STUDI
parlamentari e di politica costituzionale

Anno cinquantaduesimo
1°-2° trimestre 2019

203
204

Poste Italiane S.p.a.
Spediz. in a.p. D.L. 353/03
(conv. in L. 27.02.2004, n. 46)
art. 1 co. 1 – 45% C/RM/25/2010

Direzione e redazione
Via Massa Fiscaglia n. 1, 00127 Roma
Tel. 06.52370333
e-mail: edistudio@tiscali.it

Direttore responsabile
Maria De Benedetto

- *Elaborati e documenti inviati alla rivista, anche se non pubblicati, non verranno restituiti*

- *Articoli e scritti firmati impegnano esclusivamente la responsabilità di ciascun autore*

- **Abbonamenti per il 2020**: Italia: € 100. Estero: € 120. Per spedizione raccomandata aggiungere € 6.

- **Arretrati:** Italia: fascicolo singolo € 32, fascicolo doppio € 50. Estero: fascicolo singolo € 38, fascicolo doppio € 55.

- Tutte le rimesse in denaro devono essere effettuate mediante bonifico bancario intestato a EDISTUDIO Srl, Intesa SanPaolo, IBAN: IT91 P030 6903 2011 0000 0507 049. I reclami per il mancato ricevimento di un fascicolo saranno considerati soltanto se proposti entro 30 giorni dalla spedizione del fascicolo successivo.

- Registrazione presso il Tribunale di Roma n. 461/85 dell'11.10.1985

- ISSN 0303 9714

Proprietà: **EDISTUDIO** Srl - Roma
www.edistudio.org

Chiuso in redazione il 28 dicembre 2019

Stampa: Rotostampa Group S.r.l.
Via Tiberio Imperatore, 23
00145 Roma

RIVISTA TRIMESTRALE
già diretta da Nicola Greco

STUDI
parlamentari e di politica costituzionale

Sommario n. 203-204

SAGGI E CONTRIBUTI

RINO CAIAZZO

STUDI
parlamentari
e di politica
costituzionale

Anno 52 – N. 203-204
1°-2° trimestre 2019

The antitrust enforcement against tech giants

1. Tech giants today

The so-called Big Tech companies are currently at the heart of almost every debate.

Be it the influence that social networks and algorithms may have on political preferences, the technological disruption that dismantled the traditional economic schemes, the social habits which developed after the technological revolution, or the ever-present big data issue, tech companies have always been at the forefront.

These companies have undoubtedly changed the lives of citizens the entire world over. They dominate markets worldwide. In 2018, in the top ten list of the largest companies in the world by market value (1), the first six positions were covered by tech giants (namely, Apple, Amazon, Alphabet (Google), Microsoft, Facebook and Alibaba) (2).

(1) In billion US dollars.

(2) Source: *http://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/*. The table shows the top 100 companies in the world by market value on 11 May 2018.

Until a few years ago, mainstream opinion was keen to emphasize the advantages brought about by the innovation revolution. In recent times, however, a vigorous new consciousness of the drawbacks of technological disruption has arisen. The use of big data has started to raise fundamental questions related to the respect of fundamental rights, privacy rights in particular; algorithms used by search engines and social networks have revealed their inherent capacity to influence user views and preferences, leading to pluralism issues; the seriously underestimated mechanisms and consequences of the technological revolution have contributed to the spread of inequality all over the world; the increase in the concentration of wealth and the progressive pauperization of the middle classes has brought unsurprising claims of inequality and massive political; Big Tech companies have gained such political power that they have become a threat even to Governments, in a global context in which the role and the power of nation states is consistently being reduced.

The Economist coined the term "techlash" to describe the harsh reaction that has arisen against tech giants from various corners, defining them as BAADD (*Big, Anti-competitive, Addictive and Destructive to Democracy*) (3).

In such an extremely complicated and delicate context, in which a great variety of highly complex issues is at stake, including human rights, innovation, privacy, consumer protection and even democracy and pluralism, antitrust rules are straining to accomplish their mission.

A fierce academic debate among antitrust scholars has been prompted on the topic, giving rise to an extremely broad discussion, covering a huge number of highly complicated issues.

The present article falls within the framework of such dispute, trying to draw attention on some of the main points at stake.

After a short analysis of the approach currently adopted by competition authorities on both sides of the Atlantic towards Big Tech, the first section will focus on the two main hidden dangers this trend brings with it, namely the delay of public intervention and a substantial over-enforcement tendency.

Thereafter, a short consideration of the appropriateness of the traditional antitrust tool kit in the current landscape will follow, with a special focus on Big Data and its capability to constitute a barrier to entry, especially in sectors such as search engines and social networks, and on multi-sided platforms.

(3) The Economist, *Internet Firms Face a Global Techlash - Though Big Tech Firms Are Thriving, They Are Facing More Scrutiny Than Ever*, 10 August 2017, available at *www.economist.com/international/2017/08/10/internet-firms-face-a-global-techlash*, last accessed on 5 November 2019; Id., *How to tame the tech titans, the dominance of Google, Facebook and Amazon is bad for consumers and competition*, The Economist, 18 January 2018, available at *https://www.economist.com/leaders/2018/01/18/how-to-tame-the-tech-titans*, last accessed on 11 November 2019.

Afterwards, in order to offer a deeper understanding of the conclusions drawn in the first part of the article, the on-going debate concerning the goals which competition law should pursue will be briefly taken into account. In particular, the current claims for the introduction of social and political instances in antitrust enforcement will be assessed, questioning the validity of the so-called *hipster antitrust* approach (and its followers *New Brandeisians*).

Before concluding, the article will discuss the effectiveness and the convenience of the frequently invoked breakup remedy. This is a solution often called for, especially by those in favour of the opening of antitrust analysis to social and political instances, but also a rather delicate tool that could lead to even worse consequences for innovation and therefore future competition.

2. The main dangers of the current approach

As mentioned above, big tech companies are in the firing line of competition authorities all over the world, but especially in Europe. Here, in the last two decades, they have been the objects of a significant flow of cases before the European Commission, most of them ending with fines. This is certainly not surprising since the concerns of the Commission about Big Tech are well known. In a speech of 1st June, 2018, Commissioner Vestager stated, "We're dealing with businesses that are big and powerful. […] 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"(4).

Furthermore, she recently added that the Commission will seriously consider digital platforms suspected of anti-competitive behavior to be required, in certain circumstances, to demonstrate clear gains for their users to avoid punitive measures (5).

In the US context, even if antitrust enforcement against tech giants in the past appears to have been less severe than in Europe, a massive public debate about tech titans is now underway.

(4) M. VESTAGER, *When technology serves people, speech given at Brain Bar*, Budapest, 1 June 2018, available at *ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/when-technology-serves-people_en*, last accessed on 7 November 2019.

(5) J. ESPINOZA, S. FLEMING, *Margrethe Vestager eyes toughening 'burden of proof' for Big Tech*, Financial Times, 30 October 2019, available at *https://www.ft.com/content/24635a5c-fa4f-11e9-a354-36acbbb0d9b6*, last accessed on 11 November 2019. For the mentioned report see note no. 69 below.

Indeed, large US technology companies are currently facing five separate federal and state investigations into their corporate power. In particular, the DoJ opened a probe into Google in September 2019, asking the company to provide documents relating to previous investigations by the FTC, and is conducting a sweeping review of the dominance of Facebook, Apple and Amazon in order to assess whether and how those market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers (6).

In addition, the Federal Trade Commission (FTC) is paying peculiar attention to this topic. It launched a series of hearings on *Competition and Consumer Protection in the 21st Century* to be held between autumn 2018 and spring 2019 (7) and, last February, created a Technology Task Force, dedicated to monitoring competition in US technology markets (8). Furthermore, in late August 2019, FTC Chairman Joe Simons declared the agency was prepared to break up major technology platforms even by undoing their past mergers, if necessary, whether companies, including Facebook, will be found harming competition (9).

Meanwhile, David Cicilline, the head of the House of Representatives Antitrust Subcommittee, has been leading a separate inquiry into the power of big tech, asking for sensitive documents from Google, Amazon, Facebook and Apple (10). Moreover, local officials too are paying close attention to technology companies, as two separate investigations are under way: one, a probe into Google involving 50 state attorneys-general, and another into Facebook involving 47 (11).

However, the current attitude toward big techs, and especially the approach adopted in Europe, both by the European Commission and

(6) Department of Justice, *Justice Department Reviewing the Practices of Market-Leading Online Platforms*, press release, 23 July 2019, available at *https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms*, last accessed on 11 November 2019.

