*, para 70.
[481] *Ibid.*, paras 63-73.
[482] *Ibid.*, para 74.
[483] In evaluating the seller's performance Amazon only takes into account negative feedbacks received by the sellers with regards to orders that were managed directly or through a third-party. *Ibid.*, para 76.

Amazon FBA have unique access to Amazon "Prime", regardless of the features of the delivery (such as timing, terms and prices)[484]; and iii) a greater speed and ease in the purchase of the product through the selection of the products in the so called "BuyBox" (i.e. the option that allows consumers to buy the product through just one click without choosing among the offers of different sellers for a specific products)[485]. Indeed, adhering to Amazon logistics service significantly increases the seller's probability of being selected for the Buy Box product[486].

As a consequence, the Authority argues that *"[o]verall, a seller can be penalized in the ranking and in "accessing" consumers on Amazon's marketplace solely because a competitor is also a customer of Amazon's logistics service, even though its offering is competitive and convenient and its overall sales performance is comparable to that of that competitor"*[487].

The Authority also believes that the better ranking in the search result has a non-marginal impact on the sales performance of the sellers adhering to FBA, based on the fact that 70% of the consumers check only the offers displayed in the first results page and that the products display therein account for 81% of the sales for a given search[488].

Based on all the above, the Authority concludes, as already mentioned, that such practices fall outside competition on the merits and depend on Amazon's ability to "discriminate" sellers and products based on their adherence to FBA; moreover, they appear to provide Amazon a significant competitive advantage in the market of logistics services, to the detriment of those operators competing on that market (operators only active in the provision of e-commerce

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[484] "Prime" is Amazon's program which allows consumers - who pay an annual fee to join the program - fast delivery in one or two to three days. Moreover, there is an ad hoc filter – which consumers can select – that allows consumers to view only those products/sellers inserted in the Prime program. The Authority also recalls that the results' ranking is determined by an algorithm named "A9", and the positioning of the product exercise great influence on the sales of the product on the marketplace: 70% of consumers only check the offers on the first results' page, without not even looking at the second page; 35% of consumers buy the product which is shown as first and 64% buy a product included in the top three results. The products which appear on the first page amount for 81% of the sales of a given search. *Ibid.*, para 14.
The Authority has also pointed out that given the specific features of Amazon functionalities, access to "Prime" and "BuyBox" confers a significant advantage to the sellers in order to win the competition and increase the sales on the marketplace. Indeed, when a product is offered by more sellers, the offer that gains the BuyBox is provided as first in the results page and more than 80% of the purchases on Amazon occur through the BuyBox. The Authority draws an analogy with Google Search affirming that the BuyBox has the same importance as appearing among the first results in Google Search. *Ibid.*, para 27.
Moreover, Prime customers tend to buy more often than non-Prime users and tend to select the products to purchase among those that are part of the Prime program. This is because they don't pay the delivery as the subscription fee (charged once a year) allow to benefit of free deliveries.

[485] *Ibid.*, paras 74-79.

[486] *Ibid.*, paras 76-79. Moreover, by using FBA a seller can win the BuyBox even if the price of its product is higher compared to that offered by its competitors, not delivered through Amazon.

[487] *Ibid.*, para 80.

[488] *Ibid.*, para 81. To this end, the Authority refers to the study released by CPCStrategy; see CPCStrategy (2018), *The 2018 Amazon Shopper Behaviour Study*, available at the following link: http://learn.cpcstrategy.com/rs/006-GWW-889/images/2018-Amazon-Shopper-Behavior-Study.pdf.

logistics services). The seller's choice to entrust the management of its own warehouse to a third-party logistics operator, indeed, would cause the loss of the described benefits, regardless of the effectiveness and quality of the service provided by competing operators[489].

In addition, Amazon's conducts can potentially reduce the competitiveness of competing marketplaces to the extent that such conducts in fact could reduce and/or make less attractive for sellers who use the FBA service to offer their products on competing platforms. Indeed, the pricing structure of Amazon's logistics services appears to make the management of orders placed on a competing marketplace more expensive than that of direct sales on Amazon; moreover, a seller who intends to make use of a different logistics service to manage sales made on other platforms, may have to bear higher costs – for example, because of the duplication of costs related to the management of warehouse stocks – thereby finding it more convenient to give up offering, in whole or in large part, their products on another marketplace and decide to sell only on Amazon[490].

All in all, "by granting a "preferential treatment" to sellers using its FBA logistics service ("self- preferencing"), [Amazon] appears to be able to limit the growth – or foreclose market access – of its competitors on the Italian market for e-commerce logistics services and, potentially, on the market for intermediation services on e-commerce platforms. By doing so, Amazon would be able to strengthen its dominant position on the market of intermediation services on e-commerce platforms and, at the same time, to extend it to the national market of logistics services for e-commerce in breach of Article 102 of the TFEU"[491].

3.2.2 Applying the self-preferencing test (narrow definition)

As seen, the Authority expressly refers to self-preferencing as the relevant theory of harm. Without trying to anticipate the findings that the Authority will reach, an attempt is made to apply the narrow definition and the legal test provided above to the facts of the case in order to test the soundness of those theoretical elaborations.

Starting from the definition of self-preferencing, it can be argued that Amazon's material conduct meets the narrow definition elaborated on the basis of the *Google Shopping* case. In particular, Amazon's practices are characterized by two constituent elements, namely a "pure" self-preferencing behaviour whereby the dominant firm favours its services (element no.1), as well as an active behaviour directly damaging competitors (element no. 2). As for the first element, Amazon is favouring its own logistics services allowing the sellers who rely

[489] Italian Competition Authority (2019), *A528 - FBA AMAZON*, Decision n. 27623, *cit.*, para 82.
[490] Italian Competition Authority (2019), *A528 - FBA AMAZON*, Decision no. 27623, *cit.*, para 84.
[491] *Ibid.*, para 85.

on them to enjoy great benefits, thus contributing to making Amazon's services very appealing. However, as seen in the analysis of *Google Shopping* case, had this been the only conduct, probably no alleged abuse would have been found and no investigation would have been opened in that *prima facie* there seems to be no wrong with such a practice: as those services are managed directly by the platform itself, Amazon knows first-hand the high standards to which they comply and that Amazon itself can assure; given the high quality of the services Amazon chose to "reward" the sellers who – by using Amazon FBA – can provide those same high standards to final consumers. As a consequence, it chose to made consumers aware of the high quality of logistics services by considering the usage of Amazon FBA services to qualify for higher ranking and great visibility also through the BuyBox and Amazon Prime. It can therefore be argued that the platform lawfully decided to give great visibility to those sellers relying on high quality "in-house" logistics services.

However, Amazon's practices also have a second constituent element, namely the various impediments embedded in the platform's functioning which penalize third party providers of logistics services in that – no matter the quality of their services – they would always be less appealing than those offered by Amazon given the fact that by choosing them the sellers must renounce to essential features for a good visibility on the platform, such as the Prime program and access to the BuyBox.

And indeed, it is the very combination of the two elements (and mainly the existence of this second element) that makes the practice particularly problematic under an antitrust law perspective given the importance of ranking and visibility for competing viably on the market – including being featured in the BoyBox and thus being the first visible seller for that one given product and have access to Prime – to stand a chance and succeed on the platform from the sellers' points of view. On this point, the Authority has drawn an explicit analogy with Google Search affirming that the BuyBox has the same importance as appearing among the first results in Google Search[492].

In this respect, the analysis of the case also shows the different and atypical forms that the active conduct aimed at damaging competitors in the target market can take in the context of marketplaces where in lights of its peculiar business model of "network orchestrator" the dominant platform is able to curve the rules of that marketplace to the detriment of competitors (while favoring its own services).

As for the effects, it has to be analyzed whether the two-fold conduct results in anticompetitive foreclosure. As anticipated, it is very likely that the mechanisms envisaged by

[492] *Ibid.*, para 27.

Amazon would result in the "exclusion" of actual competitors in the market of logistics services; if not a complete exclusion of actual competitors, they would very likely be marginalized to a niche of the market, while at the same time those same mechanisms would be capable of preventing the entry of new potential rivals. Similar to *Google Shopping* were the foreclosure resulted from the importance of internet traffic – denied to Google's competitors due to the demoting algorithms, in the case at the end the foreclosure results from the importance of qualifying for high ranking, Prime and the BuyBox – denied to Amazon's competitors due to the very selecting criteria elaborated by the platform to access to those features (and which exclude third party providers, regardless of the quality of their services).
It is indeed very likely that the sellers would choose to use the logistics provided by Amazon rather than being penalized on the marketplace and in its capability to reach and appeal consumers because of choosing other third-party providers, even if potentially offering better and cheaper options.
As for the actual anticompetitive effects, the foreclosure of Amazon's competitors is likely to result in less choice of logistics services for the sellers; being dominant in the market, Amazon would then be able to increase the prices of logistics services ultimately leading the sellers to charge higher prices to consumers purchasing the products given that they would need to internalize such cost. Moreover, being able to shelter its position of dominance regardless of its merits, Amazon would also loose incentives to ameliorate the services which could result in less quality and innovation in logistics services to the detriment of both sellers and final consumers.
As pointed out by the Authority, those anticompetitive effects could expand on the market for intermediation services on marketplaces given the facts that the sellers active on Amazon and relying on FBA for logistics would have less incentives in selling on other platforms as in order to operate on them they must bear the higher costs applied by Amazon to provide logistics services for other platforms, or relying on a different providers for those different channels thereby duplicating certain costs. As a consequence, the conduct can also help reinforcing Amazon's (super)dominant position in the markets of intermediation services on marketplaces.
Therefore, based on all of the above, the analysis of the Italian *Amazon* case shows that the narrow definition of self-preferencing provided above can effectively apply to conducts different from that under scrutiny in Google Shopping. Moreover, it seems able to capture the disvalue of the conduct, by focusing not only to the "positive" self-preferencing but those on that second element of active damage of the rivals, which is capable of provoking

anticompetitive foreclosure on the market. Also, the considerations elaborated above with regards to the legal test hold true in the present case, by reinforcing the importance of identifying exclusionary and anticompetitive effects, starting from the very facts of the case and how the specific difference in treatment can impact competition on the marketplace. The analysis also shows that the approach taken by the Commission could be replicated – at least so far – by a National Competition Authority and that, as further covered in the Conclusions to this work – self-preferencing as a legal category can prove useful to tackle abuses taking place in the context of the digital economy.

Finally, the case at hand also shows that the theories of harm suggested as alternatives to "pure" self-preferencing (namely tying, margin squeeze, discrimination and the manipulation of information) would fail to adapt to this scenario or in any case request considerable efforts and creative ability for no actual benefit. Indeed, the case at hand does not entail a manipulation of information. Being Amazon an e-commerce intermediation platform and not (or not only) a search engine, the services it provides on the consumer side are those of intermediation on e-commerce platforms, and not the provision of information, thereby suggesting that the manipulation of information as a theory of harm does not apply in the case at hand.

Also, a margin squeeze theory of harm would be extremely complicated to elaborate in the case given the fact that the potential exclusion of competitors in the one market is not due to the price charged by the dominant firm at the "wholesale level" but depends instead on the "conditions of access" and more precisely on the specific way the platform has set up the architecture of the visibility and promotion features available to sellers in the marketplaces.

