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Privacy, Attention, and Competition. How to Apply Competition Law to Big Tech Companies? The European Perspective

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PRIVACY, ATTENTION, AND COMPETITION. HOW TO APPLY COMPETITION LAW TO BIG TECH COMPANIES? THE EUROPEAN PERSPECTIVE

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I. ANTITRUST BIG TECH PROBLEM

The area at the interface between competition law and privacy has been at the center of a lively academic debate with the rise of the digital economy. In the new landscape that has emerged from these changes, Big-Tech companies occupy a special position. Their market power is of unprecedented magnitude allowing them to exert a significant impact on numerous markets while acting as digital platforms being intermediaries between customers and market actors active on the high level of a value chain. Competitive threats created by the digital platforms seem to create the biggest challenges for modern competition law systems on both sides of the pond. This has been illustratively described by Rebecca Haw Allensworth who rightly claimed that „American competition policy has four big problems: Amazon, Apple, Facebook, and Google."[1]

These problems are not challenges to the American antitrust law, but nearly all competition law systems in the world including the EU and its Member States. This extraordinary market position of Big-Tech companies is strictly connected with their business models which take advantage of network effects and extensive digital ecosystems. In the framework of these models, many services offered by technological companies are free for end-users, at least when it comes to price

[1] Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism*, 130 YALE L.J. FORUM 588 (2021).

expressed in money. Instead of it, customers contribute their privacy and attention to service providers. In general opinion, antitrust law, which passed over a hundred years ago, and which main concepts were developed in the case law passed in the twentieth century, was not prepared for new economic phenomena related to the rapid technological development.[2] Moreover, antitrust law based on Chicago School models, centered around the neoclassical price theory, turned out to be ill-suited to tackle anticompetitive conduct or mergers in such non-price markets.

Thus the question arises whether, and if affirmative, how, the antitrust law should be applied in the so-called non-price markets? Still, although less frequently than in the nascent years of a data-based economy, there are voices in this debate disregarding the negative effects on competition caused by technological giants. They emphasize the pro-competitive and innovative dimension of their activities and the fact that they provide consumers with innovative products for free.[3] Others however claim, that this circumstance is irrelevant and does not prevent the application of competition law to the tech giants. In this approach, privacy and attention are understood as the functional equivalent of price, and the anticompetitive effects of market conduct or mergers may be assessed through the prism of the impact they may cause on privacy and attention.

In addition to the question of whether privacy can be a parameter of competition, in the sense that private personal data may be considered the equivalent of the price paid by the consumer for a digital service, there is yet another – may a violation of data privacy rules in itself be considered an infringement of competition law? This question touches

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[2] *Id.* at 591.

[3] A comprehensive list of these views has been provided by John M. Newman – see: John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015) at 160-162 (Available at: https://scholarship.law.upenn.edu/penn_law_review/vol164/iss1/4) and articles cited by him:
Robert H. Bork, *Opinion, Antitrust and Google*, CHI. TRIB., Apr. 6, 2012, http://articles.chicago tribune.com/2012-04-06/opinion/ct-perspec-0405-bork-20120406_1_unpaid-search-results-search-enginessearch-algorithms [http://perma.cc/XRB2-W4JE]; Geoffrey Manne & Joshua Wright, *What's an Internet Monopolist? A Reply to Professor Wu*, TRUTH ON MKT. (Nov. 22, 2010), http://truthonthemarket.com/2010/11/22/whats-an-internetmonopolist-a-reply-to-professor-wu/ [http://perma.cc/L4UF-UC7K]; Catherine Tucker & Alexander Marthews, *Social Networks, Advertising, and Antitrust*, 19 GEO. MASON L. REV. 1211 (2012) at 1211.

on one of the most vital challenges that modern antitrust law faces, i.e. finding the optimal model of relations between this branch of law and the data protection law.

This article aims to analyze how the EU rules on competition responded to these questions. First, I will briefly present the characteristics of non-price/attention markets. Then, I am going to analyze whether the ideological fundamentals of the EU competition law are conducive to its application to anticompetitive conduct practices in non-price markets. Finally, I will examine the legislative and enforcement initiatives of the European Union to challenge competition and privacy violations by the Big-Tech giants.