(7) Federal Trade Commission, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century*, press release, 20 June 2018, available at *www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st*, last accessed on 5 November 2019.

(8) Federal Trade Commission, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, press release, 26 February 2019, *www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology*, last accessed on 7 November 2019.

(9) D. Mclaughlin, *FTC Chief Says He's Willing to Break Up Big Tech Companies*, Bloomberg, 13 August 2019, available at *https://www.bloomberg.com/news/articles/2019-08-13/ftc-chief-says-willing-to-break-up-companies-amid-big-tech-probe*, last accessed 11 November 2019.

(10) K. Stacey, K. Shubber, H. Murphy, *Which antitrust investigations should Big Tech worry about?*, Financial Times, 28 October 2019, available at *https://www.ft.com/content/abcc5070-f68f-11e9-a79c-bc9acae3b654*, last accessed on 11 November 2019.

(11) *Ibidem*.

national competition authorities (12), is hiding some latent dangers, which may even lead to situations that are worse than the ones being addressed.

The first which should be highlighted is delays in antitrust intervention, whilst the second is the perilous tendency towards antitrust over-enforcement.

2.1. Late antitrust intervention

Antitrust enforcement against big tech companies must cope with a very simple and peculiar feature. Innovation is so rapid that becomes extremely difficult, if not completely impossible, to control it (13).

Almost two decades ago, Richard Posner was already well aware of this problem in high-tech markets. He emphasized that the real problem "lies on the institutional side: the enforcement agencies and the courts […] do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly" (14).

In fact, in comparison with the fastmoving mechanisms of technological processes, the competition authorities' actual reaction is sometimes late: the obvious consequence of such delay is that the action undertaken turns out to be in vain. The technologies to which the decisions refer may be out-of-date when decisions themselves are delivered (because technologies are replaced during the investigations) and the imposed remedies risk to be irrelevant since they try to solve problem no longer existing (15).

Moreover, such risk is even increased by the fact that competition authorities' decisions are usually followed by an intense litigation phase.

As regards Europe, there are significant examples of the delay of the European Commission in respect of the innovation rush.

One of the first significant antitrust cases against big techs before EU Commission, the Microsoft case, originated with the complaint submitted

(12) For an interesting overview of the most targeted sectors by EU enforcement policy on abuse of dominance since 2017, see F. Dethmers, J. Blondeel, *EU enforcement policy on abuse of dominace: some statistics and facts*, in *European Competition Law Review*, no. 4, 2017, pp. 147-149.

(13) On the point, cf. P. Telles, *Abuse of dominant position enforcement: go quick or go home*, 31 May 2016, available at *http://www.telles.eu/blog/2016/5/24/abuse-of-dominant-position-enforcement-has-a-problem-speed*, last accessed on 9 November 2019, with J. Crémer, Y. De montjoye, H. Schweitzer, *Competition policy for the digital era*, in *European Commission report*, Brussels, 2019.

(14) R. Posner, *Antitrust in the New Economy, John M. Olin Program*, in *Law & Economics Working Paper no. 106*, 2000, available at *http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=law_and_economics*, last accessed on 9 November 2019.

(15) Posner also emphasised the impact of late antitrust enforcement on the efficacy of divestitures in R. Posner, *Antitrust Law*, II ed., Chicago, University of Chicago Press, 2001, 111 ("Often by the time a divestiture decree is entered or can be carried out, the industry has so changed as to make such a decree an irrelevance").

by Sun Microsystem in 1998. Then, the proceeding was opened in August 2000, the Commission issued its Decision in 2004 (16), the Court of First Instance delivered its judgment in 2007 (17), in 2008 the Commission sanctioned Microsoft for failure to comply with the 2004 Decision (18) and the 2008 Decision was then appealed before the General Court, which delivered its judgment in June 2012 (19). Ten years were not enough to come to a full circle.

In the Intel case, in 2000 AMD (Advanced Micro Devices Inc.) submitted a complaint (further specified in 2003) to the Commission, the latter issued its decision on 13 May 2009 (20) and the final judgment of the European Court of Justice was delivered on 6 September, 2017 (21).

Again, in the Google Shopping case, the proceeding was opened in November 2010, and, after seven years of investigations, the Commission Decision was issued in June 2017 (22), and the case is now pending before the General Court (23).

The same concerns have been expressed in the US, where, in relation to the Microsoft case, Herbert Hovenkamp underlined that "[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" (24). In fact, the US Microsoft case (see below at section 5) began in 1998 and in 2002 a consent

(16) *Microsoft Corporation*, case COMP/C-3/37.792, Commission Decision of 24 May 2004, 2007/53/CE [2007] OJ L32/23.

(17) Case T-201/04, *Microsoft Corp. v. Commission,* [2007] ECR II - 3601.

(18) *Microsoft Corporation*, case COMP/C-3/37.792, Commission Decision of 27 February 2008, 2009/C 166/08 [2009] OJ C166/20.

(19) Case T-167/08, *Microsoft Corp. v. Commission*, [2012], 5 CMLR 15.

(20) *Intel*, case COMP/C-3/37.990, Commission Decision of 13 May 2009, 2009/C 227/07 [2009] OJ C 227/13. The Commission has previously launched its investigations in May 2004.

(21) Case C-413/14 P, *Intel Corporation Inc. vs European Commission* [2017] 5 CMLR 18.

(22) *Google Search (Shopping)*, case AT.39740, Commission Decision of 27 June 2017, 2018/C 9/08 [2018] OJ C 9/11.

(23) Case T-612/17, *Google and Alphabet v. Commission*. As regards the other main cases against big tech companies before the EU Commission, the following should be mentioned: the (second) *Microsoft* case, opened in December 2007. The Commitment Decision was delivered on 16 December 2009 *(Microsoft (Tying)*, case COMP/39.530, Commission Decision of 16 December 2009, 2010/C 36/06, [2010] OJ 36/7); the so-called *e-book* case on MFN clauses, in which the Commission opened the proceeding on 11 June 2015 and accepted the commitment offered by Amazon on 4 May 2017 (*E-Book MFNs and related matters*, case AT.40153, Commission Decision of 4 May 2017, 2017/C 264/06 [2017] OJ C 264/7); the *Qualcomm* case, opened on 16 July 2015 (together with a parallel case against the same undertaking, which is still pending before the Commission), that ended with the Commission's Decision of 24 January 2018 (*Qualcomm (Exclusivity Payments)*, case AT.40220, Commission's Decision of 24 January 2018, 2018/C 269/16 [2018] OJ C 269/25).

(24) H. Hovenkamp, *The Antitrust Enterprise: Principles and Execution*, Cambridge (MA), Harvard University Press, 2005, pp. 299-300.

decree was reached, which then was repeatedly renewed (it expired in 2011) (25).

If compared with the European antitrust enforcement, in the US the action against tech giants has begun earlier and, at first sight, it appears to have been slightly quicker, at least in more recent times. In fact, back in 1969, the Department of Justice (DoJ) initiated a proceeding against IBM, at that time dominant in the general-purpose digital computers market (26). The case took 13 years to come to an end and was dismissed in 1982.

In the same year, the DoJ reached a settlement with AT&T, after having opened the proceeding in 1978. This case will be analyzed in section 5 in relation to breakup.

More recently, in 1998, FTC initiated a proceeding against Intel, charging the company for having violated section 5 of the FTC Act, but one year later, in 1999, a settlement was reached (27). In 2009, FTC took less than a year to reach another settlement with Intel (28).

As regards the case against Rambus, FTC filed a complaint in June 2002 and delivered its Final Order in February 2007 (29). After Rambus appealed, in April 2008, the appellate Court set aside the Federal Trade Commission decision (30). The FTC formally dismissed the complaint in May 2009, after its petition to the US Supreme Court to review the D.C. Circuit's judgment was denied (31).

---

(25) *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002).

(26) *United States v. IBM Corp.*, 69 Civ. 200 (S.D.N.Y. 1969).

(27) FEDERAL TRADE COMMISSION, Complaint, *In the Matter of Intel Corporation*, docket no. 9288, 8 June 1998, available at *www.ftc.gov/sites/default/files/documents/cases/1999/03/intelfin.cmp__0.htm*, last accessed on 9 November 2019. ID., Agreement Containing Consent Order, *In the Matter of Intel Corporation*, docket no. 9288, 17 March 1999, available at *www.ftc.gov/sites/default/files/documents/cases/1999/03/d09288intelagreement_0.htm*, last accessed on 9 November 2019. ID., Decision and Order, docket no. 9288, 3 August 1999, available at *https://www.ftc.gov/sites/default/files/documents/cases/1999/08/intel.do__0.htm*, last accessed on 9 November 2019.