As for discrimination, the problem relies once again on the fact that the competing providers of logistic services are not Amazon's trading parties given the absence of a direct business relationships between the platform and those logistic operators. In addition, as recalled above under paragraph 1.1., a theory of harm based on discrimination – as traditionally interpreted – is not well suited to deal with strategies entailing leveraging of market power and potentially causing the marginalization of competitors and welfare reduction.

Perhaps, the most relevant alternative theory of harm for the case at hand is that of tying – which indeed the economic studies recalled in chapter 1 deem to be the other form of involvement strategy (in addition to self-preferencing)[493]. Amazon's conduct could thus be seen as a tying of two different products (intermediation services for sellers being the tying good, and logistic services being the tied good), whereby the coercion or lack of consumer

[493] See chapter 1, paragraph 3.2.

choice is represented by the fact that failure to acquire the logistic services will strongly penalize sellers on the marketplace. However, in lights of the very peculiar features of the case at hand, self-preferencing seems to offer a more immediate understanding of the conduct and of its disvalue in an antitrust perspective. What matters the most indeed seems to be, rather than elements of coercion, the very fact that Amazon in its quality of "network orchestrator" – or "marketplace manager" is able to determine the functioning of the marketplace in a way that is capable not only to systematically favour its own services on the target market, but to actively damaging competitors by inserting an internal rule that impede competitors from being as attractive as Amazon's services no matter the even superior features of their services.

3.3 The (Italian) Google Android Auto case

3.3.1 The facts of the case and the Authority's preliminary findings

Another interesting case involving Google was opened by the Italian Competition Authority in 2019 right after the *Amazon* case. With decision of 8 May 2019 the Italian Competition Authority launched an investigation against Alphabet Inc., Google LLC and the Italian subsidiary Google Italy S.r.l. for an alleged abuse of dominant position in breach of Article 102 TFEU, triggered by a complaint filed by Enel X Italia S.r.l., subsidiary of Enel S.p.A., the Italian multinational energy company and one of the leading global integrated operators in the electricity and gas sectors[494].

According to the ICA's Decision, Google is allegedly liable of refusing to integrate the Enel's app ("Enel X Recharge", then renamed "JuicePass") for the provision to end users of information and charging services for electric and hybrid vehicles, into the Android Auto environment, i.e. the extension of Android operating systems for cars.

Also in this case before analysing more in detail the conduct under scrutiny, it is useful recalling the Authority's preliminary findings with regards to the relevant markets and Google's position in it. As for the markets, the Authority recalled the findings of the *Google Android* case – where the Commission defined the market for the licensing of smart mobile operating systems (OSs) in which Google is active with the Android operating system.

Android is not only used by mobile device manufacturers (OEMs) to configure the devices and manage their basic functions, but also by developers of apps for devices with Android operating system, to create compatible applications. While being two complimentary aspects,

[494] Italian Competition Authority (2019), *A529 - ICA: investigation launched against Google for alleged abuse of a dominant position*, press release, 17 May, https://en.agcm.it/en/media/press-releases/2019/5/A529.

the Authority specified that the case under scrutiny concerns the use of Android operating system by app developers[495]. Android Auto is an Android application that allows users to view selected apps on the cars' display and to use those apps (as well as certain basic features of the mobile phone such as calls and text messages) while driving, through the controls integrated in the vehicle (steering wheel, car display, knobs) and voice commands, so as to limit users' distraction while driving and maintain safety[496]. The apps available on Android Auto in 2019 include apps for maps, messaging, calls, streaming, music, podcasts, radio, audiobooks, e-books and news.

While owing and managing Android operating system and its cars' extension Android Auto, Google is also an app developer. Google Maps, which offers end users a wide range of information and functionality related to the territory, is one of Google's app and it is available in Android Auto.

Following a rather descriptive approach, the Authority then considered the services offered by Enel's app, developed following Google's public guidelines for the development of apps compatible with Android Auto. In particular, Enel's app allows users to (i) view the charging stations on a map, both those of Enel and those of other operators who have signed agreements with Enel, (ii) access information relevant to recharging (socket type, socket status, maximum deliverable power, availability of the stations, etc.), (iii) book the charging points, (iv) view the directions to reach the stations and (v) start, stop, monitor and pay for the recharging session.

With regards to Google's position, the Authority recalls the Commission's findings in the *Android* precedent, where Google was deemed to hold a dominant position in the worldwide market for mobile operating systems that can be licensed, due to the high market shares held by Google through the Android OS and the significant barriers to entry due to strong network effects. On these premises, the Italian Authority argued that Google represents a "de facto indispensable partner for app developers who want to offer their services to the users of smart devices with Android operating system"[497]. In addition, Android Auto, together with Apple CarPlay, represent a market standard for car applications being Android Auto the "reference system" for many car manufacturers, coherently with the facts that Android and Apple

[495] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel X Italia con sistema Android Auto*, Decision no. 27771 of 8 May 2019 concerning the opening of the proceedings, para 19.

[496] Android Auto is available on all compatible cars, including electric and hybrid cars, as well as cars with internal combustion engine.

[497] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel, cit.,* para 26.

represent the two main ecosystems for apps developers[498]; in this regard, for users of smart devices with Android operating system the integration of apps and cell phone functionalities with the car' tools is possible only through Android Auto[499]. Therefore, "Android Auto is a system of interface and interaction between smartphones and cars with which developers of apps to be used while driving must be integrated in order to ensure that the wide audience of owners of devices with Android operating system can safely use such apps, limiting distractions and ensuring safety while driving. This is confirmed by the fact that top apps with a large number of users (in the order of millions), such as music streaming apps Spotify and Deezer successfully pursued the integration in Android Auto"[500].

That said with regards to the markets and Google's position, the conduct at stake concerns the refusal opposed by Google to integrate Enel's app into Android Auto. According to the Authority, Google's refusal "is likely to substantially restrict competition, since the use of the App through Android Auto appears necessary to be able to compete effectively in offering e-mobility services to end customers"[501]. Such a restriction leads, in particular, to ultimately damage the final consumer; however, the assessment of the anticompetitive nature of the conduct requires, according to the Authority, assessing the existence of objective justification for Google's denial[502].

In order to assess whether an objective justification exists, the Authority reviewed the flow of contacts between the two companies[503] and precisely Google final refusal to integrate the app on the basis that – due to functionalities it offers, including that of booking recharging sockets – the app qualifies as an "utility app" which as of January 2019 (when Google was writing) was not eligible – according to Google's policies communicated by email to Enel and not publicly available to app developers – to be integrated in Android Auto. Formally Google's internal policies at that time allowed only to the categories of media and messaging apps to be integrated in Android Auto, "due to users' driving safety and other technical reasons"[504].

During the negotiations between the two companies prior to the start of the proceedings, Google proposed two alternative solutions to Enel X, deemed by Google as the only viable ways to overcome the issue and to accommodate Enel X request to integrate the App into

[498] The Authority specifies that this is true despite the fact that the Android and Apple systems identify two distinct markets as ascertained by the Commission in Android.
[499] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel, cit.,* paras 27-28.
[500] *Ibid.,* para 29.
[501] *Ibid.,* para 30.
[502] *Ibid.*
[503] Enel started contacting Google in August 2018 after it completed the development of its apps in accordance with Google's guidelines for Android Auto. The app was first made available on Google Play Store and Apple App Store on 2nd May 2018.
[504] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel, cit.,* paras 13, 31.

Android Auto. The first one entailed the integration in Google Maps of some detailed information on charging stations dislocated on the territory provided by Enel in JuicePass, while the second envisaged the development of JuicePass through the portions of software (Software Development Kit, also referred to as SDK) of Android Auto that Google itself provides to car manufacturers. However, as recognized by the ICA, both of these "solutions" substantiate a denial of Enel's request. Firstly, in both cases the app would remain outside the Android Auto system; in addition, the development of as many versions of the app as there are electric vehicle models from the many car manufacturers (envisaged in the second option) has high transaction costs and appears ineffective in the face of the spread of Android Auto and Apple CarPlay environments as the market standard on many models of the major car manufacturers[505].

Therefore, while JuicePass is the outcome of the many investments in the development of digital services sustained by Enel X and is already able to offer detailed information on the charging columns and to allow the booking and management of the recharge (including the payment), lacking the integration into Android Auto, however, JuicePass can only be used when the car is stationary, thus reducing its usefulness in the eyes of users and undermining its use and spread[506].

On the other hand, Google Maps – which allows user to view the charging stations and provides directions on how to reach them[507] – benefits of many major advantages, including a perfect integration into Android Auto (thereby enabling users to use the app while driving easily via voice commands and in compliance with driving safety regulations), as well as the strength of the Google brand and the fact that Google Maps is one of the most popular apps already benefitting of a significant scale of activity. In addition, as the market for charging services is currently developing the Authority pointed out that nothing excludes that Google will further expand and detail the information on the charging columns and add the functionalities of booking and management of charging, through agreements with the operators of the charging points and/or Mobility Service Providers, especially considering the services and functions already available in Google Maps in different fields[508].

In this context, Google's refusal to integrate JuicePass into Android Auto is capable of limiting the App's usefulness to the benefit of Google Maps, thus altering the competitive dynamics and hindering the development of an innovative service, as well as the emergence

[505] *Ibid.,* para 32.
[506] *Ibid.*, para 33.
[507] And which hardly qualifies as a media or messaging app. See *infra*.
[508] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel, cit.,* para 34

of competition on the merits. Such conclusion is especially true considering that, given the importance of network effects in platform development, Google may compromise the app's chances of success just by limiting the growth of app's users, and therefore its popularity. Moreover, since network effects lead to a strengthening of the barriers to entry into a given market (as a new entrant, in addition to offering a different and/or better services, must also convince a sufficient number of users and/or operators to choose their platform), just by delaying the app's access on Android Auto for the time necessary for users to get used to search for charging stations on Google Maps, Google would be able to undermine the development and success of the App[509].

More in details as for the anticompetitive effects, the ICA stresses how Google's behaviour is capable of eliminating a competitor (Enel) and frustrate its investments in technology; this would in turn lead to a restriction of supply in terms of breadth, variety and degree of innovation, both because the presence of healthy competition is a powerful stimulus to innovation and because Google's conduct in the present case is designed to exclude a competitor that is financially sound and willing to invest.

The Authority also pointed out in a broader perspective that Google's conduct is suitable to undermine the possibility of developing a digital service of a "vertical" nature, i.e. dedicated to a specific purpose, in this case to provide information and functionalities aimed at recharging electric vehicles, against the affirmation and strengthening of a tool of a "horizontal" nature, such as Google Maps, which aggregates a plurality of functions and services to end users through a constant process of integration of the utilities that from time to time are proposed on the market[510].

Ultimately, as the refusal to integrate the App into Android Auto will prevent consumers from the possibility to use Enel's app to book the charging stations while driving, a substantial lowering of the quality of the service would occur, which would also affect the better usability of electric cars, to the detriment of users. In addition, the conduct would result into an artificial restriction of users' choice in terms of operators and platforms, characteristics of the service (whether specialised or part of a wide range) and degree of innovation: users would be precluded from choosing the service most suited to their needs, assessing the usefulness of the different offers without interference from companies that, like Google with the Android ecosystem, act as "gatekeepers"[511].

[509] *Ibid.,* para 35.
[510] *Ibid.,* para 37.
[511] *Ibid.,* para 38.