II. NON-PRICE MARKETS BUSINESS MODELS.

Many technological companies work as digital platforms operating in two-sided markets. This notion has been theorized primarily by Jean-Charles Rochet and Jean Tirole, who in their seminal paper published in 2003, analyzed network externalities of markets in which "two groups of agents interact via "platforms", and where one group benefits from joining a platform depends on the size of the other".[4] Two-sided platforms' business models vary significantly. However, as Rochet and Tirole noticed, typically one side (usually final customers) is a loss leader while another is a profit center. Accordingly one side of the platform is usually subsidized by the profits gathered from the other side.[5]

In some cases, two-sided platforms are just intermediaries in simple

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[4] Jean-Charles Rochet and Jean Tirole, *Platform Competition in Two-Sided Markets*, Journal of the European Economic Association, vol. 1 (2003), pp. 990-1029 at 991; see as well Michael L. Katz; Carl Shapiro, *Network Externalities, Competition, and Compatibility*, The American Economic Review, Vol. 75, No. 3. (Jun., 1985), at 424-440 (Katz and Shapiro identified noninternalized positive consumption externalities among end-users and listed the following sources of them:
1) Direct physical effect of the number of purchasers on the quality of the product. This effect is characteristic of telephone services, where the utility of the service for a consumer depends on the number of network users.
2) Indirect effects that arise where the value of the service or product increases with the number of customers of other compatible service or product.
3) For a durable good – "when the quality and availability of postpurchase service for the good depend on the experience and size of the service network, which may in turn vary with the number of units of the good that have been sold.")

[5] Jean-Charles Rochet and Jean Tirole, *Platform Competition in Two-Sided Markets*, Journal of the European Economic Association, vol. 1 (2003), pp. 990-1029 at 991.

simultaneous transactions between suppliers and customers, in which a specific good or service is traded. Such a business model is characteristic of Amazon and online travel agents (OTA's) selling accommodation services, airline tickets, or car rental services. Apple and Google operate similarly in the smartphone software markets, where they offer mobile applications of other software producers in their stores (App Store and Google Play).[6] Under such circumstances, a clear two-way relationship emerges – the more users on one side, the more attractive the platform becomes for the other side, and vice versa.[7]

Other platforms work in a model based on the monetization of data collected from users. For instance, Google's web search engine (Google Search), provides searching services to final customers and advertising services to upstream customers – advertising companies or suppliers of goods and services. Facebook operates similarly – providing social networking services to final users while offering upstream customers a variety of personalized advertising services. The more personalized data the platform operator has collected, the better and the more personalized services it can provide to advertisers and content providers. Therefore, with the increase in the number of platform end-users and the value of the data collected, not only the reach of advertising growth but also its effectiveness. This further increases the attractiveness of the platform's services for advertisers and content providers.[8] However, in this model, the reverse is not true. On the contrary, end-users are expected to be interested in a few advertisements and other elements distracting their attention as possible. Similarly, customers are interested in the lowest possible levels of usage

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[6] Numerous other two-sided platforms are operating this way, e.g.: credit and debit card networks like Visa, MasterCard, Amex, mobility as a service providers like Uber and Lyft, or food ordering and delivering platforms such as Grubhub and Uber Eats.

[7] David S. Evans & Richard L. Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press, Cambridge, 2016, at 72, David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, CoaseSandor Working Paper Series in Law and Economics, No. 753 (2016) at 7 and Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19 Conn. Pub. Int. L.J. 271 (2020), at 281.

[8] According to the principle created by the Ethernet inventor Bob Metcalfe (so-called Metcalfe law), the value of a network goes up as the square of the number of users. See Carl Shapiro, Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy*, Boston, Harvard Business School Press 1998, at 184.

and processing of their data.[9]

These platforms' *modus operandi* strongly exploits the so-called data-driven network effects resulting from two types of "feedback loops":

1. user feedback loop, where a firm with a large users' base is able to collect more data what helps to improve the quality of service and what in turn attracts more users,
2. monetization feedback loop, where a firm with a large users base is able to increase its profits by improving ad targeting and thus attracting more customers on the other side of the platform. Increased profits the firm may in turn use to invest in the quality of its service attracting new users. As a result, the so-called "vicious circle" arises.[10]

This business model turned out to be very effective in building a market advantage and creating entry barriers.[11] In this model, a consumer pays with his or her privacy or putting it differently – consumer's data, and his or her attention. In the case of this type of platform data is a derivative of the attention that a consumer has paid while using a

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[9] On the other hand, the declared intention to protect privacy is rarely reflected in the actual actions of users aimed at protecting their data. This phenomenon, known as privacy paradox, has been widely described in behavioral economics literature. For the review of the literature on privacy paradox see: Susanne Barth and Menno D. T. de Jong, *The privacy paradox – Investigating discrepancies between expressed privacy concerns and actual online behavior – A systematic literature review*, Telematics and informatics. 2017 ; Vol. 34, No. 7 at 1038-58.

