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Abuse of Dominance: Changing Landscape in Abuse of Dominance Enforcement

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The Current Scenario

- the ***«new and fast-changing industries»*** and the so called ***Tech Giants***
- main features: built-in tendency to monopoly, network effects, imposition of standards, massive acqusition and use of big data
- plurality of highly complex issues at stake, related to competition, innovation, privacy, consumer protection and even to democracy and pluralism
- **the crucial question**: are current antitrust tools sufficient in order to ensure a real competition on such markets? Is it adequate to deploy them as "*old school in new markets*" (Vestager)?

EU/Italian Competition Authorities intervention against the Big Tech

EU Commission

- in the last few years, EU Commission paid very close attention to the *hi-tech* industry, which is **at the very top of its policy priorities**
- Commission's concerns emerge clearly from a recent speech of Commissioner Vestager, held on 1 June 2018, in which she stated that "[…] *We're dealing with businesses that are big and powerful. But we, as a society, are powerful too. In Europe, for instance, we have a single market of more than 500 million people. And that's definitely big enough to make companies pay attention.* ***The same companies that, not long ago, transformed our world with new ideas, have become the establishment. They have the power to protect their position, by holding back the next generation of innovators. But our competition rules allow us to protect innovation*** *[…]* ***Because our fundamental values are at stake here – our freedom, our democracy, our equality****. And it's up to us all to stand up and protect them*".

Relevant EU Commission case-law in the hi – tech sector

- ***Microsoft I*** **(Opening of proceedings 3 August 2000 - Decision 24 March 2004)**

Microsoft was sanctioned for having abused its dominant position in the market for PC operating systems by *i*) refusing to provide interoperability information necessary for competitors to be able to compete in the work group server operating system market and by *ii)* tying its Windows Media Player with Windows;

- ***Intel*** **(Opening of proceedings May 2004 - Decision 13 May 2009)**

Intel abused its dominant position in the market for x86 central processing units (CPUs) by *i*) granting rebates to computer manufacturers conditional on them obtaining their x86 CPUs requirements from Intel and making direct payments to a major retailer on condition it stock only computers with Intel x86 CPUs and by *ii*) making payments to computer manufacturers to prevent or delay the launch of products containing x86 CPUs of competitors and to limit the sales channels of these products;

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- ***Microsoft II*** **(Opening of proceedings 21 December 2007 - Committment Decision 16 December 2009)**

Microsoft has been accused of breaching art. 102 TFUE by tying its web browser Internet Explorer to its operating system Windows. The EU Commission accepted the commitments offered by Microsoft. On 6 March 2013, the Commission sanctioned Microsoft for failing to comply with such commitments;

- ***Google Shopping*** **(Opening of proceedings 30 November 2010 - Decision of 27 June 2017)**

Google abused its dominant position in the market of general search engine by giving illegal advantage in its general search results pages to its own comparison shopping service;

- ***Google Android*** – **(Opening of proceedings 15 April 2015 – Decision - press release - 18 July 2018)**

Google infringed art. 102 TFUE through three different conducts: *i*) imposition on manufacturers to pre-install Google Search and Google Chrome as a condition for the license of Google Play Store; *ii*) illegal payments to manufacturers and mobile network operators conditional on exclusive pre-installation of Google Search and *iii*) illegal obstruction of development and distribution of competing Android operating system;

- ***E-book MFNs and related matters (Amazon)*** **- (Opening of proceedings 11 June 2015 – Committment Decision – 4 May 2017)**

The Commission considered that Amazon abused its dominant position on the markets for the retail distribution of English language and German language e-books to consumers in the EEA, in breach of Article 102 TFEU, by requiring E-book Suppliers *i)* to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere; and/or *ii)* to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another E-book Retailer.