Another aspect, which is not less important, is the impact of Google's conducts on data flows: according to the Authority, indeed, by defending the horizontal model of Google Maps the company appears able to maintain and strength its role of contact centre with users that allows Google to acquire the flow of data produced by the latter. In this regard, it is worth pointing out – as the ICA did – that, in both the alternative solutions proposed by Google, the flow of data generated by JuicePass's users would instead be diverted from Enel X to Google, either because of the integration of the app into Google Maps, or into the various multimedia systems of electric vehicles through portions of software (SDK of Android Auto) belonging to Google[512].

3.3.2 Qualifying Google's conduct: refusal to deal vs *self-preferencing*

Contrary to the *Amazon* case where the Italian Competition Authority expressly refers to self-preferencing, the investigation against Google does not pivot around the same theory of harm. Instead, Google's conduct allegedly violates Article 102 (b) TFEU, therefore, integrating an exclusionary and anticompetitive abuse. The Authority indeed has focused on Google's refusal to integrate Enel's app in Android Auto and has done the first steps to establish the abuse in accordance with the traditional legal test applicable in cases of refusals to deal[513]: other than focusing on the anticompetitive effects stemming from the conduct, the Authority stresses the importance of Android Auto to compete effectively in the market of e-mobility services as well as on the lack of objective justification for the behaviour.

With regards to the latter aspect, in the final part of the decision the Authority argued that *prima facie* Google has failed to provide any objective reason justifying the refusal. The Authority notes that the app was developed by Enel X following the Android app quality for cars guidelines published by Google, with the aim of ensuring driving safety, in particular by limiting user-app interactions to voice commands only. In addition, the negotiations related documents show that while Google had first indicated that only two categories of apps, namely media (a) and messaging (b) apps, were likely to be integrated into Android Auto, it then added to the list a third category, namely navigation apps (c), only after Enel X detected the presence on Android Auto of Google Maps and Waze. According to the Authority, therefore, the identification of the apps' categories deemed suitable to be integrated into Android Auto appears a mere *ex post* classification of the apps already integrated in the

[512] *Ibid.,* para 11.

[513] As seen in chapter 2 (paragraph 3.1.1), the following conditions apply: the refusal is likely to have a negative effect on competition, the conduct does not have any objective justification, and the claimed resource is indispensable.

Android Auto environment by Google's will, rather than an explicit plan predefined before Enel's request. In addition, Google expressly stated that it has no plans to "open" Android Auto to other categories of apps "for driving safety reasons and for other technical reasons" ignoring that Enel X has set itself the objective of ensuring greatest safety in developing the app and neglecting to indicate what are the actual technical reasons preventing the integration of JuicePass into Android Auto[514].

The justifications given by Google were not deemed plausible also in light of the fact that Google Maps already offers some of the functionalities of the app, such as the display of the columns and the indication of the route to reach them. These features, however, do not prevent the app from being perfectly integrated in Android Auto. In addition, Google seems to contradict itself by offering to Enel X the option to integrate detailed information on the characteristics of the charging points directly into Google Maps as well as by proposing to use Android Auto SDKs to integrate the App in the multimedia systems of the many models of electric vehicles of different car manufacturers. Therefore, while Google states that JuicePass is not suitable to be integrated into Android Auto, at the same time, it believes, that the app's features are compatible with Android Auto if they are intermediate by Google Maps and are even compatible – again without any safety concerns – with the multimedia systems of electric vehicles.

For all these reasons, the refusal qualifies, according to the Authority, as an abuse of Google's dominant position in the market for operating system that can be licensed aimed at excluding a competitor that developed an app for the provision of e-mobility charging services in order to defend and strength the business model of Google Maps which also represents an access point to end users as well as to the data flows generated by their activities[515].

That said, the following paragraph will try to "test" the approach adopted by the Italian Competition as well as the narrow definition of self-preferencing and the other theoretical considerations elaborated in the first paragraphs of this chapter. First, assuming that the conduct does integrate a refusal to deal and not a self-preferencing type of conduct as correctly concluded by the Authority, it should fall outside the narrow definition of self-preferencing provided above. It this holds true, the same definition will prove useful in narrowing down according to meaningful criteria the vast range of conducts that were potentially deemed to fall under the new label of self-preferencing.

Second, the analysis will try to assess if the conduct at hand can meet the stringent criteria elaborated by the case law on refusal to deal, and precisely the indispensability requirement.

[514] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel, cit.,* para 39.
[515] *Ibid*., para 41.

While those conditions could not be met by the conduct at stake in *Google Shopping*, they should instead be meet by the "more traditional" refusal carried out by Google with regards to Android Auto despite occurring in the context of the digital economy.

As for the first defining issue, il light of the detailed analysis of the facts of the case, it can be argued that Google's practice does not fall within the narrow definition of self-preferencing outlined above. Indeed, the two constituent elements characterizing self-preferencing are not present in the case at hand. This is because the refusal opposed by Google amounts to a "streamline" and traditional conduct which contains in itself the two constituent elements that are instead autonomous parts of the self-preferencing type of conduct, i.e. the "mere" self-preferencing and the "active demotion" of competitors. In particular, by refusing to grant access to Android Auto Google is favouring its own services and implicitly damaging competitors, but the refusal itself does not integrate that *atypical* and *active* conduct damaging competitors that instead is the peculiar feature of what characterize self-preferencing in *Google Shopping* (in the form of the active demotion of competitors though the application of ad hoc adjustment algorithms) and – as seen – in the Italian *Amazon* case.

Differently from those cases, in the case at hand the main self-preferencing feature, i.e. the combination of a preferential treatment with an active and "unconventional" behaviour "against" competitors, is absent.

Moreover, differently from self-preferencing where – as seen above – the actual active conduct is a deliberate act of the dominant firm to place competitors at a competitive disadvantage having no positive value whatsoever for the legal system, the refusal to deal may represent – at least in theory – the exercise of a right granted by the laws to the undertakings (even dominant ones).

In light of the above, it is believed that – if narrowly interpreted – self-preferencing is not at stake in every case involving Big Tech and such a narrow definition provides authorities (and interpreters) with sufficient and meaningful guiding criteria to recognize when self-preferencing may be relevant according to the specificities of the case under scrutiny. In addition, it should be noted that it would be inappropriate and even absurd to invoke self-preferencing as a theory of harm in the case at hand just because the case involves some sort of self-favouring by a vertically integrated firm, not least given the fact that there are other theories – and precisely refusal to deal – well equipped to effectively frame and assess the practice at stake.

On the other hand, it follows from the above that, as it will be analysed here below, extreme caution is needed when ascertaining the abusive nature of a refusal to deal. Excluding self-

preferencing as the theory of harm applicable in the *Google Android Auto* case, the conduct should be analysed following the "traditional" test established by the case law for refusals. As seen in chapter 2, given the peculiar issues surrounding refusal to deal (including objections on effectivity, equity and administrability grounds[516]), both the Commission's precedents and the case law have developed particularly stringent conditions of liability, including the indispensability requirement. Without trying to anticipate the exact test that the Authority will apply (also depending, among others, on whether Android Auto will be deemed to represent an IP resource), it is worth mentioning that in light of the facts of the case at hand establishing the indispensable nature of the resource (as established by the case law in brick-and-mortar cases and strictly interpreted by the scholars commenting on it) may not be an easy task. Indeed, while the exact definition of indispensability according to traditional antitrust analysis falls outside the scope of the present work, in light of the considerations on this topic discusses in chapter 2, it can be argued that demonstrating that access to Android Auto is *indispensable to compete in the market of e-moving charging services* may prove to be challenging.

In this regard, accessing Android Auto (or more precisely displaying a firm's app on Android Auto) is certainly indispensable to *effectively* compete on the market – or in the Authority's words, it "appears necessary to be able to compete effectively in offering e-mobility services to end customers", demonstrating that lacking such an access competing on the market for e-moving charging services would be "impossible" or "unreasonably difficult"[517] seems to go further than that. The point is that Enel X, as well as other companies providing charging services can offer those services on the market through different channels, for instance through the app developed by Enel and that users can use directly on the smartphones, even with the supplement of e-cards for actually starting the charging session and limiting to the app the search of the charging points. However, as the market of internet traffic moved from PCs to smartphones, it is likely that the market for e-charging services – which at the movement is still in a very early stage of development – will fast move from mobile to connected cars as soon as the market of electric and hybrid cars will expand, also in light of the fact that all electric and hybrid last generation cars are all endowed with powerful built-in displays and connecting systems and that users will need to use such services especially when driving their cars and needing to charge them before running out of "fuel" (i.e. power).

Therefore, it is evident that in a new and developing market where many operators are exploring different alternatives for the purpose of letting users have access to their

[516] Among others, see N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 2-5.
[517] Reference is made to Ibáñez Colomo, Pablo (2020), Self-Preferencing, *cit*., pp. 7-8.

smartphones and apps directly on the car's infotainment system, arguing that access to Android Auto is an "objective necessity"[518] is not easy. It would be probably be easier to assess whether Android Auto is indispensable or not later on, when in a more mature market the different roles and the values of each of the service and player is more defined[519]. However, Google's conduct may not be less problematic under an antitrust perspective in that by refusing other operators (such as Enel X) to progressively being able to offer their services to consumers in a new and more efficient way (being directly available on users' cars), will impede those operators from being competitive when then market will further expand or even tip, contrary to Google which instead will be in pole position to benefit from any new market development.

Finally, on a different note, assuming that the dynamics observed in chapter 1 do represent the reality in the tech sector, and thus that Big Tech tend to mimic each other initiatives, it is possible to imagine a change in Google's strategy due to the fact that Apple has announced in June 2020 that, starting with the new version of iOS14 operating system, Apple Carplay (i.e.t the equivalent of Android Auto) would open to new categories of apps, including those aimed at electric vehicle charging, parking and delivery food and has released the related instructions for designers and developers[520]. As a consequence, Google may decide to somehow grant access to Android Auto also to Enel's app in order to keep up with Apple, thereby "changing" its absolute refusal to a delay or the constructive refusal. Should this happen, the Authority would need to assess such a hypothetical different scenario and determine whether the abusive nature of the conduct persists under these new circumstances. In particular, as the Authority itself has already envisaged in the decision opening the proceedings that just by delaying the app's access on Android Auto for the time necessary for users to get used to search for charging stations on Google Maps, Google would be able to undermine the development and success of the App, due to the presence of strong network effects[521], it is possible to imagine that the analyses would focus on that, again, requiring the Authority a difficult task, namely to establish when such a delay is likely to be

[518] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 83.

[519] In this regard, it is very interesting recalling the findings of the Department of Justice in its lawsuits against Google where the DoJ states that: "Google Is Positioning Itself to Control the Next Generation of Search Distribution Channel. Although mobile phones and computers account for the vast majority of general searches on the internet today, in the future, an increasing number of searches will likely be conducted on next generation devices such as smart watches, smart speakers, smart TVs, and connected automobiles. Google is positioning itself to control these emerging channels for search distribution, excluding new and established rivals." See U.S. Department of Justice *et al.* (2020), *Complaint v. Google LLC*, *cit.*, para 160.

[520] See Apple's press release of 22 June 2020, *Apple reimagines the iPhone experience with iOS 14*, available at https://www.apple.com/newsroom/2020/06/apple-reimagines-the-iphone-experience-with-ios-14/.

[521] Italian Competition Authority (2019), *A529 - Google/Compatibilità App Enel, cit.,* para 35.

anticompetitive in a market which is currently evolving and where the dynamics are still taking place.