(28) FEDERAL TRADE COMMISSION, Complaint, *In the Matter of Intel Corporation*, docket no. 9341, 16 December 2009, available at *www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf*, last accessed on 9 November 2019. ID., Agreement Containing Consent Order, *In the Matter of Intel Corporation*, docket no. 9341, 28 July 2010, available at *www.ftc.gov/sites/default/files/documents/cases/2010/08/100804intelagree_1.pdf*, last accessed on 9 November 2019. ID., Decision and Order, docket no. 9341, 29 October 2010, available at *www.ftc.gov/sites/default/files/documents/cases/101102inteldo.pdf*, last accessed on 9 November 2019.

(29) FEDERAL TRADE COMMISSION, Complaint, *In the Matter of Rambus Incorporated*, docket no. 9302, 18 June 2002, available at *www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf*, last accessed on 9 November 2019. ID., Final Order, 2 February 2007, docket no. 930, available at *www.ftc.gov/sites/default/files/documents/cases/2007/02/070205finalorder.pdf*, last accessed on 9 November 2019.

(30) *Rambus Inc. v. F.T.C.*, No. 07-1086 (D.C. Circ. 22 April 2008).

(31) *F.T.C. v. Rambus Inc.*, 129 S. Ct. 1318 (2009). FEDERAL TRADE COMMISSION, Order Returning Matter to Adjudication and Dismissing Complaint (Docket No. 9302), 12 May 2009, available at *www.ftc.gov/sites/default/files/documents/cases/2009/05/090512orderdismisscomplaint.pdf*, last accessed on 9 November 2019.

In 2013, several months were enough to settle the Google and Motorola case, which arose after Google acquired Motorola in March 2012. In January 2013, FTC reached a settlement with Google (32) and the Final Order was issued in July 2013 (33).

From the short case-law review reported above, it turns out that, speaking in "legal" terms, a proceeding that lasts, for instance, one or two years, could be considered as rather fast. However, such a time frame may be still too long for the "technology" timeframe (34). Nevertheless, it is worth specifying that, obviously, the time that competition authorities take to terminate a proceeding depends on a variety of factors that are not necessarily linked with agencies' efforts, such as the complexity of the case, the degree of sophistication of the technologies concerned (that may require the assistance of specialized personnel), the internal procedures, the organization and the resources of agencies themselves, the possibility to reach an agreement with the undertakings involved, etc.

Very interesting on the topic of a timely intervention, for the first time in its history the European Commission has adopted an *interim* measures decision in order to stop Broadcom from applying certain provisions contained in agreements with six of its main customers, so as to prevent serious and irreparable harm to competition likely to be caused by the company's conduct, which has been found to be *prima facie* infringing EU competition rules (35).

In addition to the considerations developed so far, it is particularly noteworthy to underline another relevant feature of high-tech markets. It

(32) Federal Trade Commission, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search*, press release, 3 January 2013, available at *www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc*, last accessed on 9 November 2019. Id., Complaint, *In the Matter of Motorola Mobility LLC, a limited liability company, and Google Inc., a corporation*, file no. 1210120, available at *www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolacmpt.pdf*, last accessed on 9 November 2019. Id., Decision and Order, file no. 1210120, *https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolado.pdf*. Id., Agreement Containing Consent Order, file no. 1210120, available at *http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaagree.pdf*, last accessed on 9 November 2019.

(33) Federal Trade Commission, Decision and Order, docket no. C-4410, 23 July 2013, available at *www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf*, last accessed on 9 November 2019. Id., *FTC Finalizes Settlement in Google Motorola Mobility Case*, press release, 24 July 2013, available at *www.ftc.gov/news-events/press-releases/2013/07/ftc-finalizes-settlement-google-motorola-mobility-case*, last accessed on 9 November 2019.

(34) As highlighted by P. Telles, *Abuse of dominant position enforcement: go quick or go home*. See note no. 13 above.

(35) European Commission, *Antitrust: Commission imposes* interim *measures on Broadcom in TV and modem chipset markets*, press release, 16 October 2019, available at *https://ec.europa.eu/commission/press-corner/detail/en/ip_19_6109*, last accessed on 11 November 2019.

seems that the late intervention issue will be increasingly problematic, since the amount of time that new technologies need to expand in such markets will continuously shorten.

In fact, in comparison with the timeframe that older technologies (colour TV, for instance) took to penetrate the market, new ones, such as smartphones or tablets, have needed far fewer years to be massively adopted (36). Thus, presumably, competition authorities will struggle more and more to keep pace with the rapidity of high-tech markets.

However, the flip side of this phenomenon should be carefully taken into account: as much as such technologies may rapidly spread, they also could be replaced much sooner than the older ones.

This scenario paves the way for a complex and divisive issue, the question of the rapidity and stability of dominant positions in high-tech markets, which should be considered in the context of a much more detailed analysis, not falling within the scope of the present paper.

In fact, in the light of the fast-changing processes of such markets, even the acquisition and the decline of a dominant position could be rather quick as well.

According to some scholars, high-tech markets are, by their very nature, *winner-takes-all* markets (37) (or, at least, *winner-takes-most*). When a company launches a new product, it often creates a market in which it will probably retain a dominant (or even monopolistic) position. Therefore, at least for the initial period, it may enjoy a dominant position, benefitting from economies of scale that new entrants will not be likely able to replicate in the short term. Moreover, in high-tech markets such advantages could be also amplified by other factors, such as intellectual property rights and network effects (38).

Thus, several commentators argue that once a dominant position is gained, it is extremely hard to dismantle it because of the very nature of such markets (39).

However, even assuming that high-tech markets are *winner-take-all* markets and that there is no competition "in the market", it does not follow

(36) On this topic, see the graph (referred to the US market) available at *www.asymco.com/2013/11/18/seeing-whats-next-2/*, last accessed on 9 November 2019, that shows the time technologies took to shift from 10% of an addressable market to 90%.

(37) P. Barwise, L. Watkins, *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*, New York (NY), Oxford University Press, 2018, pp. 21-49.

(38) M. Rato, N. Petit, *Abuse of Dominance in Technology Enabled Markets: Established Standards Reconsidered?*, in *European Competition Journal*, vol. 9, no. 1, April 2013, available at *https://ssrn.com/abstract=2387357*, last accessed on 10 November 2019.

(39) See note no. 37 above.

that there is no competition "for the market" (40): on the contrary, this is usually rather intense.

From the same perspective, many scholars have underlined that dominant positions in tech markets are too easily inferred from the size of tech giants, since the large size of a company cannot be plainly equated to market power (41).

In any case, irrespectively of the approach adopted, history has shown that giants are not invincible. When Microsoft started to compete with Netscape, the latter appeared to be undefeatable. However, it disappeared in the "first browser war". In 1995, over 90% of desktops adopted the same browser, Netscape Navigator. Microsoft released Internet Explorer 4 in 1997. By 1998, Netscape Navigator had a market share of only 8%, whilst Internet Explorer 4 had a market share of 90% (42).

The same could be said for Yahoo, which vigorously competed with Google, but lost its fight or Nokia in the phone market. Nokia was the world's leading producer of phones until 2011, but in 2013 its device division was acquired by Microsoft. Its phone business later faded into the background, whilst Samsung and Motorola became quickly market leaders (43).

2.2. Antitrust over-enforcement

The second danger of the current antitrust approach worth analyzing is the risk of antitrust over-enforcement. This term usually refers to the risky tendency of forcing the application of antitrust rules to cases in which there are no genuine antitrust issues at stake (44).

This stress on antitrust over-enforcement certainly does not mean to suggest that cases against big tech companies are not always grounded on

(40) A. FINCH, *Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation*, keynote address at Capitol Forum's Fifth Annual Tech, Media & Telcom Competition Conference, 14 December 2018, available at *www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-keynote-address-capitol*, last accessed on 9 November 2019.