- ***Qualcomm*: (Opening of proceedings 16 July 2015 - Summary Decision of 24 January 2018)**

Qualcomm was fined for having abused its dominant position in the market of Long-Term Evolution ('LTE') baseband chipsets, by making payments to Apple on condition it would not buy from competitors all of its requirements of chipsets;

- ***Qualcomm*: (Opening of proceedings 16 July 2015 - pending)**

The Commission is investigating Qualcomm's pricing practices and, in particular, whether it has sold certain chipsets at prices below costs (predatory pricing);

- ***Google Ad Sense* (Opening of proceedings 14 July 2016 - pending)**

The agreements between Google and the partners of its online search advertising intermediation programme AdSense are under examination.

Criticisms against the Google Android decision

Some criticisms have been expressed, especially in relation to:

- lack of assessment of the impact of the sanctioned conducts on consumers (and, in particular, of the benefits that the Google «model» granted to final customers: lower prices, product innovation);
- Android's availability for license by third party device manufacturers (unlike Apple iOS, which relies on a «*walled garden*» system) and the consequent market definition (Android was considered to operate on a different market from iOS and Blackberry). Is this true?
- lack of the Commission's power to dispute the business models adopted by firms (open vs. closed)

Relevant ICA's cases in the hi – tech sector

- ***Uber* (Advisory activity - 23 September 2015 and 1 March 2017)**

In its advocacy activity, in September 2015 the ICA issued a response to a question by the Ministry of the Interior at the request of the State Council, underlining the benefits for consumers granted by digital mobility platforms.

In 2017 the ICA sent a complaint to the Parliament and the Government to emphasize the need to reform non-scheduled mobility legislation: in particular, it asked for more flexibility in favor of the holders of a taxi license and full equivalence between operators with a taxi license and those with C&DH (Car-and-Driver Hire) authorization, in order to stimulate beneficial forms of consumer service, such as **Uber Black** and Mytaxi.

AGCM stressed that the reform should also focus on the services that connect non-professional drivers and end users via digital platforms, such as **Uber Pop** service, which, in Italy, is currently prohibited following an order of the Court of Milan (Order of the Court of Milan, 25 May 2015 - First Instance; Order of the Court of Milan, 2 July 2015 - Appeal) based on the lack of licence of non-professional drivers.

Furthermore, in 2018 ICA intervened for the first time as *amicus curiae* in support of UBER in an appeal civil trial before the Rome Tribunal brought against Uber Black service by taxi drivers cooperative companies based on unloyal competition because of lack of respect of certain license conditions.

- ***Whatsapp* (Unfair Commercial Practices case - Opening of proceedings 27 October 2016 - Decision 11 May 2017)**

After having conducted two separate investigations, ICA sanctioned WhatsApp Inc. for the breach of the Italian Consumer Code:

- by forcing the users of WhatsApp Messanger to accept in full the new "Terms of Use" and specifically the provision to share their personal data with **Facebook,** by leading them to believe that without granting such consent they would not have been able to use the service anymore;

- by adopting, in the "Terms of Use", contractual clauses concerning, *inter alia*, exclusions and limitations of responsibility in favor of WhatsApp; the possibility, accorded to the latter, to unilaterally interrupt the service without reason or advance notice, as well as the right to terminate the contract in any moment and for any reason and the right to introduce changes, also of economic nature, to the "Terms of Use" without indicating in the contract the reasons; the choice of the law of the State of California as only governing law in case of disputes.

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- ***Mytaxi*** **(Antitrust case - Opening of proceedings 18 January 2017 – Decision 27 June 2018)**

Following a complaint by the platform Mytaxi, ICA launched two parallel investigations concerning the exclusivity clauses included in the agreements governing the relationships between radio taxi cooperative companies and taxi drivers (*i.e.* their cooperative members). ICA concluded that the main taxi cooperative companies in Rome and Milan infringed Art. 101 TFEU (Art. 2 of Law No. 287/90), since such contractual provisions, by forcing taxi drivers to converge their entire operational capability to a single radio taxi service operator, constitute bundles of vertical agreements, preventing new operators to enter the market.

- ***Big Data*** **(Fact-finding survey 30 May 2017– ongoing)**

ICA, together with the Italian Communications Authority and the Personal Data Protection Authority, launched a fact-finding survey on Big Data. A preliminary information notice has been issued last June. In conducting the survey, ICA adopted an approach based on three different perspectives: the users that provide the data, the companies that collect and elaborate the data for commercial purposes, the market.