4. The ban of self-preferencing in the DMA

The Draft DMA introduces a fixed series of eighteen *ex ante* obligations divided into two lists: a list of self-executing obligations, i.e. directly applicable (Article 5), and a list of obligations that may be further specified by the Commission (Article 6). More in detail, among others, Article 5 introduces for the gatekeepers:

a. various price related obligations, including for instance the duty to allow commercial users to offer the same products or services to end users through third party online intermediary services at prices or conditions different from those offered through the gatekeeper's online intermediary services (Article 5(b))[522] and the provision laid down in Article 5(g)) concerning the disclosure by the platform of certain price information to advertisers and publishers[523];
b. a prohibition of certain tying strategies both towards business users and end users[524];
c. the obligation to guarantee the right of users to take action against gatekeepers, i.e. the duty to refrain from preventing commercial users from raising with any competent public authority issues relating to the practices of gatekeepers or from restricting that possibility (Article 5(d)); and
d. the duty to refrain from requiring business users who make use of the gatekeeper's basic platform services to use or offer a gatekeeper identification service, or to interoperate with it (Article 5(e)).

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[522] This obligation probably follows the debate on the subject of parity clauses (or most favoured nation clauses, MFN), often used by platforms operating in the hotel booking sector, allow the platform (Online Travel Agency, OTA) to request that suppliers do not offer lower prices or better conditions on other platforms or on their own websites. The way in which competition authorities have considered the legality of these clauses has varied considerably over time and has caused a certain degree of legal uncertainty for businesses. The debate has been resolved in the sense of considering such clauses prohibited. On the topic see M. Colangelo (2019), *Competition Law and Most Favoured Nation Clauses in Online Markets* in K. Mathis - A. Tor (eds.), *New Developments in Competition Law & Economics*, Economic Analysis of Law in European Legal Scholarship Series, Springer, 2019, https://ssrn.com/abstract=3293716.

[523] The obligation to provide advertisers and publishers to whom the platform provides advertising services, at their request, with information relating to the price paid by the advertiser or publisher, and the amount or remuneration paid to the publisher, for the publication of a given advertisement and for each of the relevant advertising services provided by the gatekeeper.

[524] Reference is made in particular to the duty of gatekeepers to allow business users to promote offers to end users acquired through the basic platform service and to enter into contracts with such end users, irrespective of whether or not they use the gatekeeper's basic platform services for this purpose; gatekeepers are also obliged to allow end users to access and use content, subscriptions, components or other items through the basic platform services using a business user's software application through which they have been purchased (Article 5(c)). Similarly, Article 5(f) requires the platform to refrain from requiring commercial users or end users to subscribe or subscribe to any other basic platform service as a condition for accessing, re-registering or subscribing to any of its services.

Moreover, and most importantly for the purpose of the present analysis, the obligations subject to further specification by the Commission include a general prohibition of discrimination in Article 6 (k) and three obligations that seem to recall the facts and findings of some of the recent cases dealt by the Commission, laid down, respectively, in Article 6 (1), (a), (b), (c) and (d).

In particular, Article 6 (k) intervenes with specific reference to data produced by search engines and establishes that the gatekeeper is required to guarantee third-party providers access on fair, reasonable and non-discriminatory terms to positioning, search, click and display data for free and paid searches generated by end users, without prejudice to the anonymisation of personal data.

Recalling the facts of the *Amazon* case[525], Article 6(1) (a) and the related Section 6(2) of the DMA prohibit the platform from using, in competition with business users, non-publicly accessible data generated through the activities of the business users themselves, i.e. all aggregated and non-aggregated data generated by business users that can be derived or collected through the commercial activities of business users or their customers on the gatekeeper's basic platform service.

Building on the recent *Google Android*[526], the Draft DMA requires gatekeepers to allow end-users to uninstall any pre-installed software application (which is not essential for the operating system or the device itself) on their basic platform service (Article 6(b)), and, on the other side, to allow the installation and actual use of third-party software applications or application stores on their basic platform service, the platform only being entitled to take proportionate measures to ensure that the third-party software applications or shops of software applications do not pose a risk to the integrity of the hardware or operating system provided by the gatekeeper (Article 6(c)).

Finally, clearly evoking the *Google Shopping* case, according to Article 6 (d) gatekeepers must refrain from giving more favourable positioning to services and products offered by the gatekeeper himself or by third parties belonging to the same company than to similar services or products of third parties. Literally, the actual wording of Article 6(d) imposes to gatekeepers the duty to "refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking".

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[525] European Commission (2019), *Antitrust: EC opens formal investigation against Amazon*, *cit.* See chapter 3, paragraph 3.1.

[526] European Commission, Case AT.40099 *Google Android*, *cit.*.

As clearly stated in the recitals concerning the ban of self-preferencing, "gatekeepers are often vertically integrated and offer certain products or services to end users through their own core platform services, or through a business user over which they exercise control which frequently leads to conflicts of interest. This can include the situation whereby a gatekeeper offers its own online intermediation services through an online search engine. When offering those products or services on the core platform service, gatekeepers can reserve a better position to their own offering, in terms of ranking, as opposed to the products of third parties also operating on that core platform service. This can occur for instance with products or services, including other core platform services, which are ranked in the results communicated by online search engines, or which are partly or entirely embedded in online search engines results, groups of results specialised in a certain topic, displayed along with the results of an online search engine, which are considered or used by certain end users as a service distinct or additional to the online search engine. Other instances are those of software applications which are distributed through software application stores, or products or services that are given prominence and display in the newsfeed of a social network, or products or services ranked in search results or displayed on an online marketplace. In those circumstances, the gatekeeper is in a dual-role position as intermediary for third party providers and as direct provider of products or services of the gatekeeper. Consequently, these gatekeepers have the ability to undermine directly the contestability for those products or services on these core platform services, to the detriment of business users which are not controlled by the gatekeeper"[527]. Therefore, "in such situations, the gatekeeper should not engage in any form of differentiated or preferential treatment in ranking on the core platform service, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls. To ensure that this obligation is effective, it should also be ensured that the conditions that apply to such ranking are also generally fair. Ranking should in this context cover all forms of relative prominence, including display, rating, linking or voice results. To ensure that this obligation is effective and cannot be circumvented it should also apply to any measure that may have an equivalent effect to the differentiated or preferential treatment in ranking. The guidelines adopted pursuant to Article 5 of Regulation (EU) 2019/1150 should also facilitate the implementation and enforcement of this obligation."[528]

[527] European Commission (2020), *Proposal for a Regulation on contestable and fair markets, cit.,* recital 48.
[528] *Ibid.*, recital 49. The regulation referred to by the DMA is Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

It follows from the above that the Commission has somehow restated the theory of harm adopted in *Google Shopping*, also continuing to rely on the broad definition of self-preferencing while establishing an explicit link between such a practice and the idea of non-discriminatory, i.e. fair, practices by recalling the Regulation on on promoting fairness and transparency for business users of online intermediation services.

A preliminary analysis of such provision seems therefore to confirm that the narrow definition of abusive self-preferencing provided above (chapter 2, paragraph 2) remains useful to guide not only the enforcement of Article 102 TFEU – which will still continue to apply – but also the enforcement of Article 6 (1) (d) of the Draft DMA, especially as it is included among the practice subject to further specification by the Commission. Following that approach, the Commission's intervention should not be triggered when the gatekeeper "merely" provides a preferential treatment to its products or services, but when that treatment is coupled with an active – and somehow non-traditional behaviour directly damaging competitors.

This indeed would serve as a fundamental boundary to guide an effective application of the self-preferencing ban especially as the Draft DMA does not leave any room for gatekeepers to challenge their regulatory duties on grounds that their conduct is incapable or unlikely to have anticompetitive effects[529]. In fact, as seen above (Introduction, paragraph 2) the Draft DMA explicitly states that the obligations imposed by virtue of Articles 5 and 6 apply regardless of their impact on competition on a given market, making the protection of fairness and contestability in relation to core platform services independent from the protection of the competitive process as understood under Articles 101 and 102 TFEU[530].

As for the interplay between abusive self-preferencing pursuant to Article 102 TFEU and the ban of self-preferencing under the DMA, it can be foreseen that – following the entry into force of the Draft DMA assuming that it will be enacted in its current version – the latter will find more frequent application in that, as clearly stated by the Commission, Article 102 TFEU application will be limited to certain cases of market power and anti-competitive behaviour[531]. Being self-preferencing a conduct that can be problematic under the antitrust perspective only when the platforms operate in markets whose dynamics express firms acting as "network orchestrators" or gatekeepers (following the definition of gatekeeper provided in the Draft DMA[532]) it is very likely that the Commission will more frequently recur to the new regulatory tool. The proceedings for abusive self-preferencing under Article 102 TFEU would

[529] P. Ibáñez Colomo (2021), *The Draft Digital Markets Act, cit.,* p. 19.
[530] *Ibid.*
[531] *Ibid.,* recital 5.
[532] See chapter 1, paragraph 2.5.

likely play a marginal role only where a firm may be able to carry out an abusive form of self-preferencing while escaping the broad definition of gatekeepers, even an "emerging" one and even according to the broad power retained by the Commission based on the qualitative criteria provided for by Article 3 (6). However, the topic would need a more in-depth analysis of the interplay between the "antitrust self-preferencing" and the "regulatory" and may be the subject of another work dedicated to it.

CONCLUSIONS

The economic studies (referred to in chapter 1) show that platforms operating on the digital markets have both the incentives and the ability to engage in envelopment strategies, i.e. to expand into target markets (typically adjacent to those where they carry out their core activities) by leveraging on shared user relationships, common components and data they can count on given the fact that they are active in a multi-sided market (the origin market). This strategy can take the form of bundling and self-preferencing. While the former relies on a well-established theory of harm and constitutes a "traditional" form of abuse under antitrust law and analysis, self-preferencing – which occurs when the enveloper expands into a target market that is mediated by its own origin platform – represents more of a novelty. The peculiarity of such case is that, given its unique position, the enveloping platform can – through its behaviour – affect the terms of trade in that target market, including the possibility of trade itself, by bending the origin platform's rules to provide a better outcome for its own products or services.

Such a strategy often leads to forms of foreclosure, including leveraging market power – i.e. using the market power in the origin market to exclude competitors from the target market to acquire market power and extract profits in that market – and protecting market power – that is, protecting the origin market, where the enveloper holds market power, from potential entry by competitors that operate in the target market. Due to the specific features of digital markets, including economies of scale, network and lock-in effects and market's tendency to tip, incumbent platforms may have particularly high incentives to foreclose competitors by enacting exclusionary practices, even stronger than those present in "traditional" markets.

While the existence of exclusionary incentives to envelop needs to be established on a case by case basis (depending, among other factors, on the cost of entry into the target market, the value of the incremental data in the origin market, the risk of entry into the origin market in the absence of entry in the target market, the reaction of users, etc.), it is believed that self-preferencing as a new form of abuse and theory oh harm represents a useful concept in the antitrust analysis as a tool that by its very nature is able to "capture" leveraging strategies between (or across) two or more digital markets.