[10] The OECD Report of November 2016 "Big data: Bringing competition policy to the digital era". Background note by the Secretariat, DAF/COMP(2016)14, p. 10.

[11] The research conducted by Jens Prüfer and Christoph Schottmüller, based on the game theory, shows that data-based network effects in almost every case lead to a permanent market dominance. Market barriers resulting from a larger portfolio of user data prevent its competitors from gaining more than only negligible market share. In the view of these authors, this situation does not change, even if the market requires constant small investments in innovation from the dominant firm in order to meet the expectations of consumers regarding the quality of services. Prüfer and Schottmüller argue that a special feature of such dominated markets is little incentives to invest in innovation. A smaller competitor, realizing the advantage of the dominant firm in terms of quality of services and its significantly lower marginal investment costs resulting from significantly larger database of customers, gradually loses the incentives to invest in innovation. A dominant firm, in turn, being aware of this situation, limits investments in innovation to a minimum that allows to maintain the quality of services, since also in this case it is able to maintain its position. See Jens Prüfer and Christoph Schottmüller, *Competing with Big Data*, TILEC Discussion Paper No. 2017-006 CentER Discussion Paper No. 2017-007, http://ssrn.com/abstract=2918726, Feb 2017.

platform. It may be held that competition for users' attention between platforms is, to a significant extent, the competition for data. The competition is all the more intense, the more the collected data is specific and its availability is limited. This refers to data collected from specific and relatively narrow groups of customers, such as diabetics or pregnant women. This means that privacy and attention are strongly interconnected. The more attention platform users apply, the more they give out of their privacy and the more data the platform can collect. In this context, privacy and attention may be considered functional equivalents of money. At the same time attention, and to lesser extent privacy, should be understood as a quality parameter, since it is obvious that for a consumer fewer advertisements mean just better quality service.

It has been argued that American antitrust law, which is based on the neoclassical foundations of the Chicago school and centered around the notion of the consumer welfare, is not in the best position to be applied to conduct taking place on the non-price markets.[12] From the perspective of the Chicago school, consumer welfare is understood primarily as the highest possible output and the lowest possible prices.[13] Although these opinions seem to be losing their relevance, it is difficult to deny that a lenient antitrust policy based on the Chicago school's theoretical assumptions has vastly contributed to the uncontrolled development of the tech giants.

Leaving aside the question of the ideological foundations of the American antitrust law and their influence on the possibility of its application to anticompetitive conduct of Big-Tech companies it is worth discussing how the EU competition law ideological foundations influence the EU approach towards them.

III. THE PLURALISM OF OBJECTIVES OF THE EU COMPETITION LAW.

Current ideological fundamentals of the EU competition law are the product of the clash of various, sometimes contradictory views on the model of the EU economic system and the role of the competition

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[12] John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015) at 196 (Available at: https://scholarship.law.upenn.edu/penn_law_review/vol164/iss1/4).

[13] See *inter alia*: Robert Bork, *The Antitrust Paradox*, Free Press, New York, 1978 at 91, Richard Posner, *The Chicago School of Antitrust Analysis*, University of Pennsylvania Law Review, April 1979, vol. 127.

policy in it. They were formed under the influence of two dominant currents. The first one, associated with the Fribourg School, understood competition law as a key element in the original European model of negative integration through the market. The competition law system was then to stimulate the process of the European integration by removing barriers to trade between the Member States and expanding the limits of economic freedom thus protecting smaller market participants against the abuse of market power by larger operators.

On the other hand, since at least the 1990s, with the process of their modernization, the EU rules on competition have been under the indirect influence of the Chicago school of law and economy. The then implemented "more economical approach" incorporated the postulate of economic rationality into the ideological foundations of the EU competition law, placing at its very center the concept of consumer welfare.