The fact-finding survey is expected to end by the end of 2018.

A different approach - The German Facebook abuse case

On 19 December 2017, the German Competition Authority stated, in its preliminary assessment, that Facebook is abusing its dominant position by imposing unfair terms and conditions on its users in relation to personal data (specifically by making the use of Facebook conditional upon its being allowed to collect data generated by using third-party websites and merge it with the user's Facebook account)

(some of the) most relevant cases in the *high-tech* sector in the US

- **Intel (June 1998 – August 1999)**

On 8 June 1998, the FTC filed suit against Intel, charging the company with violating section 5 of the FTC Act for the unlawful monopolization, unlawful attempts to monopolize and unfair competition. The FTC settled the case against Intel on 8 March 1999. The settlement order limits Intel's ability to withhold certain types of intellectual property from its customers for reasons relating to an IP dispute with that customer and prohibits Intel from refusing to sell (or threatening to refuse to sell) general-purpose microprocessors to a customer based on an IP dispute with that customer.

- **Rambus Inc., (June 2002 – February 2009)**

The case concerned Rambus failing to disclose patents to JEDEC, a standard setting body (SSO). The U.S. Court of Appeal for the D.C. Circuit set aside the FTC decision holding that Rambus' conduct constituted monopolization under Section 2 of the Sherman Act. The D.C. Circuit held that the FTC failed to carry its burden to show the conduct was exclusionary. The U.S. Supreme Court refused the Commission's petition against the Decision.

- **Yahoo! Inc. and Google Inc. (5 November 2008)**

Yahoo! Inc. and Google Inc. abandoned their advertising agreement after the DOJ informed the companies that it would file an antitrust lawsuit to block the implementation of the agreement. According to DOJ the agreement (companies accounting for 90 percent or more of each relevant market) would have likely harmed competition in the markets for Internet search advertising and Internet search syndication. Under the agreement, Google would have placed sponsored search and contextual ads on Yahoo! search result pages and on the web pages of Yahoo! syndication partners in the United States and Canada. A fundamental debate raised by the agreement was whether it should be viewed as a traditional "outsourcing" agreement similar to the kinds of agreements Google had with many other web publishers or whether it should be viewed as a horizontal agreement between competitors that would diminish competition and lead to higher prices and reduced innovation.

- **Intel (December 2009 – November 2010)**

The FTC sued Intel in December 2009 alleging that the company used anticompetitive tactics to cut off rivals' access to the marketplace and deprive consumers of choice and innovation in the market for computer chips. In 2010, the FTC approved a settlement with Intel, related to CPU, Graphics Processing Units (GPU) and chipsets, which prohibited Intel from using threats, bundled prices or other offers to exclude or hamper competition or otherwise unreasonably inhibit the sale of competitive CPUs or GPUs. The settlement also prohibited Intel from deceiving computer manufacturers about the performance of non-Intel CPUs or GPUs and it ensured to manufacturers of complementary products the access to Intel's CPU for the subsequent six years. Under the settlement, Intel was also prohibited from *i)* conditioning benefits to computer makers in exchange for their promise to buy chips from Intel exclusively or to refuse to buy chips from others and retaliating against computer makers if they do business with non-Intel suppliers by withholding benefits from them. In addition, the FTC settlement order required Intel to *ii)* modify its IP agreements with AMD, Nvidia, and Via so that those companies could have more freedom to consider mergers or joint ventures with other companies, without the threat of being sued by Intel for patent infringement; *iii)* maintain a key interface for at least six years, not limiting the performance of graphics processing chips; *iv)* disclose to software developers that Intel computer compilers discriminate between Intel chips and non-Intel chips and that they may not register all the features of non-Intel chips.