In this context, the decision adopted by the European Commission in the *Google (Search) Shopping* case represented a turning point in the application of Article 102 TFEU to certain (self-preferencing) type of conducts carried out by dominant platforms active in digital markets and managing a full ecosystem of products and services. While the Commission does

not mention the term "self-preferencing" in its 216-page long decision, thereby refraining from expressly framing self-preferencing as novel form of abuse (and comprehensively so), in an extensive (and time-consuming) analysis it clarifies that a self-preferencing type of conduct – as it results from the combination of two distinct elements, namely "pure" self-preferencing and active demotion of competing services[533] – is capable of having anticompetitive effects on the market given the importance of internet traffic for Google's competitors.

Since its adoption, the decision has been subject to many criticisms: the Commission's approach was defined as based on sketchy ground (given the fact that it relied on leveraging constituting a "well-established form of abuse") and unusual (also in light of the fact that it did not provide a "basket of cases" in support of its findings[534]). Moreover, self-preferencing as both a theory of harm and a legal category has become a hot topic in the antitrust discourse, becoming the subject matter of many scholarly works expressing a set of different theses.

In particular, as the decision hasn't reconciled the analysis provided therein with the established case law (especially that on refusal to deal) a lively debate has emerged about possible theories of harm that could have served the purpose of addressing the conduct at hand – in what was deemed – a more legally sound manner.

First, according to some scholars, Google's conduct does not fit any of the established category of practices, nor it constitutes an abuse according to the general principles of Article 102 TFEU and it should therefore have been held lawful. In particular, it has been observed that Google's conducts cannot amount to a refusal to deal, which – according to the case law – occurs when a dominant firm refuses an input (product or service) that is objectively necessary for other firms to be able to compete effectively on a downstream market. This is because based on the specific facts of the case, Google's conduct does not meet the so called "Bronner criteria" and mainly the indispensability requirement, which is satisfied – according to a consistent line of case law when that access to the input (or platform) controlled by the integrated firm (and that is the object of the refusal) is indispensable for competition on a neighbouring market. While Google search results are an important gateway to reach users,

[533] See chapter 3, paragraph 3. The thesis argued about the need to conceive self-preferencing in light of a narrow definition which is already present in point of fact in the *Google Shopping* decision where the material conduct is identified thought the combination of two different elements: i) the preferential treatment given by Google to its comparison shopping service achieved by prominently displaying the results generated by Google Shopping with a rich format in the Shopping Unit and ii) the actual demotion of competing services mainly by the application to Google's competitors of adjustment algorithms systematically preventing them from reaching the first page of the generic search results (or even the first few results pages).

[534] See chapter 2, paragraph 2.

they could not be held absolutely essential to compete on the market of comparison shopping services given the existence of a set of alternatives, albeit less advantageous.

In addition, it was observed that the facts of the case could not support a finding of discrimination according to Article 102 (letter c) of the TFEU (also known as secondary line injury), mainly because of the absence of a necessary requirement (i.e. the existence of "other trading parties") to apply the type of discrimination envisaged in that article, given the facts the lack of any trading-party relationship between Google and other comparison shopping websites. The facts of the case do not allow neither to recur to a technical tying type of abuse, given to the fact that it would have been extremely difficult to reduce the articulated facts of the case to a form of tying and that the allegedly tying product (Google Search) is available under certain circumstances – without the hypothetical tied product (Google Shopping).

Most importantly for the purpose of the present work, the very rationale used by the Court in refusal to deal cases represents the basis for the strongest criticisms to the Commission's decision and self-preferencing as a new form of abuse. In this respect, it was argued that establishing abusive self-preferencing – and thus allowing antitrust authorities to impose burdensome remedies such as that established in Google Shopping – would limit the firms' freedom to dispose of its property and choose its trading partners. The absence of a high threshold (such as that represented by the Bronner criteria and indispensability in refusal to deal cases) would allow antitrust authorities to more often impose remedies that not only falls outside the scope of antitrust law, but can also have detrimental consequences for the market by lowering firms' incentive to invest and innovate[535]. The extensive literature on self-preferencing, indeed, has placed great attention on refusal to deal to point out that a duty of equal treatment (which derives from the ban to self-favour) does not exist in the EU regime and should be considered as a last resort (or *extrema ratio*) remedy only in exceptional circumstances that the case law has identified by requesting the high threshold of indispensability when imposing (the similar burdensome) duty to deal with an entity that was not chosen by the dominant firm as a business partner. Lowering the established threshold would cause a set of negative implications. Differently from a regulatory type of intervention, antitrust law aims at preserving the competitive process which is made possible by the very fact that firms seek to gain that competitive edge over rivals and to enjoy the related benefits.

[535] See, for instance N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, p. 35 arguing that: "[t]he Bronner criteria [and mainly indispensability] reflect an attempt to balance conflicting interests, and to identify circumstances where the risks of intervention are outweighed by likely benefits". The Author also argues that the derogation from the "Bronner criteria" (and namely the indispensability requirement) in Google Shopping (as in Slovak Telekom) was led by the Commission's "desire to make its own life easier" at the cost of denying the very arguments it has laid down in the Guidelines on the enforcement of Article 102 TFEU concerning the need to limit the anticompetitive nature of an otherwise legitimate right of freely dispose of its property.

Outstepping such boundaries, will weaken dynamic competition, and therefore harm consumer welfare, as a result of lower quality of products and services. Such an intervention could thus result in protecting competitors, more than competition and precisely disadvantaging consumers due to chilling innovation and competition.

On the contrary, other scholars suggest Google's conduct is exclusionary and anticompetitive according to a pure effects analysis in line with the general two-prong test established for this type of abuses according to the principles of Article 102 TFEU. However, as a pure effects analysis may have certain shortcomings (including failing to provide guidance on the applicable legal test to help distinguish when self-preferencing can be anticompetitive, and failing to facilitate National Competition Authorities to eventually replicate such types of findings) several scholars have made the exercise of trying to interpret the facts of the case in light of the established theories of harm and applicable legal tests.

In particular, it was argued that the facts of the case did fit certain "branded conducts" and that the Commission could have saved itself the trouble of establishing self-preferencing as an independent form of abuse, by analysing *Google Shopping* as a constructive refusal to deal, unlawful discrimination and other exclusionary abuses, namely margin squeeze and tying[536]. As the legal test for these conducts does not entail a rigid need to establish the indispensability of the input, they would also have been consistent with the established case law without the need to demonstrate the indispensability of Google Search and its results.

As a constructive refusal to deal occurs when, rather than an absolute refusal to supply, the dominant platform unduly delays or otherwise degrades the supply of the product or imposes unreasonable conditions in return for the supply, it was argued that Google's behaviour could have been qualified as such in that what it was precisely the conditions under which rival comparison shopping services got access to the search results that made the conduct anticompetitive. In this context, it was suggested that self-preferencing should be interpreted as a form of constructive refusal to deal where the inapplicability of the Bronner criteria (and precisely of the indispensability condition) is rooted and justified in the fact that given the "rule-setting function" performed by digital platforms, they have a "overarching duty" – when dominant – to ensure that "competition on their platforms is fair, unbiased and pro-users"[537]. If limited to these situations, the duty of equal treatment would thus be confined as platform-specific and a manifestation of that "special responsibility" that is linked not only to the

[536] See I. Graef (2019), *Differentiated Treatment*, *cit.*, p. 477.
[537] N. Dunne (2019), *Dispensing with Indispensability*, *cit.*, pp. 23-25.

undertaking's position as a dominant undertaking, but also to its "gatekeeper" role within the wider digital ecosystem[538].

As for discrimination, many scholars have identified Article 102 (letter c) of the TFEU as the legal basis for a theory of abusive self-preferencing suggesting that a claim of "favouring" and a remedy based on "equal treatment" *per se* implies discrimination, which indeed was believed to be the essence of the case. In this respect, it is argued, that the case represented an opportunity for the Commission to provide clarity on some of the ambiguities that surround discriminatory abuses.

With regards to exclusionary abuses, other scholars argue that margin squeeze can serve as the analytical tool and theory of abuse capable of "fitting" abusive practices by online multi-sided platforms, either by giving a more prominent role to the "conditions of access" other than price – which in the contest of digital markets is a less important parameter of competition (a sort of "margin squeeze 2.0")[539] – or by ascertaining that Google Shopping would not be profitable if it had to pay Google Search to be listed in its current position, i.e. on top of the search results[540].

As for tying, it has been argued that Google was able to induce the selection of its tied good (i.e. shopping services) merely by granting it *visual prominence* in its general search. Google's strategy of linking its proprietary vertical (or specialized) search platforms to its horizontal (or general) search platform through visual prominence, constitutes an "unconventional" form of tying which fulfils the legal conditions elaborated over the years by the case law for this category of abuse[541].

Finally, other scholars argue that through its conduct Google was able to actually manipulate the information it provides to users (the search results) without informing them of the positioning processes it adopted; as users relied on the truthfulness of the results provided by Google, the conduct was able to distort users' behaviour. Google's choice to lower the quality of its search engine product by showing consumers results that are less reliable without an appropriate disclosure as to the distortion of information presented constitutes a strategically rational strategy, difficult – if not impossible – to justify recurring to other argument rather than the advantages resulting from foreclosing competitors. To this end, it has been outlined a theory of harm that can apply to any firm which as a result of fraudulent and/or manipulative

[538] *Ibid.*
[539] I. Graef (2019), *Differentiated Treatment*, *cit.*, pp. 477-478.
[540] F. Bostoen (2018), *Online Platforms and Vertical Integration*, *cit.*, p.19.
[541] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit.*

conduct reduces the quality and/or accuracy of information generated and, consequently, consumer welfare[542].

In addition, addressing more in general the hypothesis of self-preferencing as a legal category, scholars have argued that it should not constitute a stand-alone abuse since it potentially captures a too diverse range of practices that differ in important respects from one another (including those mentioned above). Actually, given the inherent diversity of the conducts which could qualify as self-preferencing and the lack of meaningful criteria to narrow down the practices that should fall within the category, self-preferencing as an autonomous legal category can be misleading and inherently flawed precisely because it overlaps, partially or totally, with several existing legal categories. Conceived as an autonomous category, it would end up applying to conducts that vary widely and that, for the same reason, are subject to legal tests that are also different thus blurring the line between practices and raising questions about the appropriate legal test[543]: the idea is there is no added value in introducing a new category where there is already a well-established body of case law (and different legal tests elaborated therein) applying to the very same conduct. Moreover, as there is no clear and distinct legal test applicable to self-preferencing, the new category inevitably leads to legal uncertainty, which not only constitutes a fundamental principle of the legal system, but it is also of great importance to incentivize firms to innovate[544]. More precisely (as already mentioned above), self-preferencing as an autonomous abuse may lead to the abandonment of the case law on refusal to deal without an appropriate examination of the logic underpinning it and without evaluating the negative consequences of departing from it. The new category may in fact be used to circumvent the indispensability requirement which was set up by the case law to establish a high threshold when imposing proactive remedies to refusal to deal type of abuse, such as imposing a positive obligation such as requesting the firm to transfer an asset or enter into an agreement. As a consequence, an extremely intrusive non-discrimination duty (which implies a proactive intervention changing the business model and/or the product design to accommodate – or even subsidise – rivals) can be imposed on the dominant firm, despite the absence of any truly exceptional circumstances to justify and filter such an intrusion against the firms' freedom to select their counterparts and freely dispose of their products and inputs.

[542] M. Maggiolino and M. Colangelo (2019), *Manipulation of information*, *cit.*, p. 19.
[543] See P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 20.
[544] See chapter 2, paragraph 3.4.