(41) *Ex multis*, R. EPSTEIN, *Beware of Populist Antitrust Law*, Forbes, 23 January 2019, available at *www.forbes.com/sites/richardepstein/2019/01/23/beware-of-populist-antitrust-law/#f79af1b586b9*, last accessed on 9 November 2019. The same consideration has also been remarked on by Andrew Finch, see note no. 40 above, who stressed that "too much of the concentration debate seems to focus on the size or market power of today's tech platforms rather than looking at whether they are engaging in anticompetitive conduct".

(42) A. PUJARI, *Netscape: Lessons from the Rise and Fall of the Internet's First Start-up*, in *Entrepreneur's Blog*, 5 March 2017, available at *www.ecell.iitm.ac.in/post-6.html*, last accessed on 7 November 2019.

(43) L. SALVIOLI, *La Cavalcata dello Smartphone dal 2001 a Oggi*, ne *Il Sole 24 Ore*, 22 February 2019, available at *http://lab24.ilsole24ore.com/cellulari/*, last accessed on 5 November 2019.

(44) For a general overview on antitrust over-enforcement risk, cf., *ex multis*, K.N. HILTON, *Antitrust Law: Economic theory and Common Law evolution*, Cambridge (UK), Cambridge University Press, 2003; T. EILMANSBERGER, *How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses*, in *Common Market Law Review*, vol. 45, no. 1, 2005, pp. 129-177.

a solid antitrust base; nonetheless, the perils of using the antitrust tool kit even in absence of serious anticompetitive evidence must be underlined, with the aim of striking down big tech companies and contrasting their massive economic power. It sometimes appears, in fact, that antitrust is invoked as much for its powerfulness and deterrence, rather than by virtue of a scrupulous analysis of its adequacy (45). As will be stressed later, antitrust enforcement is not a cure-all instrument and cannot be adopted without a serious economic assessment.

In addition to such considerations, the over-enforcement argument is further complicated by the fact that it is strictly linked to another relevant question, which is the possibility to ascribe the same issues to the competence and intervention of several disciplines along with competition law. This means that the same factual situation is capable of being addressed with different tools (46).

Let us take *Facebook* as example.

In 2017, the Italian Competition Authority (ICA) sanctioned WhatsApp for having induced its users to accept the new Terms of Use of WhatsApp Messenger, including the option to share with Facebook some personal data of their account for commercial and advertising goals, with the threat to otherwise interrupt the service (47). The Italian Competition Authority has also undertaken another proceeding against Facebook, concerning two separate conducts: the first related to the failure to properly inform users about Facebook data-collection practices, whilst the second dealt with the sharing of information with third-party websites and apps (48). In all these cases, the conducts involved were deemed to be unfair commercial practices in breach of the Italian Consumer Code (Legislative Decree n. 206/2005).

Subsequently, in June 2019, the Italian Privacy Authority again sanctioned the company for having unlawfully collected users' personal data with a psychological-tester App and having used them to unduly influence US political elections in 2016 (49).

(45) See, *ex multis*, S.D. Solomon, *Changing Old Antitrust Thinking for a new Gilded Age*, New York (NY), N.Y. Times, 22 July 2014; S. Vaheesan, *The Evolving Populisms of Antitrust*, Lincoln (NE), in *Nebraska Law Review*, vol. 93, is. 2, 2014, 370; J.E. Stiglitz, *The price of inequality: how today's divided society endangers our future*, New York (NY), W.W. Norton & Company, 2012.

(46) On this point, see A. Pezzoli, *"With a little help from my friends": quale politica della concorrenza per l'economia digitale?*, in *Economia italiana*, 1, 2019, pp. 13-37.

(47) Italian Competition Authority (Agcm), PS10601 – *Whatsapp - Trasferimento Dati a Facebook*, Decision no. 26597 of 11 May 2017, Boll. 18/2017.

(48) Italian Competition Authority (Agcm), PS11112 – *Facebook - Condivisione Dati con Terzi*, Decision no. 27432, 29 November 2018, Boll. 46/2018.

(49) Italian Privacy Authority, *Cambridge Analytica: Facebook fined 1 million Euro by the Italian Dpa*, press release, 28 June 2019, available at *https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-dis-*

In Germany, on 7 February 2019, the *Bundeskartellamt* (the German Competition Authorit-GCA), identified an abuse of dominant position in Facebook's policy of collecting, merging and using the data of users' accounts (50). Specifically, Facebook merged users' data from Facebook-owned properties like WhatsApp and Instagram as well as from third-party websites with a person's Facebook account. Facebook was deemed to hold a dominant position in the German market for social networks and the GCA considered that such conduct allowed Facebook "to optimise its own service and tie more users to its network. With the merging of the data the 'identity-based network effects' and the lock-in effects increase to the benefit of Facebook and to the detriment of other providers of social networks" (51).

The approach adopted by the GCA reflects the views previously expressed in the position paper it issued, together with the French Autoritè de la Concurrence (French Competition Authority - FCA), in May 2016. The paper takes a rather strong position, stating that: "even if data protection and competition laws serve different goals, privacy issues cannot be excluded from consideration under competition law simply by virtue of their nature. […] privacy policies could be considered from a competition standpoint whenever these policies are liable to affect competition" and "there may be a close link between the dominance of the company, its data collection processes and competition on the relevant markets, which could justify the consideration of privacy policies and regulations in competition proceedings" (52).

As will be shown later in section 4, the German Facebook case has had a great significance, since it acknowledges that the respect of privacy law can be considered as a parameter of competition, since a conduct concerning products that do not comply with privacy rules may be deemed to be anticompetitive (53).

---

play/docweb/9121506&zx=e0zo5w898ech, last accessed on 11 November 2019.

(50) BUNDESKARTELLAMT, "*Bundeskartellamt prohibits Facebook from combining user data from different sources*", press release, 7 February 2019, available at *www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html*, last accessed on 11 November 2019.

(51) BUNDESKARTELLAMT, "*Bundeskartellamt prohibits Facebook from combining user data from different sources - Background information on the Bundeskartellamt's Facebook proceeding*", 7 February 2019, available at *www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6*, last accessed on 11 November 2019.

(52) AUTORITÈ DE LA CONCURRENCE, BUNDESKARTELLAMT, *Competition Law and Data*, 10 May 2016, available at *www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf*, last accessed on 11 November 2019, pp. 23-24.

(53) See, in this regard and in relation to privacy-driven theories of harm, G. COLANGELO, M. MAGGIOLINO, *Big Data, Data Protection and Antitrust in the Wake of the Bundeskartellamt Case against Facebook*, in *Italian Antitrust Review*, vol. 4, no. 1, 2017, available at *http://iar.agcm.it/article/view/12608/11414*, last accessed on 11 November 2019.

In the US, Facebook has already entered into a consent decree with the FTC in 2011, whereby the company committed itself to a more transparent behaviour in the collecting, handling and retention of data (54). The final settlement was approved in 2012 (55). Lastly, on 24th July 2019, FTC imposed on Facebook a record-breaking $5 billion penalty and submitted the company to new restrictions and a modified corporate structure that will hold it accountable for the decisions it makes about its users' privacy (56).

From the different Facebook cases reported above, it could be easily inferred how a conduct that is substantially the same has been differently faced in the various jurisdictions (and even in the context of the same nation, as the Italian cases show), by employing different tools. The same conduct may thus be sanctioned as a consumer law breach, as a privacy violation and as an abuse of dominant position under antitrust law.

This situation, on the one hand, may grant a significant flexibility to competition authorities and regulators, since they could choose (compatibly with their institutional tasks and powers) the tool they deem more appropriate (57). In this respect, it should also be considered that different tools also imply significant discrepancies from a sanctioning point of view (for example, the Italian Competition Authority is allowed to apply much higher fines for violation of competition law in respect of those for the violations of the Consumer Code).

On the other hand, such flexibility should be used with great caution to avoid the risk of over-enforcement. Antitrust cases must always be supported by strong evidence and the capability of the same conducts to fall within the framework of several disciplines should not lead to a

(54) Specifically, Facebook deceived consumers by telling them they could keep their data private and then repeatedly sharing and making them public. FEDERAL TRADE COMMISSION, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises*, press release, 29 November 2011, available at *www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep*, last accessed on 11 November 2019.

(55) FEDERAL TRADE COMMISSION, Decision and Order, docket no. C-4365, 27 July 2012, available at *www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf*, last accessed 11 November 2019. FEDERAL TRADE COMMISSION, *FTC Approves Final Settlement With Facebook, Facebook Must Obtain Consumers Consent Before Sharing Their Information Beyond Established Privacy Settings*, press release, 10 August 2012, available at *www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook*, last accessed on 11 November 2019.