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- **Google Inc. (3 January 2013)**

On 3 January 2013 FTC closed Google antitrust matters. FTC and Google reached a settlement:

- Google agreed to change some of its business practices to resolve FTC concerns that some conducts could stifle competition in the markets for popular devices such as smart phones, tablets and gaming consoles, as well as the market for online search advertising. Google should have allowed competitors access – on fair, reasonable, and non-discriminatory terms – to patents on critical standardized technologies needed to make popular devices;
- Google agreed to give online advertisers more flexibility to simultaneously manage ad campaigns on Google's AdWords platform and on rival ad platforms;
- Google agreed to refrain from misappropriating online content from so-called "vertical" websites that focus on specific categories such as shopping or travel for use in its own vertical offerings

- **Qualcomm Inc. (January 2017 – pending)**

The FTC's complaint alleges that Qualcomm has market power in the worldwide markets for CDMA and premium LTE chipsets for mobile baseband communications. According to the FTC, Qualcomm allegedly leveraged this market power to support a "*no license, no chips*" policy whereby device OEMs are required to license Qualcomm's standard-essential patents at royalty rates and license terms they would not otherwise accept before they are allowed to purchase chips. The FTC further alleged that Qualcomm refused to license its standard-essential patents to competing chipset manufacturers. According to the FTC's complaint, these policies allowed Qualcomm to impose an anticompetitive "tax" that made rivals' chipsets relatively more expensive for OEMs. Finally, the FTC contends that Qualcomm coerced Apple into entering an exclusive agreement for mobile broadband chipsets by offering partial relief from the royalties that Qualcomm charged to Apple's contract manufacturers (and were subsequently passed through to Apple).

- **Uber (Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.** (February 2016 – judgment 27 March 2018)

The US Court of Appeals for the Third Circuit has ruled that Uber's entry into the Philadelphia transportation market did not run afoul of antitrust laws despite causing a precipitous drop in the value of taxicab medallions. The U.S. Court of Appeals for the Third Circuit ruled that the Philadelphia Taxi Association and 80 individual taxicab companies failed to show that Uber violated the Sherman Act by depressing competition.

Remedies employed in *hi-tech* cases: new markets, same old remedies

EU:

- interruption of the conduct (*diffida*) (4 - *Intel, Google Shopping, Qualcomm, MyTaxi*)
- disclosure of interoperability informations (1 - *Microsoft I*)
- sale of a version of Windows OS without WMP (1- *Microsoft I*)
- granting the availability of competing browsers (1- *Microsoft II*)
- abandon price parity clauses (1- *E-book MFNs and related matters (Amazon))*

U.S.:

- order to allow access to IP rights (1- *Intel 1999*)
- prohibition of conditional benefits; granting freedom to consider mergers/joint ventures with other companies; order to maintain a key interface (1 - *Intel* 2010)
- order to allow access to patents on standardized technologies on FRAND conditions (1- *Google*)
- order to give online advertisers the flexibility to campaign on different ad platforms (1- *Google*)
- order to refrain from misappropriating online content from "*vertical websites*" for use in its own vertical offerings (1- *Google*)

Most relevant issues in current framework

- As for **dominance**: do Big Tech companies have a real market power? They unquestionably have a massive economic power, but does this economic power amount to a real market power? It must be considered the time extension during which a company could hold a dominant position: such time extension must be (at least) appreciable.
- Furthermore, in relation to Big Data, it is worth pointing out the need to clarify the mechanisms (for example, of collecting and elaborating data) according to which a company may acquire a dominant position. Is Big Data an essential facility? Traditional access remedies.

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- As to **market definition**: multi-sided platforms, in particular, raise serious issues in market definition, since innovative processes change substitutability relationships and, therefore, the boundaries of the markets. One of the key factors to face the issue has been individuated by some commentators in the existence of a **transaction** between the two sides of the platforms and, consequently, in the application of a *two-part tariff:* two-sided *transaction* platforms may be considered as a single relevant market.
- In addition, platform markets are characterized by a significant **power of intermediation**: in the digital context **platforms "become" market**, acting as intermediaries between demand and supply. A dominant position may therefore also arise from a strong power in intermediation. NB In the on-line platforms markets, free offers on one sided market is the driving force for the other sided market.

  See the recent case before the U.S. Supreme Court, ***Ohio v. American Express*** (25 June 2018), where it was stated that competitive effects must be evaluated on both sides of the platform (merchants side and cardholders side), taking into account the two-sided credit cards market as a whole.