Building on the analysis of these scholarly works as well as on the analysis of the Commission's decision, the present thesis concludes, first of all, that while refraining from expressly establishing self-preferencing as a new form of abuse, the Commission hasn't relied on any predefined theory of antitrust liability, *de facto* developing a new theory of harm according to the general principles of exclusionary conducts under Article 102 TFEU, aimed at addressing the peculiarities of the facts that were under scrutiny in that case[545] and – which – are an accurate exemplification of the specific competitive dynamics (including envelopment strategies) occurring in digital markets (as referred in chapter 1). Doing so, the Commission delivered an accurate and modern analysis of competitive dynamics taking place in digital markets.

In particular, while the fears linked to conceiving self-preferencing as an autonomous legal category can be shared, they should not prevent antitrust law and analysis to rely on a tool – such as that of self-preferencing – which can be essential in capturing the anticompetitive effects that platforms' conducts can provoke in the context of digital markets. In this context, the analysis of the *Google Shopping* decision and of the opening of the *Amazon* case by the Italian Competition Authority, show that the conduct identified as self-preferencing is in fact a combination of two different behavioural elements: "pure" self-preferencing (i.e. the preferential treatment given to the platform's own services) on the one hand, and an active behaviour directed against competitors (the demotion of competing services in the case of Google and the ban to access the platform's top features in the Italian *Amazon* case), on the other. Therefore, identifying self-preferencing as the practice of an (integrated) undertaking favouring its own products or services over those competing products/services offered by other (typically non-integrated) firms[546] is not completely correct, as such a definition lacks one major point, namely the fact that the preferential treatment to one's own products would not be sufficient to the finding of an abusive conduct without the simultaneous presence of an active behaviour aimed at damaging competitors, and which does not take the shape of a "traditional" conduct (or any "branded practice"), but it implies using atypical and unprecedent schemes made possible by the functioning of digital markets and platform's business model. The main self-preferencing feature, indeed, is the combination of a preferential treatment with an active and somehow "unconventional" behaviour "against" competitors. Should that second conduct (and precisely the active demotion of competitors

[545] It is believed the Commission could have avoided stating that "leveraging" constitutes an "independent abuse" as the statement it is not accurate (see chapter 2, paragraph 3).

[546] This is most recurrent notion of self-preferencing used in the literature on the topic. See for instance P. Ibáñez Colomo (2020), *Self-Preferencing, cit.,* p. 2, and J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p. 7.

through adjustment mechanisms in *Google Shopping* and the impediments for sellers to qualify for the most important platform's features in the *Amazon* case) be absent, no abusive conduct would probably exist under antitrust law. Against this background, self-preferencing may constitute a misleading expression as it only focuses on the first and somehow "less serious" element of the conduct.

Embracing such a narrow definition of self-preferencing allows to meaningfully narrow down the practices that can be qualified as such, thereby avoiding the risk that self-preferencing as an autonomous legal category ends up capturing a too wide range of practices. Thus, not all of the recent antitrust cases involving Big Tech qualify as self-preferencing; for instance, there seem to be little (if no) doubt that *Google Android* and the Italian *Google Android Auto* cases do not involve self-preferencing.

Moreover, given the inherent peculiar features that characterize self-preferencing – not least its "atypical" manifestation originating from the peculiarities of digital markets and platforms – there seem to be no valuable reasons to argue that it would be preferable to read and qualify such type of conduct according to one (or more) existing theories of harms. In this regard, some of the theories of harm suggested in the literature as alternative, and precisely discrimination, tying, margin squeeze and the manipulation of information, not only do not seem to capture the specific features of self-preferencing types of conduct, but they also require solving complex issues, mainly related to need to adapt certain conditions and concepts to a new reality.

For instance, while Google's conduct could be read as a form of "tying 2.0", doing so would require interpreting coercion (typically a necessary condition to establish abusive tying) as the inducement given by the visual prominence to the tied good (Google Shopping in this case) by means of the tying good (Google Search)[547]. While such a reconstruction is conceptually sound and has the merit of avoiding imposing a regulated access to any input as a remedy (the remedy would simple be stop tying/stop self-preferencing) and consequently to prove the indispensability of the input to compete on an adjacent market, it seems nevertheless a curvy road to take at least in the context of *Google Shopping* (while it may seem to be slightly more capable to address Amazon's conduct.) The same considerations hold true for margin squeeze, with the additional problem that – by its very nature – margin squeeze identifies pricing conduct and adapting it to fit the non-pricing self-preference type of conducts of digital platforms is not an easy task. Similar "adaptation issues" arise with regards to discrimination in light of the textual requirements laid down in letter c) of Article 102 TFEU

[547] E. Iacobucci, F. Ducci (2019), *The Google search case in Europe*, *cit*. On this topic see also chapter 2, paragraph 3.3.2.

(including the existence of "other trading parties" and of a "competitive disadvantage"), not to mention the fact that discrimination mainly pivots around considerations of fairness towards competitors, and it is therefore not well suited to deal with strategies entailing leveraging of market power and potentially causing the marginalization of competitors and welfare reduction[548]. Also, resorting to the manipulation of information as the relevant theory of harm requires to focus on certain additional elements such as consumers' reliance on the information that are not always present and, in any case, do not seem to fully capture the disvalue of self-preferencing type of conducts.

That said, the major defining efforts required to "elevate" self-preferencing as a stand-alone conduct requiring its own legal test, concerns the differences with refusal to deal in all its forms. This is because not only constructive refusal to deal seems the closest category to self-preferencing, at least for what concerns the material conduct, but also because – as already mentioned – the concern of those who argue that lowering the threshold of indispensability can have negative consequences capable of distorting firms' incentives to invest and innovate should not be ignored.

In this respect, the narrow definition of self-preferencing provided above is of utmost importance. Differently from refusal to deal where the active conduct of the dominant firm actually represents the legitimate exercise of the fundamental right and freedom of the firm (even if dominant) to choose if and with whom enter into business relationships, in self-preferencing the active conduct does not entail only the favouring of the dominant firm's products or services, but – and most importantly for the purpose of this reasoning – it entails a behaviour that is far from being a manifestation of any sort of right, as it instead constitutes a deliberate act against competitors with the sole aim of placing them at a competitive disadvantage. As seen in chapter 1, being the platform also the "manager" of the marketplace where the transactions occur – other than a competitor on the target market, it is in the unique position to bend the rules of that marketplace so as to make competitors' life harder.

It follows from the above, that while extreme caution is needed when ascertaining the abusive nature of a refusal to deal (and hence the need to verify the "Bronner criteria"), that same extreme caution is less of a necessity when dealing with active conducts which serve no other purpose than damaging competitors.

In order to elevate self-preferencing to an autonomy legal category, it is also necessary to confront with the argument related to the type and nature remedy imposed in the *Google*

[548] *Ibid.*

Shopping case, based on the assumption that other self-preferencing cases would require the same kind of remedy. Indeed, scholars have noted the proactive and thus burdensome nature of the remedy imposed in self-preferencing cases (i.e. the duty of equal treatment) and its implications (such as the need to change the design of a platform's product or service) postulate that it can only be adopted on strict conditions, such as the high threshold of indispensability. Lowering the established threshold could be detrimental for the market well-functioning in that it would neutralize a dominant firm's competitive advantage, by requesting it to share it with rivals (through a change in product design, for instance) and thus lower the firm's incentive to invest and innovate.

However, the present analysis concludes that not only the remedy of equal treatment is not as "invasive" as that of a duty to deal, but also the approach according to which the assessment of antitrust liability should be based on the remedy to be imposed is inherently flawed.

As for the first aspect, an in-depth analysis of the remedy imposed on Google has shown that it more similar to a one-off cease and desist order (such as stop self-preferencing), than a duty to deal. Indeed, Google was left free to decide how to stop the conduct and to implement the principle of equal treatment, which the Commission could have refrained from imposing as it would have been implicit in the order to stop the conduct. Therefore, if anything, it can be argued that the Commission may had gone a little too far requesting Google to implement the equal treatment principle, as the same result could be achieved, indeed, by simply requesting Google to stop self-preferencing, i.e. to stop actively demoting competitors through the application of ad hoc mechanisms (and nothing more).

While the remedy was said to entail a very complex and far-reaching implications, it should be noted that Google deliberately decided – precisely exercising its freedom – to adopt the competitive pay-for-placement auction set up by Google, which indeed resulted to be an "optimal" result for the platform, capable of allow it to enjoy the benefit of the success achieved by its search engine[549].

And there is more. It can be argued that the anticompetitive foreclosure ascertained in the decision could have probably been overcome even if Google had decided to remedy the breach by reserving all for itself the visually rich window of the Shopping Unit (i.e. displaying only Google Shopping results in the Shopping Unit) on the condition that it stopped applying the adjustment algorithms to its competitors and that it disclosed that the visual prominence attributed to Google Shopping results is not the outcome of any ranking

[549] See in particular chapter 2, paragraph 2.4 and chapter 3, paragraph 1.

mechanisms between results offered by other comparison shopping sites[550]. This would have the benefit of making consumers aware that the results in the Shopping Unit are provided by Google and Google only (and therefore are not filtered and selected based on meaningful criteria) and of allowing competitors offering a good comparison shopping service to emerge and be placed among the first positions among the non-sponsored blue links that are the "standard" generic search results and to which consumers attributed great credit, as shown in the decision.

All in all, while the remedy of equal treatment could *prima facie* resemble a duty to deal given the far-reaching implications it ended up entailing, the analysis of the specific circumstances of the case show that in fact the principle imposed by the Commission cannot be interpreted as having the same proactive and invasive nature of that of a duty to deal.

Moreover, the remedy to impose to stop the abuse should not play a decisive role in determining the theory of antitrust liability to apply in a given case. As it was noted in some scholarly work, doing so would requires to "put the horse before the cart" requesting the Commission to decide upon preferred remedies before identifying the legal test" and therefore even before reaching a conclusion on whether an abuse has been committed. Moreover, such an approach presumes a clear distinction between "proactive" remedies (triggering the "Bronner criteria") and mere prohibitive ones (excluding those criteria), while as the reality of *Google Shopping* well illustrates, such a distinction is often blurred in practice, and constraints the remedial freedom attributed to the Commission.

For all these reasons, arguing about the need to meet a legal test centred on indispensability is not only inherently artificial and unnecessary but it would also limit the effectiveness of antitrust law imposing "brick-and-mortar lenses" to address behaviour taking place in a new digital realty, and ultimately the incapability of antitrust law to effectively address the leveraging of market power in digital markets.

And indeed, the Court has already endorsed independent forms of abuses distinct from refusal to supply irrespective of whether a duty to deal existed under the "Bronner criteria". In particular, both in case of constructive refusal to deal and margin squeeze the input's indispensability is not a requirement for the practice to be found abusive. On the contrary, applying the Bronner criteria to any conduct in relation to the dominant firm's terms of trade "would unduly reduce the effectiveness of Article 102 TFEU"[551]. Therefore, establishing that

[550] Such consideration follows from the analysis provided by Colangelo and Maggiolino according to whom the anticompetitive nature of Google's conduct manly relies in the fact that it manipulated information on which consumers rely, lacking any form of transparency about the ranking processing. See chapter 2, paragraph 3.3.3.