(56) FEDERAL TRADE COMMISSION, *FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook*, press release, 24 July 2019, available at *https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions*, last accessed on 11 November 2019. See also, COMPETITION POLICY INTERNATIONAL, *US: Regulators eye 'record' Facebook fine*, 21 January 2019, available at *www.competitionpolicyinternational.com/us-regulators-eye-record-facebook-fine/?utm_source=CPI+Subscribers&utm_campaign=ffe0cb0c30-EMAIL_CAMPAIGN_2019_01_21_11_32&utm_medium=email&utm_term=0_0ea61134a5-ffe0cb0c30-236915405*, last accessed on 5 March 2019.

(57) Again A. PEZZOLI, *"With a little help from my friends": quale politica della concorrenza per l'economia digitale?*, 2019, see note no. 46 above.

blurring of the borders of competition law, by applying it in the absence of proper antitrust violation.

3. Are the traditional antitrust tools still fit for purpose?

The technological disruption has led to a fierce debate on the suitability of the traditional antitrust tools to face the new landscape. Specifically, the discussion concerns whether the categories and doctrines of competition law employed so far are still adequate in the antitrust analysis of digital markets or new parameters tailored for tech companies are necessary (58).

This question has arisen in relation to several profiles. Two of them are to be considered as pivotal features: Big Data and multi-sided platforms.

The main concerns regard the Big Data issue. Obviously, the accumulation of huge amounts of data is not a problem by itself. However, it could have an enormous impact on the competitive process from different point of views.

For the purposes of this paper (the topic is very broad indeed), in relation to the appropriateness of "old" antitrust tools in new markets, it seems opportune to confine the following remarks to the fact that the competitive advantage that Big Data may confer and their capability to constitute a barrier to entry have a peculiar relevance in relation to abuse of dominance cases (59). In fact, especially in sectors such as search engines and social networks (which, in addition, are usually highly concentrated markets), smaller competitors may be seriously marginalised due to the fact that they are unable to collect a similar amount of data as bigger firms, such as Google or Facebook, and thus cannot improve their services as the latter are allowed to do (which in turn leads to the lack of possibility to gain new customers and more data) (60). In this context, the traditional essential facility doctrine (61) has often been invoked, since such a huge amount of

(58) See, *ex multis*, with J. Crémer, Y. De Montjoye, H. Schweitzer, *Competition policy for the digital era*, European Commission report, Brussels, 2019, and D. Gerardin, J.G. Sidak, *European and American approaches to Antitrust. Remedies and the institutional design of regulation in telecommunication*, in *Handbook of telecommunications economics*, vol. 2, in S.K. Majumdar; I. Vogelsang; M.E. Cave (eds.), *Technology evolution and the Internet*, Amsterdam (NL), Elsevier North-Holland, 2005.

(59) On this point, see G. Pitruzzella, *Big Data, competition and privacy: a look from the antitrust perspective*, in *Concorrenza e Mercato*, 23, 2016, pp. 15-28; L.M. Breed, F. Schöning, *Exploring the contrasting views about antitrust and big data in the Us and EU*, Hoganlovells.com, 27 September 2018, available at *https://www.hoganlovells.com/en/publications/exploring-the-contrasting-views-about-antitrust-and-big-data-in-the-us-and-eu*, last accessed 11 November 2019.

(60) See note no. 52 above.

(61) Under the "essential facilities doctrine", a monopolist found to own "a facility essential to other

data may represent an essential asset to detain in order to compete in the market (62).

Another clear example of the issues that the transposition of traditional antitrust tools to high-tech sector may bring about is represented by multi-sided platforms, which have been considered as problematic, in terms of competition analysis, from several viewpoints (63). For example, they raised notable questions as regards market(s) definition (64), since the product that a given platform offers on one side does not compete with the one offered on the other side of the platforms (65) and in relation to the competition analysis of the effects of an abusive conduct (66). On this matter, it is worth briefly mentioning the recent judgment of the *US Supreme Court in Ohio v. American Express* (67), which states, *inter alia*, that the credit card market can be considered as a two-sided transaction

competitors" is required to provide reasonable use of that facility, unless some aspect of it precludes shared access. In particular, such doctrine refers to any economic input that cannot be duplicated by competitors in the foreseeable future, as duplication is taken to mean the creation of an alternative source of efficient supply capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market. The refusal to supply an indispensable input constitutes, therefore, an abusive conduct, as it is liable to eliminate effective competition. For further readings on this topic, see, *ex multis*, A.F. Bavasso, *Essential Facilities in EC Law: The Rise of an "Epithet" and the Consolidation of a Doctrine in the Communications Sector*, in *Yearbook of European Law*, vol. 21, is. 1, 2001, pp. 63–106, available at *https://doi.org/10.1093/yel/21.1.63*, last accessed on 11 November 2019; A. Capobianco, *The essential facility doctrine: similarities and differences between the American and the European approaches*, in *European Law Review*, 26(6), 2001, p. 548; R. Pitofsky, D. Patterson, J. Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, in *Georgetown Law Faculty Publications and Other Works*, 2001, 346, available at *https://scholarship.law.georgetown.edu/facpub/346/*, last accessed on 11 November 2019; R. Wish, D. Bailey, *Competition Law*, 8th ed., Oxford (UK), Oxford University Press, 2015, pp. 734-752.

(62) However, the applicability of the essential facility doctrine is not endorsed by many scholars. See G. Colangelo, M. Maggiolino, *Big Data as a Misleading Facility*, in *European Competition Journal*, vol. 13, is. 2-3, 2017, pp. 249-281, and in *Bocconi Legal Studies Research Paper*, no. 2978465, 1 June 2017, available at *https://ssrn.com/abstract=2978465*, last accessed on 11 November 2019.

(63) See, R. Nazzini, *Online platforms and Antitrust: where do we go from here?*, in *Italian Antitrust Review*, no. 1, 2018, pp. 5-18; G. Muscolo, A. Minuto Rizzo, *Sharing Economy: a multifaceted phenomenon*, in *Italian Antitrust Review*, no. 1, 2018, pp. 95-111.

(64) Market definition is a "tool to identify and define the boundaries of competition between firms. […] The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure", European Commission, *Notice on the Definition of the Relevant Market for the Purpose of EU Competition Law*, OJ (1997) C 372/05. On this topic, see also C. Abudino, *Definizione del mercato rilevante ed applicazione del diritto comunitario* antitrust*: la comunicazione della Commissione*, in *Contratto e Impresa–Europa*, 1998, p. 524; R. Wish, D. Bailey, *Competition Law*, 8th ed., Oxford (UK), Oxford University Press, 2015, pp. 26-43.

(65) See also Oecd, *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018, available at *www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf*, last accessed 7 November 2019.

(66) R. Nazzini, *Online platforms and Antitrust: where do we go from here?*, see note no. 63 above.

(67) *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

platform market (68) and that the anti-competitive effects of a conduct must be evaluated having regard to both sides of the platform, since they belong to a single relevant market.

From the few considerations developed above, it appears that, notwithstanding the peculiar factual scenario that tech markets present, the conceptual categories and theories employed to approach antitrust issues in such cases are always the "traditional" ones. The core antitrust issues they pose do not involve anything that cannot be scrutinised by adopting the old schemes. The real exceptional feature, as explained in the following paragraph, is the fact that antitrust analysis in the tech sector has to deal with a context characterised by the complex interaction of outstanding factors, such as extremely fast innovation processes, and globalisation mechanisms, etc. But these aspects do not modify the (eventual) underlying antitrust problems to such a point as to require a new tool kit specifically designed for them.

The same conclusions have been recently reaffirmed in the report presented by three prominent scholars, namely Jacque Crémer, Yeves-Alexandre de Montjoye and Heike Schweitzer, to EU Commissioner Vestager, assessing how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. The three confirmed that "the basic framework of competition law, as embedded in Articles 101 and 102 of the TFUE, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era", whose established concepts, doctrines and methodologies only need to be adapted and redefined to better deal with the specific characteristics of platforms, digital ecosystems and data economy (69).

In particular, the report suggests that, as already assumed, in the case of multi-sided platforms, interdependence of the sides becomes a crucial part of the assessment and, in general, more emphasis should be put on theories of harm and identification of anti-competitive strategies than on market definition. Similarly, the assessment of market power has to be case-specific as well, and should take into account insights drawn from behavioural economics about the strength of consumers' biases towards default options and short-term gratification.