Most serious RISKS of the current antitrust enforcement approach

- **Over – enforcement**

Forcing the application of antitrust rules by deploying them even when there are no genuine antitrust issues at stake, in order to pursue other, albeit legitimate, goals, appears to be quite a high risk. Need for a serious evidence analysis, (including economic effects).

- **Late intervention**

As Hovenkamp explained in relation to the *Microsoft* case in the US, "[*T]he legal wheels turn far too slowly. By the time each round of Microsoft litigation had produced a 'cure', the victim was already dead".*

The **impressive time discrepancy between the innovation rush and the reaction of competition Authorities** is a pressing issue also in the light of the fact that usually the decisions are followed by an **intense litigation phase** (for instance, in the *Intel* case, the Commission decision dates back to 13 May 2009 and the final judgment of ECJ has been issued on 6 September 2017).

In an interview released to the Italian newspaper *Corriere della Sera* on 3 December 2015, Tim Berners - Lee remarked that the web history, apparently, is a story of monopolies which succeed each other: while the attention is focused on one supposed enemy, the wind changes, innovation comes (and new players appear).

Big –tech quickly (almost) disappeared

New goals of competition law?

- Competition law instruments **are still adequate to the extent that they are used for the goals of competition law itself.** If other aims are pursued, other instruments become necessary (es. new laws, sectorial regulations).
- Current debate on the so called "***hipster antitrust***" approach and the intense discussion on the role that antitrust may play in protecting **democracy and pluralism.**
- NB In the US, the introduction of *Sherman Act* (1890) was strictly linked to the limitation of the power of conglomerates: as stated by Judge Learned Hand in *United States v. Aluminum Co. of America,* "[*i]n the debates in Congress Senator Sherman himself […] showed that* ***among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital*** *because of the helplessness of the individual before them*": more than one century later, in a completely different context, the same instance reappears.
- "*Under ideal conditions, the relative allocation of political and social power would perhaps not be made through the antitrust laws. In practice, however, the conclusion that these laws embody political and social aspirations as well as economic goals cannot be escaped and should not be avoided.* ***The Sherman Act, a product of the Populist Era, was as much a reaction to fear about the loss of personal opportunities and the growth of urbanization as it was a response to the specific economic ills that flowed from the Oil, Tobacco and Sugar Trusts. ……..*** *The decisions of the Supreme Court have themselves consistently indicated an awareness that the antitrust laws serve political as well as economic purposes, advancing goals that may at times even require higher prices and less economic efficiency*" (Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation,* 1978).
- Nowadays, Tech Giants are the new "*great aggregations of capital"* that, on a global scale, enjoy a massive economic and political power.
- In the US, proposed executive order for US President Trump that would subject Big Techs to federal investigations for alleged political bias: the aim should be to "*thoroughly investigate whether any online platform has acted in violation of the antitrust laws".*

***Break – up*: a remedy back in the spotlight?**

- Among the remedies frequently invoked in order to preserve competition in *hi-tech* markets, the so called *break-up* appears at the top of the list.
- *Break-up* is a remedy of **last resort,** to be used exceptionally (also as a threat), but only when there are no other instruments available.
- *Break-up* is a delicate tool: executing a *break-up* could lead to worst consequences of the situation that it would like to improve: it may undermine efficiencies, stifle innovation and harm stakeholders.
- Furthermore, whilst in merger cases it is usually easier to individuate the lines where the *break-up* should occur, in non merger cases it could be quite complicated to determine how business units should be separated.
- In relation to *hi-tech* markets, since a *break-up* could lead to a lack of personnel, organization, informations and IP rights, the rusulting entities could have a diminished innovation capacity difficulties in competing on the market.