[551] Case C-52/09 *Konkurrensverket v TeliaSoneraSverige AB*, *cit*., para. 58. See also chapter 2, paragraph 3.3.2.

the indispensability requirement does not apply to self-preferencing is in line with the case law of the Court. While the scholarly arguments against self-preferencing rely very much on the pas case law and the logic underpinning it, they fail to take equally into account the competitive dynamics between ecosystems that take place in digital markets, including the incentives and effects of envelopment strategies taking the form of self-preferencing.

In this respect, the analysis provided shows that the platform ability to carry out a self-preferencing type of conducts – as narrowly defined – but also its capability to cause anticompetitive effects is directly linked to the unique role performed by (dominant) digital platforms. Regardless of whether they fit the still blurred definition of "gatekeeper" (as discussed in Chapter 1, paragraph 2.4), what should be noted is that in light of the business model adopted by some digital platforms (including Google,) i.e. their intermediary role or "intermediation power", by enacting atypical conducts (such as applying different algorithms to different entities operating on the "network") they have the actual capability of foreclosing competitors, a foreclosure which in turn may also be anticompetitive (i.e. detrimental for consumer welfare) and thus relevant for antitrust law. In other words, a self-preferencing type of conduct – encompassing the two elements described above – is very likely to have a negative impact on competition when the dominant firm acts like an intermediary or a two-sided platform, in the sense that its business model of "network orchestrators" (as defined in chapter 1, paragraph 2.1) entails creating value by putting together inputs/information gathered by one group of users (i.e. one side of the market) to make it available to the other group on another side of the market. In this context, what makes an otherwise irrelevant conduct (such as applying different algorithms to competitors or architecting "prizes" such as the BuyBox and the Prime Program) worth of undergoing antitrust scrutiny is the peculiar business model adopted by the dominant company and which makes a self-preferencing type of conduct particularly prone to result in the foreclosure of competitors.

And indeed, as discussed in chapter 1, business models have acquired more importance in industrial economics[552]. Similarly, the business models adopted by platforms should be taken into account when analysing a conduct in the perspective of competition law. In other words, it can be argued that a self-preferencing type of conduct (as narrowly defined) has the capability of amounting to a breach of Article 102 TFEU in that in light of the business model adopted by the dominant firm an atypical behaviour – otherwise incapable of generating any

[552] See for instance the work of Libert, Beck and Wind (referred to in chapter 1, paragraph 2.1) which refers to need to classify companies based on their business model, regardless of their specific activities. According to the Authors most "digital companies" share a common feature, i.e. a business model of facilitating transactions and interactions within a network; for that reason they suggest to refer to them as "network orchestrators".

negative effects – allows the firms itself to exercise its market power in a way that can be detrimental for the market.

All in all, imposing a ban on self-preferencing on dominant platforms operating an intermediatory business model can be considered as a variation of that special responsibility which is traditionally placed upon dominant firms and it is thus coherent with the traditional interpretation of EU competition law, especially as it has been affirmed several times that the scope of the special responsibility has to be considered in light of the specific circumstance of the case.

Recognising that atypical active behaviours aimed at damaging competitors in the context of digital markets can be relevant under antitrust law given the peculiar role played by platforms in these contexts, however, does not mean that in self-preferencing cases the burden of the proof should be reversed, nor that the conduct should be found *prima facie* abusive as suggested in the Report to the Commission (as discussed in chapter 2, paragraph 3).

The analysis of the ongoing Italian *Amazon* and *Google* cases allowed to prove the considerations expressed above by applying the narrow definition, the principles and legal test governing self-preferencing to different contexts. In particular, such analysis – together with that of the leading case *Google Shopping* – well illustrates that self-preferencing, conceived as an autonomous form of abuse of a dominant position, represents an essential tool for antitrust law and analysis to capture the anticompetitive effects caused by envelopment strategies taking the form of self-preferencing carried out by platforms on digital markets.

The *Amazon* case, indeed, proves the usefulness of the new category – narrowly defined – to tackle a conduct capable of having exclusionary and anticompetitive effects and which was made possible given the platform nature of "complete ecosystem" being at the same time i) the operator running the marketplace (thereby fixing the rules and the fees for third-party sellers operating on such marketplace), ii) a seller itself, and iii) provider of a series of accessory services to the sellers on the marketplace, (like fulfilment)[553].

Amazon conduct entails a first element (namely "pure" self-preferencing behaviour whereby the dominant firm favours its logistics service) and a second active behaviour directly damaging competitors, namely the various impediments embedded in the platform's functioning which penalize third party providers of logistics services in that – no matter the quality of their services – they would irremediably be less appealing than those offered by Amazon given the fact that by choosing them the sellers must renounce to essential features for a good visibility on the platform, such as the Prime program and access to the BuyBox.

[553] Italian Competition Authority (2019), *A528 - FBA AMAZON*, paras 63-73.

The analysis also demonstrates that Amazon's equivalent of a demoting mechanism can results in anticompetitive foreclosure, and precisely in in the "exclusion" of actual competitors in the market of logistics services or their marginalization to a niche of the market, given the importance of qualifying for high ranking, Prime and the BuyBox (the equivalent to internet traffic in *Google Shopping*) – denied to Amazon's competitors due to the very selecting criteria elaborated by the platform to access to those features and which exclude third party providers, regardless of the quality of their services. the foreclosure is in turn capable to result in less choice of logistics services for the sellers; being dominant in the market, Amazon would then be able to increase the prices of logistics services ultimately leading the sellers to charge higher prices to consumers purchasing the products given that they would need to internalize such cost. Moreover, being able to shelter its position of dominance regardless of its merits, Amazon would also loose incentives to ameliorate the services which could result in less quality and innovation in logistics services to the detriment of both sellers and final consumers. In addition, those anticompetitive effects could expand on the market for intermediation services on marketplaces, thus reinforcing Amazon's (super)dominant position in the markets of intermediation services on marketplaces.

And if self-preferencing as an autonomous form of abuse seems to be able to capture the disvalue of the conduct, proving to be a useful and sound tool to tackle abuses taking place in the context of the digital economy, the narrow definition of self-preferencing articulated in chapter 3 proves useful in narrowing down according to meaningful criteria the vast range of conducts of dominant platforms that were deemed to potentially be captured by the new category and which instead should be excluded from its scope of application given their inherently different features. This latter aspect is evident in Italian *Google (Android Auto)* case.

While both cases are currently pending before the Authority and may be defined at the beginning of 2021, what is worth noting here – without trying to anticipate the Authority's ultimate findings, is that contrary to the *Amazon* case, the Authority had no need to recur to self-preferencing as Google's conduct consisting in the refusal to integrate Enel app in Android Auto (Enel may potentially compete against Google in the (target) market of e-mobility charging services) properly qualifies as a refusal to deal in accordance with the "traditional" applicable legal test. In particular, Google's "self-favouring" does not integrate that atypical and active conduct damaging competitors that instead is the peculiar feature of self-preferencing, in that the refusal contains in itself an element against competitors in that damaging competitors is implicit in the refusal. In other words, differently from *Google*

Shopping or the *Amazon* cases, in the case at hand the main self-preferencing feature, i.e. the combination of a preferential treatment with an active and "unconventional" behaviour "against" competitors, is absent.

Therefore, invoking self-preferencing as a theory of harm in the case at hand just because it involves some sort of self-favouring by a vertically integrated firm would be inappropriate and inefficient, not least given the fact that there are other theories – and precisely refusal to deal – well equipped to effectively frame and assess the practice at stake. Accordingly, the Italian Competition Authority has underlined – other than focusing on the anticompetitive effects stemming from the conduct – the importance of Android Auto to compete effectively in the market of e-mobility services, as well as on the lack of objective justification for Google's refusal.

Excluding self-preferencing as the applicable theory of harm in the *Google Android Auto* case, the conduct should be analysed following the "traditional" test established by the case law for refusals; however, establishing the indispensable nature of the resource (as established by the case law and strictly interpreted by the scholars commenting on it) may not be an easy task in light of the facts of the case. Indeed, while the exact definition of indispensability according to traditional antitrust analysis falls outside the scope of the present work, demonstrating that access to Android Auto is *indispensable to compete in the market of e-moving charging services* may prove to be challenging. In this regard, accessing Android Auto (or more precisely displaying a firm's app on Android Auto) is certainly indispensable to *effectively* compete on the market – or in the Authority's words, it "appears necessary to be able to compete effectively in offering e-mobility services to end customers", demonstrating that lacking such an access competing on the market for e-moving charging services would be "impossible" or "unreasonably difficult"[554] seems to go further than that. Thai is because the facts of the case well illustrate the form a refusal to deal can take in the context of digital and highly innovative and still developing markets, with certain peculiarities that risk making it less straightforward than a refusal taking place in the context of a "brick-and-mortar" economy. The point is that Enel X, as well as other companies providing charging services can offer those services on the market through different channels, for instance through the app developed by Enel and that users can use directly on the smartphones, even with the supplement of e-cards for actually starting the charging session and limiting to the app the search of the charging points. However, as the market of internet traffic moved from PCs to smartphones, it is likely that the market for e-charging services will fast move from

[554] Reference is made to Ibáñez Colomo, Pablo (2020), Self-Preferencing, *cit*., pp.7-8.

smartphones to connected cars given the fact that electric and hybrid last generation cars are all endowed with powerful built-in displays and connecting systems and that users will need to use such services especially when driving their cars and needing to charge them before running out of "fuel" (i.e. power). Therefore, it is evident that in a new and developing market where many operators are exploring different alternatives for the purpose of letting users have access to their smartphones and apps directly on the car's infotainment system, arguing that access to Android Auto is an "objective necessity"[555] require some efforts. It would be probably be easier to assess whether Android Auto is indispensable or not later on, when in a more mature market the different roles and the values of each of the service and player is more defined.

In light of all the above, it is likely to foresee that other concepts and tools of traditional antitrust law and analysis – pivotal in the current treatment of exclusionary abuses in "internet markets" – should be adjusted and refined in the near feature to effectively keep up with the competitive dynamics taking place on digital markets. This is because in light of the online business models, there can be cases – as shown by the analysis of the Italian *Google* case – where the refusal opposed by a digital platform, while qualifying as a refusal to deal under antitrust law, would not easily meet the indispensability threshold requested by the case law (as strictly interpreted by the doctrine) in that the input that is refused does not prevent competitors to access the market *tout court* as there may be other alternatives to somehow reach users, while considerably less efficient. However, in light of the specific features of digital players and of the dynamics taking place in the digital environment, those behaviours can be as harmful as those concerning a "properly indispensable" recourses according to the case law, in light of the fact that by refusing assess to such a resource the conduct of the dominant undertaking is capable of making that access more difficult, thus raising barriers to entry capable of having anticompetitive effects on both the core and target markets concerned. In other words, the complexities inherent to the business model of "network orchestrators" are reflected in the difficult legal issues materializing when applying established antitrust law and concepts in this new scenario, and which therefore request the adaptation and refinement of certain concepts, doctrines and methodologies of antitrust law and analysis. Antitrust law and analysis will thus need to entail a certain dose of creativity to effectively purse other atypical conducts, an example being both the ongoing French case[556] and a second Italian case opened

[555] See European Commission (2009), *Guidance on the Commission's enforcement priorities, cit.,* para 83.