Even the significant revamp of national competition rules, recently promoted by the German Ministry of Economics and Energy in order to better target the increased scrutiny of digital platforms (70), confirms the

(68) Platforms offer products and services to two different groups that depend on the platform to intermediate between them.

(69) J. Crémer, Y. De Montjoye, H. Schweitzer, *Competition policy for the digital era*, European Commission report, Brussels, 2019, 3.

(70) The German Ministry of Economics and Energy, *Act on Digitalisation of German Competition Law*

suggested substantial consistency in antitrust tools for digital markets, as it mainly provides specific indications for the implementation of traditional concepts in the new landscape.

For example, the proposed draft bill suggests that the importance of the services offered by an intermediary on multi-sided markets for other companies' access to supply and sales markets shall be taken into account for the assessment of such intermediary's market power, and its refusal to grant other companies access to data shall, under certain circumstances, be considered an abuse of dominance by the intermediary, in line with the recalled essential facility doctrine.

Similarly, the draft bill suggests that even a "relative market power" may arise from the fact that a company depends on access to data controlled by another company and that the refusal to grant access to that data (even if lacking in commercial value) may constitute a restriction of competition.

In addition, interestingly enough, a new form of dominance is envisaged in the Act, in order to facilitate the scrutiny of digital platforms that cannot be found either to be dominant or to possess "relative market power". In particular, in the case of a company with "paramount significance for competition across markets", the national competition authority will have the power to prohibit any impediment of competition or the creation of entry barriers by the use of data collected from a dominated market (71).

The fact that big tech companies do not pose really new issues *in terms of antitrust analysis* is further confirmed by the fact that the remedies adopted in the proceedings against big techs by competition authorities both Europe and the US, and even those included in both the report and the German draft bill just mentioned, may be ascribed to the traditional tool kit.

Indeed, apart from the breakup issue, which will be analysed in section 5, remedies such as the disclosure of information, the order to grant interoperability among competing products, access to patent at FRAND (fair, reasonable, and non-discriminatory) conditions, etc. appear not to disrupt the traditional remedial system adopted so far (72).

(GWB-Digitalisierungsgesetz), 14 October 2019. The new rules shall enter into force in 2020, after the draft has passed through Parliament. The latter might request changes to the draft bill.

(71) For an early comment on the contents of the draft bill see also F. SCHÖNING, C. RITZ, *Germany's proposed digital antitrust law: an ambitious project to regulate digital markets*, *HoganLovells.com*, available at *https://www.hlregulation.com/2019/10/31/germanys-proposed-digital-antitrust-law-an-ambitious-project-to-regulate-digital-markets/*, last accessed 11 November 2019.

(72) In the first European Microsoft case (see note no. 16), concerning refusal to supply and tying, the disclosure of interoperability information and the sale of product to end users in a version not incorporating the 'tied product' were ordered. In the second European Microsoft case (see note no. 18), the commitments concerned, inter alia, the obligation to grant the availability of competing browsers. Among the remedies imposed in the US context that are relevant to the goals of the present article, it should be mentioned the first Intel case (see note no. 27), where the access to information and the supply of product, notwith-

4. Does antitrust need to pursue new goals?

As mentioned in the introduction, the massive debate on antitrust enforcement against big techs re-opened the discussion on the goals of competition law. Such debate is certainly not new; indeed, it is as old as antitrust itself (73).

Most of the considerations developed in the previous paragraphs clearly depend upon one's opinion of the goals of competition law. Writing in 1978, Robert Bork, in his latest book, *The Antitrust Paradox*, stated that "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules" (74).

After many years, we are now engaged in a new (but in reality old) discussion, since the crucial issue appears to be represented by the need to include in the antitrust assessment a variety of socio-economic instances such as equality, pluralism, etc., rather than keeping the focus merely on market efficiency and the traditional consumer welfare standard (75).

The explicit introduction of privacy concerns in the antitrust analysis of the GCA Facebook decision has already been mentioned above (see section 2.2). Such decision falls in the middle of a lively discussion between those

standing eventual IP disputes, was ordered, and the second Intel case (see note n. 28), in which the inclusion of a key interface was imposed. In the Google case (see note n. 33), along with the removal of restrictions hampering advertisers' management of their ad campaigns across competing platforms, Google agreed to allow competitors access on FRAND terms to patents on critical technologies and to refrain from misappropriating content from vertical websites for use in its own vertical offerings.

(73) Concerning the debate on competition goals and on the ultimate scope of antitrust doctrine, see, *ex multis*, G. Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*, Oxford-Portland (OR), Hart Publishing, 1997, F. Gobbo, Il mercato e la tutela della concorrenza: introduzione alla politica e all'economia della concorrenza, Bologna, il Mulino, 2001; A. Pera, *Concorrenza e* antitrust*: usi e abusi del mercato. Le regole e le istituzioni per il suo corretto funzionamento*, Bologna, il Mulino, 2001; M. Siragusa, L. Prosperetti, *Economia e diritto* antitrust, Roma, Carocci, 2006; H.R. Bork, *The Antitrust Paradox*, New York (NY), Basic Books, 1993; E.M. Fox, *Modernization of Antitrust: A New Equilibrium*, in *Cornell Law Review*, 66, 1981, p. 1140, available at: *http://scholarship.law.cornell.edu/clr/vol66/iss6/3.J.*, last accessed on 11 November 2019; H. Hovenkamp, *Antitrust policy and the Social cost of Monopoly*, in *Iowa Review,* 78, 371, 1993; R. Pitofsky, *Political Content of Antitrust*, in *University of Pennsylvania Law Review*, 127, 1979, p. 1051, available at: *https://scholarship.law.upenn.edu/penn_law_review/vol127/iss4/19*, last accessed on 11 November 2019.

(74) R. Bork, *The Antitrust Paradox: A Policy at War with Itself*, New York, Basic Books, 1978, p. 50.

(75) See M. Steinbaum, M.E. Stucke, *The Effective Competition Standard. A New Standard for Antitrust*, New York, Roosevelt Institute, September 2018, also available at *https://ssrn.com/abstract=3293187*, last accessed on 11 November 2019.

commentators who consider privacy as a competition concern since the degree of personal data protection is simply another parameter on which a product on a certain market could be assessed (together with innovation, quality and variety) and those who are rather critical about the inclusion in antitrust scrutiny of violations of rules different from competition ones, such as privacy law (76). In this regard, it should be noted that in the *Facebook/Whatsapp* merger, the EU Commission explicitly embraced this second position, stating that "[a]ny privacy-related concerns […] do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules" (77).

In any case, the GCA Decision has considerably blurred the line between competition law and privacy law and could set a significant precedent, opening the way to assess the breaches of other set of laws in terms of competition abuses.

Apart from the relevance in the antitrust assessment of the violation of rules different from competition law, the main current claims, as noted above, aim at the opening of antitrust enforcement to wider socio-economic issues.

Before analyzing these instances, it seems opportune to start from the objections to the traditional standard adopted so far, which is the consumer welfare standard.

The traditional consumer welfare standard has been recently called into question in its role as cornerstone of antitrust enforcement. For decades there has been a broad consensus on the use of such parameter as the ground on which mergers, cartels and abusive practices should have been evaluated. However, some commentators, favorable to a more intrusive antitrust approach especially toward tech giants, started to claim that consumer welfare standard represents the main curb to a stronger antitrust enforcement against them (78).

The consumer welfare standard, as we know it today, has been developed especially through the highly influential work of the Chicago

(76) See M.K. Ohlhausen, A.P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, in *Antitrust Law Journal*, 80, 1, 2015, available at *https://ssrn.com/abstract=2561563*, last accessed on 8 November 2019, where the Authors stress that "attempting to unify the competition and consumer protection laws creates needless risks for the Internet economy and could destabilize the modern consensus on antitrust analysis, again pulling it away from rigorous, scientific methods developed in the last few decades and reverting back to the influence of subjective noncompetition factors. […] Although privacy can be (and is today) a dimension of competition, the more direct route to protecting privacy as a norm lies in the consumer protection laws".

(77) *Facebook/Whatsapp*, case no. COMP/M.7217, Commission Decision of 3 October 2014, C(2014)7239 final [2014], para. 164.

(78) See B. Orbach, *How Antitrust lost Its Goal*, in *Fordham Law Review*, 81, 2013, 225, 2013, available at *http://ir.lawnet.fordham.edu/flr/vol81/iss5/6*, last accessed on 9 November 2019, and, in particular, T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, New York (NY), Columbia Global Reports, 2018.