Break –up **in the EU legislation**

- *Break-up* is a subtype of structural remedies provided in Regulation 1/2003, aimed at preventing the repetition of the infringment.
- **Recital 12 Reg. 1/2003** states that «***Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking*».**
- **Art. 7 Reg. 1/2003**: the Commission «*may impose […] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.* ***Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy***».
- A four-pronged **test** for *break-up* remedies has been proposed (De Smijter and Kjølbye):

1. the infringement has a substantial impact on competition and consumers;
2. the undertaking has engaged in repeated infringements or the structure itself of the undertaking causes it to infringe competition rules;
3. other available remedies are ineffective;
4. *break-up* must not lead to a significant loss of efficiencies at the level of the undertaking, which would undermine the pro-competitive effects of the remedy.

Break-up in the US Antitrust

- As to structural remedies, in the US antitrust history, the *break-up* instrument has been adopted only on two occasions:

- ***Standard Oil (1911)***: the US Supreme Court ordered the *break-up* of Standard Oil into 34 independent companies, following the breach of Section 1 and Section 2 of the Sherman Act; it controlled over 90% of oil-related assets in the United States;

- ***AT&T (1982):*** it voluntarily entered into the settlement that separated AT&T long distance and Bell Labs Research from the local companies operating local telephone lines and switching.

- ***Microsoft* (complaints filing 18 May 1998 – consented final judgment 12 November 2002)**

Microsoft was accused of restricting competition in the web browser market by bundling the Windows operating system with Internet Explorer. On 7 June 2000, the *break-up* order was ruled: Microsoft should have been split into an application business and an operating systems business. Microsoft appealed the decision and a year later the D.C. Circuit Court of Appeals reversed Judge Jackson's order that the company be split, but upheld many of the findings that the company violated federal antitrust law. After the case was remanded to Judge Kathleen Kollar-Kotelly, negotiations resumed between Microsoft and Justice Dept., resulting in a settlement agreement in November 2001. The parties revised the agreement in March 2002. Judge Kollar-Kotelly accepted nearly all of the terms of the Second Revised Proposed Final Judgment, finding that it promoted the public interest. The final judgement provided for behavioral remedies, among which:

- ❑ the prohibition to retaliate against any OEM (*Original Equipment Manufacturer*) that develops, distributes, uses, sells or licenses any non Microsoft products;
- ❑ the disclosure of application programming interfaces (APIs) that would allow software developers to interoperate more easily with the Windows operating system;
- ❑ a three-person "technical committee" in order to help monitor Microsoft's compliance with the decrees.

Final Remarks

- Is *break-up* the cure-all tool for Big Tech? There are other areas in the world where the trend is exactly the opposite: big companies are merging to face the innovation challeges (for instance, in China, the possible merger between China Unicom and China Telecom is under consideration in order to tackle the 5G quest). As stated by Commissioner Vestager herself, a *break-up* would not be a "*silver bullet*" for more competition in hi-tech markets.
- need to keep the markets open to competition and innovation with rapid and effective interventions of antitrust authorities, but being aware at the same time of the risks of over-enforcement, which could preclude technological innovation to the ultimate detriment of the consumers.
- Innovation markets are characterized by their very nature by a rapid succession of players: consider that Google is only twenty years old and smartphones (iPhone) were launched just in 2007.
- Vertical search engines, such as Booking, Amazon, Ebay, Skyscanner, are rapidly eroding Google Search market power in targeted online research.
- Innovation changes consumers' habits fastly: according to the *App Annie 2017 Retrospective Report*, last year the average smartphone user had 80 apps on its phone and uses 40 of them in a given month. As for the total apps installed on phones, Japan and China are at the top of the list, whilst in India, China and Brasil users tend to utilize a greater number of apps.
- Consumer welfare is a wide concept: it is not related only to the price and the quality of a product, but it encompasses the general living standards of individuals.Technology has massively contributed also to ease of life standards as well as to spread knowledge, by facilitating the access to an enormous amount of notions. Thus, improving consumers welfare (life conditions) also in a wider, non strictly economic sense.
- In conclusion, even in the digital world, "classic" antitrust enforcement tools can be deemed still adequate, to the extent that they are properly and timely deployed with a wide and correct market definition and evaluation of the real long term effects of the conducts under examination.

"All that is human must retrograde if it do not advance"

Edward Gibbon (historian) 1776

The History of the Decline and Fall of the Roman Empire