[556] The *Google vs Press Publishers Rights* case was opened by Decision 20-MC-01 of 9 April 2020 of the Autoritè de la concurrence. With such a decision the French Authority adopted interim measures against Google by granting the request submitted in November 2019 by the complainants (several trade unions representing the press publishers and the Agence France-Presse). The decision was confirmed by the Court of Appeal of Paris

against Google[557]. And besides, over the years, EU competition rules have provided a solid basis for protecting competition in a broad variety of market settings. Competition law doctrine has evolved and reacted to the varying challenges on a case-by-case basis. This evolutionary method has allowed competition law enforcers to react to changing circumstances based on the solid empirical evidence of real-life cases. At the same time, the stable core of EU competition rules has prevented EU competition policy from following fashions. Therefore, within the basic framework of abuse of dominance, as embedded in Articles 102 of the TFEU which continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era, certain concepts of analysis should be adapted to keep with the digital revolution. The creativity should therefore be limited within the rigid boundaries offered by those principles and consumer welfare as the essential parameter against which assessing the well-functioning of the market.

On the other hand, the analysis has shown that so far – despite the limited number of cases, some still ongoing – self-preferencing as new self-standing theory of antitrust liability

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with a ruling of 8 October 2020. In addition to granting interim measures, the Authority has opened proceedings to establish the alleged abuse of a dominant position in the market for generic online research, currently ongoing. Interestingly, in such a decision, the Authority pointed out that Google's conduct seems *prima facie* integrating a number of different profiles of wrongdoing, including (i) the imposition of unfair trading conditions (in breach of Articles L. 420-2 of the Commercial Code and 102(a) TFEU), (ii) the circumvention of the Related Rights Act (*contournement de la loi*) and (iii) discriminatory conduct (in breach of Articles L. 420-2 of the Commercial Code and 102(c) TFEU). As for the facts of the case, with the law of 24 July 2019 France implemented the so-called European Copyright Directive (Directive 2019/790 of 17 April 2019 on copyright and related rights in the digital single market), with the aim of creating the conditions for a balanced negotiation between publishers, press agencies and digital platforms and redefining, in favor of publishers and press agencies, the sharing of value between these actors. In order to comply with the new provisions, however, Google has unilaterally decided to eliminate the display of extracts from articles, photographs, infographics and videos (so-called "snippets", i.e. previews of a content) within its various services (Google Search, Google News and Discover), unless publishers grant Google permission to publish content free of charge. In practice, this conduct has resulted in the overwhelming majority of publishers granting Google licenses to use and display their protected content without any negotiation and without receiving any remuneration. Moreover, as part of Google's new display policy, the licenses that publishers and press agencies have granted it offer the possibility of using more content than in the past. See Autorité de la concurrence (2020), *Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP (Agence France Presse)*, press release of 9 April 2020, https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press, and Autorité de la concurrence (2020), *Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse,* https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf.

[557] The Italian Competition Authority opened another investigation against Google for an alleged abuse of dominant position as the company with regard to the availability and use of data for the design of display advertising campaigns, i.e. the space that publishers and website owners make available for the display of advertising content. In particular, in the key market for online advertising, which Google controls also thanks to its dominant position on a large part of the digital value chain, the Authority questions the undertaking's discriminatory use of the huge amount of data collected through its various applications, preventing rivals in the online advertising markets from competing effectively. Interestingly, the Authority qualifies the conduct as "an internal/external discriminatory conduct" consisting in "refusing to provide its competitors with Google ID decryption keys and excluding third-party tracking pixels. At the same time, Google has allegedly used tracking elements enabling its advertising intermediation services to achieve a targeting capability that some equally efficient competitors are unable to replicate", both in violation of letter b) and c) of Article 102 TFUE. See Italian Competition Authority (2020), *A542 - ICA: investigation opened against Google*, *cit*.

represents an essential and legally sound tool to tackle leveraging and multiple markets practices in the context of digital markets and thus bring up to date established competition rules and principles.

And indeed, conceiving self-preferencing as an autonomous legal category – within the boundaries defined above, represents a new tool which allows to adjust traditional rules and concepts so as to affectively address the new dynamics posed by the digital economy and the anticompetitive effects stemming from them, while, at the same time, strongly relying on established competition rules, and without extending beyond the scope of EU competition law. In this respect, self-preferencing represents a key tool to "modernize" antitrust law and to make it fit for the digital environment, together with the new initiatives taken by the Commission and which will soon see the light, and precisely the Digital Service Act and the New Competition Tool[558], which – regardless of the exact form and scope of application that the upcoming regulation will take[559], will necessarily complement (and not substitute) antitrust enforcement[560]. In turn, given the inherent features of digital markets where boundaries tend to change rapidly, large user bases may be created or leveraged rapidly, and future developments are quite unpredictable, a sound and effective enforcement of competition law needs to rely – even more than in the past – on well construed theory of harm and analysis of the effects, backed up by a sound understanding of the dynamics taking place in digital markets[561]. And indeed, it has been argued that a "strengthened antitrust enforcement *vis-à-vis* big tech firms may be undertaken only by broadening the existing theories of harm that already mentioned in the enforcement guidelines of the competition agencies"[562]. Self-preferencing thus constitutes an important tool not only to strengthen antitrust enforcement, but also – by doing so – to strengthen the relevance and the effectiveness, in the digital sector, of competition policy as a key instrument to promote

[558] See the Introduction.

[559] Even if the Digital Service Act will contemplate a ban on self-preferencing, as it may be the case. On the consultation launched by the European Commission regarding the Digital Services Act see Introduction, paragraph 2.

[560] On the relationship between antitrust and regulation see M. Cappai, G. Colangelo (2020), *Navigating the Platform Age*, *cit*.; N. Petit (2020), *Big Tech and the Digital Economy*, *cit.* and G. Colangelo (2020), *Regulating digital platforms: the last dance of antitrust?*, Chillin' Competition, 22 October 2020. A same complementary role should be played, at different level, by business unfair business practice rules, data protection and privacy law and consumer protection law. While competition law requires an elaborate and thus time-consuming process, those set of rules is more straight-forward and can thus help achieving a level playing field.

[561] See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., pp. 3-4: "In the digital world, market boundaries might not be as clear as in the "old economy". They may change very quickly. Furthermore, in the case of multi- sided platforms, the interdependence of the "sides" becomes a crucial part of the analysis whereas the traditional role of market definition has been to isolate problems. Therefore, we argue that, in digital markets, we should put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies." Those concepts are discussed above in chapter 1.

[562] M. Botta, S. Solidoro (2020), *Hipster antitrust, the European way?, cit*., p.5.

innovation, safeguard market contestability and ensure a level playing field between the different actors of the sector.

It has been noted, that "in their own way, competition authorities are actually going a little bit 'hipster' – but genuinely hipster (if that is not too painfully oxymoronic a term): authorities are riding new trends and they are experimenting" [563]. While the statement specifically refers to the fact that authorities are increasingly tackling data, AI and APIs and designing novel remedies to address novel problems, it can be argued that the Commission went a little "hipster" *de facto* recognizing self-preferencing as new form of abuse in the *Google Shopping* case, in the sense that it went beyond the predefined concepts and categories within the traditional antitrust "toolkit" in order to effectively address the specific competition problems that arose in that case, linked to the features of digital markets, including those of a multi-sided platforms, ecosystem and "gatekeeper" embedded in Google's business model. However, such an approach strongly different from the Hipster/New Brandeisians suggestions by strongly reaffirming consumer welfare as the polar star guiding antitrust analysis and enforcement. So conceived, the development of techniques and tools (including the role attributed to self-preferencing) aiming at ensuring that consumer welfare is safeguarded is the most desirable outcome of an "Hipster attitude" interpreted as a claim for a more effective and "vigorous" enforcement of competition law in the digital sector.

What is certain is that there is no need to overhaul the consumer welfare paradigm to effectively meet the challenges and risks for competition that occur in the new economy.

However, among its merits, self-preferencing does not contribute to speed up antitrust cases dealing with leveraging conducts. That is because, as every other conduct capable of following within the prohibition of Article 102 TFEU, self-preferencing type of conducts need an in-dept and careful assessment not only of the peculiar facts of the case, but of their very effects, whether pro or anti-competitive. And especially so given that – as recalled in chapter 1 – many economic features and implications of the phenomena occurring in the digital arena need to be further studied and understood. In light of the above, while the proposal to introduce a rebuttable presumption of anti-competitiveness with regards to these types of conducts should not be upheld[564] and the Draft DMA criticized in that it does not allow for an analysis of the effects, those legitimate request for a speeder and more timely enforcement of abuses in digital markets especially linked to the rapid pace of those markets before the "tipping" point may be reached, should be address through complementary tools,

[563] P. Marsden (2018), *Who should trust-bust?, cit.*, p.5.

[564] Reference is made to the proposal contained in the Crémer Report. See J. Crémer *et. al.* (2019), *Competition Policy for the Digital Era*, *cit*., p.60. Se above, chapter 2, paragraph 3.

such as a more frequent resort to interim measures and – at some conditions – *ex ante* regulation.

In particular, among the series of eighteen *ex ante* obligations envisaged by the Draft DMA, building on the *Google Shopping* case, Article 6 (d) imposes gatekeepers to "refrain from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking". Moreover, in the recitals concerning the provision (48 and 49), the DMA somehow restated the theory of harm adopted in *Google Shopping*, continuing to rely on the broad definition of self-preferencing and establishing an explicit link between such a practice and the idea of discriminatory, i.e. unfair, practices. The work therefore concludes that the narrow definition of abusive self-preferencing provided above (chapter 2, paragraph 2) still remains useful to guide not only the enforcement of Article 102 TFEU – which will still continue to apply – but also the enforcement of Article 6 (1) (d) of the Draft DMA, especially as it is included among the practice subject to further specification by the Commission. Following that approach, the Commission's intervention should not be triggered when the gatekeeper "merely" provides a preferential treatment to its products or services, but when that treatment is coupled with an active – and somehow non-traditional behaviour directly damaging competitors.

This indeed would serve as a fundamental boundary to guide an effective application of the self-preferencing ban especially as the Draft DMA – mistakenly – does not leave any room for gatekeepers to challenge their regulatory duties on grounds that their conduct is incapable or unlikely to have anticompetitive effects.

As for the interplay between abusive self-preferencing pursuant to Article 102 TFEU and the ban of self-preferencing under the DMA, while a further in-depth analysis is needed, it seems reasonable to foreseen that – following the entry into force of the Draft DMA assuming that it will be enacted in its current version – the latter will find more frequent application in that, as clearly stated by the Commission, Article 102 TFEU application will be limited to certain cases of market power and anti-competitive behaviour[565]. Indeed, being self-preferencing a conduct that can be problematic under the antitrust perspective only when the platforms operate in markets whose dynamics express firms acting as "network orchestrators" or gatekeepers (following the definition of gatekeeper provided in the Draft DMA[566]) it is very likely that the Commission will more frequently recur to the new regulatory tool. The proceedings for abusive self-preferencing under Article 102 TFEU would thus be the

[565] *Ibid.,* recital 5.
[566] See chapter 1, paragraph 2.5.

exception to the rule and initiated only where a firm may be able to carry out an abusive form of self-preferencing while escaping the broad definition of gatekeepers, even an “emerging” one and even according to the broad power retained by the Commission based on the qualitative criteria provided for by Article 3 (6). There is the therefore the risk that following its entry in to force the DMA will intercept many - if not all the - conducts potentially breaching Article 102 TFEU in digital markets (including self-preferencing), leaving no or little room for traditional antitrust enforcement.

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