School and, particularly, of Robert Bork (1927-2012) (79). Professor Bork related consumer welfare standard to the concept of economic efficiency, intended as the maximization of consumer welfare substantially in terms of lower prices, and developed it as the exclusive goal of antitrust enforcement (80). Moreover, he stressed that the consumer welfare standard was the original intention of the Congress: in this respect, he argued that "[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription" (81).

Many of the current claims for the inclusion in the competition law assessment of other instances contend the consumer welfare standard.

Indeed, challenges to the antitrust approach focusing solely on the efficiency standard were raised well before the technological disruption.

In 1979, Robert Pitofsky expressed his concerns, stating that "if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs" (82). He left no doubt by stating that "it is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws" (83).

The year before, Joseph Bauer underlined that "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

(79) The concept proposed by Bork and the Chicago School of the ultimate aim of antitrust as a tool to protect "consumer welfare", as based on a pure economic approach and analysis of negative impact on the end prices, had been adopted by the U.S. Suprem Court in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

(80) See note n. 74 above. Among the huge range of contributions about the massive influence of Robert Bork on antitrust doctrine and enforcement, see, *ex multis*, G.L. PRIEST, *The Abiding Influence of The Antitrust Paradox: An Essay in Honor of Robert H. Bork*, in *Yale Law School Faculty Scholarship Series*, paper 643, 2008, available at *http://digitalcommons.law.yale.edu/fss_papers/643*, last accessed on 9 November 2019.

(81) See note no. 74 above, and also J.B. BAKER, S.S. SALOP, *Antitrust, Competition Policy, and Inequality*, *Working Papers*, paper 41, 2015, available at *http://digitalcommons.wcl.american.edu/fac_works_papers/41*, last accessed on 7 November 2019.

(82) R. PITOFSKY, *The Political Content of Antitrust*, in *University of Pennsylvania Law Review*, 127, 1979, 1051, available at *https://scholarship.law.upenn.edu/penn_law_review/vol127/iss4/19*, last accessed on 6 November 2019.

(83) *Ibidem*.

well as economic purposes, advancing goals that may at times even require higher prices and less economic efficiency"(84).

The current positions and contributions that have in common the rejection of the consumer welfare standard are rather multi-faceted and cannot be easily simplified. However, in general terms, two different groups may be distinguished (85).

A first group argues that, even if consumer welfare standard has been misused, it still constitutes the ground of antitrust law and policy: according to the various positions that may be ascribed to this group, the key point is not such standard in itself, but, at most, its improper use and simplification (86).

A second group, instead, argues that such a standard must be totally discharged: these are the supporters of the so-called "*hipster or neo-Brandesian antitrust*" (87) and they challenge the premise of the maximization of consumer welfare as the exclusive goal of antitrust (88). According to this second group, the proper aims of competition goals have been totally abandoned. They also contend the interpretation of the original intention of the Congress as solely focused on economic efficiency, largely developed by Bork (89).

The expression *Woodstock antitrust* has also been coined, together with hipster antitrust, to indicate this critique approach to the current antitrust enforcement as *extreme, unmoored from correct antitrust doctrine* (90). Even if

(84) J.P. Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation*, in *Boston University Law Review*, 58, 1978, 199, available at *https://scholarship.law.nd.edu/law_faculty_scholarship/655*, last accessed on 6 November 2019.

(85) This partition has been drawn by T. Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice, Competition Policy International, Antitrust Chronicle*, April 2018, available at *www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Wu.pdf*, last accessed on 6 November 2019.

(86) For these positions, see C.R. Leslie, *Antitrust Made (Too) Simple*, in *Antitrust Law Journal*, vol. 79, no. 3, 2014, 917-940, available at *https://ssrn.com/abstract=2589598*, last accessed on 8 November 2019; R. Pitofsky, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, in *Oxford Scholarship Online*, 2008, available at *https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195372823.001.0001/acprof-9780195372823*, last accessed on 11 November 2019.

(87) The name refers to Justice Brandeis (1856–1941), who served the Supreme Court from 1916 to 1939 and has been a strong proponent of redistribution of power and opportunity in political economy.

(88) Together with the rejection of the traditional standard, new competition standards have also been proposed, such as the "protection of competition standard" (see note no. 85 above) and the "effective competition standard", advanced by Steinbaum and Stucke, see note no. 75 above.

(89) See, E.M. Fox, *The Modernization of Antitrust: A New Equilibrium*, in *Cornell Law Review*, 66, 1981, 1140, rejecting the single-purpose consumer welfare position as ahistorical, and arguing that the major historical purposes of the antitrust laws are "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor".

(90) H. First, *Woodstock Antitrust, Competition Policy International, Antitrust Chronicle*, April 2018, avail-

hipster antitrust and Woodstock antitrust do not precisely coincide, they both indicate the claim for the reconnection of antitrust to wider social instances.

Among the most well-known contributions to this second group of scholars, mention should be at least be made of the *Amazon's Antitrust Paradox*, in which Lina Khan points out that the consumer welfare standard is too narrowly focused on lower prices (91). In fact, "[d]ue to a change in legal thinking and practice in the 1970s and 1980s, antitrust law now assesses competition largely with an eye to the short-term interests of consumers, not producers or the health of the market as a whole; antitrust doctrine views low consumer prices, alone, to be evidence of sound competition". According to Khan, this approach has permitted Amazon to acquire a massive power, so that "[w]ith its missionary zeal for consumers, [Amazon] has marched toward monopoly by singing the tune of contemporary antitrust" (92).

The wide range of academics that challenge the traditional standard often make claims for the introduction of other instances besides efficiency in antitrust scrutiny, namely social and economic arguments.

Equality is currently one of the most frequently invoked goals that antitrust should pursue.

The key point of this approach is that the growing market concentration is strictly related to the increase of wealth inequality. Thus, a stronger antitrust enforcement, especially against tech giants, is considered as a useful instrument to help reduce wealth discrepancies.

One of the first significant contributions on this topic dates back to 2015, when Baker and Salop issued a paper in which they emphasize the impact of market power on inequality (93). They argued for a more pervasive antitrust enforcement and they even suggested considering equality as an explicit antitrust goal.

Even before 2015, prominent scholars focused on inequality. For example, in 2012, Nobel Laureate Joseph Stiglitz dedicated an entire work to equality, arguing, inter alia, a stronger antitrust approach (94). In the

---

able at *https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-First.pdf*, last accessed on 6 November 2019.

(91) L. KHAN, *Amazon's Antitrust Paradox*, in *Yale Law Journal*, vol. 126, no. 3, 2017, p. 564, available at *www.yalelawjournal.org/note/amazons-antitrust-paradox*, last accessed on 6 November 2019.

(92) *Ibidem*, p. 716.

(93) J.B. BAKER, S. SALOP, *Antitrust, Competition Policy, and Inequality*, see note no. 81 above.

(94) J. STIGLIZ, *The Price of Inequality, How Today's Divided Society Endangers Our Future*, New York (NY), W.W. Norton, 2012.

same year, Stucke compared the political revindication of the Occupy Wall Street movement to the increasing market power of big firms (95).

However, together with those commentators who proposed a more intense antitrust scrutiny, others have been more skeptical about the usefulness of this tool to defeat wealth differences (96).

Equality is a huge issue indeed. Its causes originate from a variety of factors that cannot be properly discussed here. However, what should be at least emphasised is that it appears that the current debate fosters an undue separation between economic efficiency issues and other instances, such as equality, pluralism, etc. This approach hides a subtle risk that is the idea that if economic efficiency is pursued, *thus* all other values will be stifled, as if they were in contraposition. This view is slightly too narrow.

Matters such as equality, pluralism and democracy are fundamental issues that *must* be faced in our society. However, antitrust is not a cure-all tool to overburden with a multiplicity of instances in addition to or in the place of economic efficiency. The key point of the question is that the problem is not economic efficiency alone. Economic efficiency can be still considered the (sole) aim of competition law and this is not at odds with the values that a society needs and must protect.

To use Professor Bork's words, "[a]ntitrust has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed or used. Those are matters for other laws. […] Consumer welfare […] has no sumptuary or ethical component but permits consumers to define by their expression of wants in the marketplace what thing they regard as wealth. Antitrust litigation is not a process for deciding who should be rich or poor, nor can it decide how much wealth should be expended to reduce pollution or undertake to mitigate the anguish of the cross-country skier at the discretion wrought by snowmobiles. It can only increase collective wealth by requiring that any lawful products, whether skis or snowmobiles, be produced and sold under conditions most favourable to consumers" (97).

Moreover, significantly enough, also the mentioned report recently presented to Commissioner Vestager agrees that "there is no need to rethink the fundamental goals of competition law in the light of the digital 'revolution'. Vigorous competition policy enforcement is still a powerful

(95) M.E. Stucke, *Occupy Wall Street and Antitrust*, in *University of Tennessee Legal Studies Research Paper,* no. 179, March 2012, available at *https://ssrn.com/abstract=2002234*, last accessed on 6 November 2019.

(96) See, *ex multis*, D.A. Crane, *Antitrust and Wealth Inequality*, in *Cornell Law Review*, 101, no. 5, 2016, 1171, available at *https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2793&context=articles*, last accessed on 6 November 2019.

(97) See note no. 74, pp. 90-91.

tool to serve the interest of consumer and economy as a whole. […] We do not need a new debate on the goals of UE competition law, but rather a new thinking on plausible theories of harm backed up by an increasing theoretical understanding of the specificities of digitisation and empirical evidence" (98).

Therefore, the inclusion in the antitrust scrutiny of values that diverge from economic efficiency risks causing more damage than the benefits it would like to bring. One of the most serious dangers, which is surely not new, is to entrust competition authorities and judges to develop policy considerations on issues that diverge from economic efficiency, even if they do not have the power to take decisions in such respect (99).

5. Breakup, a remedy back in the spotlight

Among the remedies frequently invoked in order to preserve competition in high-tech markets, especially by those who are in favor of the opening of antitrust analysis to social and political instances, the so-called breakup appears to be at the top of the list. In the public and academic debate, it is often claimed that big techs have acquired too much power and that the most effective way to solve this problem is to break them up (100).

To this regard, it should be firstly remarked that breakup is a remedy of last resort, to be used exceptionally, only when there are no other instruments available.

In the European context, 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" and art. 7 of the same Regulation provides that "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" (101).

Europe, however, is not so familiar with breakup, whilst in the US antitrust history, it has been employed several times.

(98) J. Crémer, Y. De Montjoye, H. Schweitzer, *Competition policy for the digital era*, see note no. 69 above, pp. 3, 40.

(99) See note no. 74, p. 83.

(100) See, *ex multis*, T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, note no. 78 above.

(101) 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, [2003] OJ L 1/1.

Apart from the cases concerning other industries, such as Standard Oil and American Tobacco cases (102), as for the tech sector the Microsoft dispute comes immediately to mind. But even before the Microsoft case, such industry faced another significant breakup case at the beginning of the 1980s, namely AT&T.

The proceeding against AT&T began in 1978. AT&T was an integrated provider of telecommunications services, holding a monopoly regulated by the government in long-distance and local telephone service and in the production of telephones. During the 70s, technological developments in the long-distance telephone industry dismantled AT&T natural monopoly and competitors started to contend the market: the government then alleged that competitors were being charged unfair fees to gain access to AT&T local telephone lines. In 1982, AT&T and the DoJ reached a settlement, by which AT&T agreed to divest itself of twenty-two local companies (Baby Bells), retaining the long-distance telephone service and its research and manufacturing facilities (103).

The Microsoft dispute has been far more complicated. The Department of Justice in 1998 accused Microsoft of restricting competition in the web browser market by adopting several anticompetitive practices, among which the illegal tying of Windows operating system to Internet Explorer (104). On 7 June 2000, the breakup order was issued: Microsoft should have been split into an application business and an operating system business (105). Microsoft appealed the decision and a year later the DC Circuit Court of Appeals reversed the order that the company should have been split. Then, negotiations between Microsoft and Justice Department resumed, resulting in a settlement agreement in November 2002 (106).

Today, a wide array of scholars, also relying on breakup precedents, strongly argue that tech giants should be broken up because of their excessive power. However, such a solution is far from being easily deployed. Breakup, in fact, is a rather delicate tool, as it could even lead to worst consequences of the situation that it would like to improve.

(102) In 1911 the Supreme Court ruled that Standard Oil, which controlled over the 90% of oil-related assets in the U.S., should have been broken up into independent companies, since it had achieved such dominant position through illegal business practices (namely, through rebates, discount, espionage, control of supplies to competitors and predatory pricing), *Standard Oil Co. of N.J. v. United States*, 221 US 1 (1911). In the same year, the Supreme Court ordered that American Tobacco, which controlled most of the tobacco industry, should be divided into different competing undertakings, *United States v. American Tobacco Company*, 221 US 106 (1911).

(103) *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

(104) *United States v. Microsoft Corp.*, Civil Action no. 98-1232, complaint filed 18 May 1998, available at *www.justice.gov/atr/complaint-us-v-microsoft-corp*, last accessed on 11 November 2019.

(105) *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 62 (D.D.C. 2000).

(106) *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C 2002).

First of all, the assessment of how big tech companies should be split is not so plain. Whilst in merger cases it is usually easier to individuate the lines where the breakup could occur, in non-merger cases it may be quite complicated to determine how business units should be separated, since not always breakup could be implemented through subsidiary or divisional lines (107).

Moreover, innovation could be seriously harmed. Since it depends largely on big companies' teams and shared technologies, a scarcely pondered breakup could cause a serious lack of personnel, organization, information and IP rights and the resulting entities could have a diminished innovation capacity and severe difficulties in competing on the market (108). In addition, companies, once broken up, would burden higher costs and efficiency could be seriously reduced (109).

Even European Antitrust Commissioner Vestager has recently recognized the exceptional and residual nature of the remedy at stake, admitting that "breaking up companies is a tool that we have available, it can be done. The thing is I have the obligation to use the least intrusive tool in order to restore fair competition" (110).

Therefore, the breakup remedy cannot be assessed only with a narrow focus on market concentration, but an analysis which takes into account all the other factors that may have an impact on consumer welfare is necessarily required.

6. Final remarks

The antitrust concerns raised by big tech companies briefly considered above must be analysed with a more far-reaching view.

Specifically, the massive power of tech giants should be evaluated in the light of the serious underestimation of the technological disruption in the middle of the globalisation processes. When technology changed the

(107) See R.W. Crandall, *Costly Exercise in Futility: Breaking up Firms to Increase Competition*, *Regulation2point0, Related Publications*, December 2003.

(108) On this point, see W. Rinehart, *Breaking Up Tech Companies Means Breaking Up Teams And The Underlying Technology*, in *American Action Forum*, 23 July 2018, available at *www.americanactionforum.org/insight/breaking-up-tech-means-breaking-up-technology-and-teams/*, last accessed on 5 November 2019.

(109) See, also, A. Finch, *Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation*, note no. 40 above.

(110) J. Espinoza, *Vestager warns Big Tech she will move beyond competition fines*, Financial Times, 8 October 2019, available at *https://www.ft.com/content/dd3df1e8-e9ee-11e9-85f4-d00e5018f061*, last accessed on 11 November 2019.

entire world, in the general excitement for its undeniable benefits, its massive potentialities, both in a negative and positive sense, have not been properly understood. The understatement of such phenomena has led to a serious underestimation of all their consequences, such as the inequities in wealth distribution, the progressive erosion of fundamental rights, etc.

Today, these drawbacks of the technological disruption have come powerfully to light, together with a wide range of extremely complicated issues, among which the fact that a few huge tech companies have acquired enormous power and they exploit it.

Competition authorities are trying to bring it back. However, no matter how bad the giant is, antitrust is not a cure-all instrument. Antitrust has *its* role to play and cannot be invoked to face problems that have no antitrust relevance. Over-burdening antitrust assessment of social and political instances does not appear the most acceptable or preferable solution. As Professor Epstein recently emphasized, "antitrust laws are a two-edged sword. There is no doubt that in some cases they are capable of preventing market abuses. But in other cases, their imprudent application often leads to strengthening the very type of monopoly positions that they are intended to control" (111).

This makes the situation particularly delicate, especially considering that innovation is the driver of growth in modern economy.

Finally, to quote Edward Gibbon, one of the most important historians since the time of the ancient Roman, Tacitus, "[a]ll that is human must retrograde if it does not advance" (112).

(111) See note no. 41 above.

(112) E. GIBBON, *The History of the Decline and Fall of the Roman Empire*, 1776, printed by J. & J. Harper for Collins & Hannay, et al., New York, vol. VI, 1826, 415.