The aftermath of the modernization of the EU competition law is a subject of the vivid debate focused on its current objectives. Some authors represent a narrow perception of the objectives of the EU competition law, limited to economic values, including consumer welfare, possibly supplemented with the traditional goal of promoting EU integration. [14]

There are opinions however that underline the relevance of protection of competitive process or protection of competition as an autonomous value being the ultimate objective of competition law. Oles Andriychuk argues that competition deserves to be understood as "an

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[14] This position is represented, *inter alia*, by Anne C. Witt, who, following an analysis of the modernization of EU competition rules, concluded that the catalog of their objectives has been narrowed down to the promotion of consumer welfare and protection of the internal market. According to her, the process of modernization has led to the questioning of the importance of non-economic values as the axiological foundations of European competition rules. Therefore, the ideological foundations of the EU and American competition law are almost the same, with the reservation, however, that the former aims to protect the consumer's welfare in the strict sense and not total welfare. (See: A. C. Witt, The More Economic Approach to EU Antitrust Law, Oxford–Portland 2016, at 180). Simon Bishop and Mike Walker have a similar understanding of the objectives of the EU competition law. In their view, the protection of the internal market has the priority where it conflicts with the objective of improving economic efficiency since practices restricting cross-border trade are prohibited regardless of their effects on the economic efficiency. (See: Simon Bishop, Mike Walker, The Economics of EC Competition Law: Concepts, Application, and Measurement, London 2010, at 6–7).

important deontological value of an economic nature"[15]. The deontological dimension of competition places it as a protected value, regardless of whether it leads to economic efficiency. Therefore, non-economic considerations, including economic integration or environmental protection, should be taken into consideration within the framework of other EU policies.[16]

Some authors mention freedom of competition, i.e. a value of an ordoliberal origin, as one of the objectives of the EU competition rules. As held by Walter Frenz EU competition law should be seen in the context of ensuring a system of undistorted competition. This author emphasizes that the skepticism of the CJEU towards the more economic approach represented by the Commission means that competition law continues to be directed at fulfilling the "fundamental function of effective competition and intact competitive structures serving the process of economic integration within the EU".[17]

On the other hand, the view of the pluralism of the objectives of the EU competition rules seems to dominate in the European literature. Damien Geradin, Anne Layne-Farrar, and Nicolas Petit mention: fairness, economic freedom, pluralism, and consumer choice, as well as economic efficiency and consumer welfare, among the values that influence the application of EU competition rules.[18] In their opinion, although historically they were assigned various meanings, currently the two latter objectives dominate. Among the objectives of the EU competition law, these authors also mention fostering European integration but point out that its importance has recently decreased.[19]

According to Christopher Townley, the EU competition law is

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[15] Oles Andriychuk, *Rediscovering the Spirit of Competition: on the Normative Value of the Competitive Process*, European Competition Journal 2010, vol. 6, No 3, at 575.

[16] *Id.* at 608-09.

[17] Walter Frenz, *Handbook of EU Competition Law*, Berlin–Heidelberg 2016, at 19.

[18] Damien Geradin, Anne Layne-Farrar, Nicolas Petit, *EU Competition Law and Economics*, Oxford 2012, at 19-26.

[19] Similarly Richard Whish and David Bailey see the broad catalog of the EU competition law objectives, including promoting consumer welfare as the dominant objective, protecting consumers, which is understood more broadly than just protecting their welfare, redistribution understood as promoting economic equality by adjusting the results of the market-oriented allocation of income, protecting competitors by providing weaker players with access to a market and equal opportunities on it, and protecting the internal market. See Richard Whish, David Bailey D., Competition Law, ed. 10, Oxford 2018 at 18-24.

intended to promote the general welfare of EU citizens.[20] He perceives undertakings as participants in social life subject to "moral obligations" resulting from competition law. This vision of the objectives of the EU competition law is pluralistic. Promoting the general welfare of EU citizens does not come down to consumer welfare, but takes into account several non-economic considerations inherent in public policy, the obligation of implementation of which is a consequence of linking competition policy with various other EU policies.[21]

Some authors also see new elements in the current picture of the ideological foundations of the EU rules on competition. According to Paul Nihoul, in recent years the CJEU case law has been characterized by a tendency to consider the consumer's free choice as one of the objectives of the EU competition law.[22] It is understood as the right of consumers to freely choose goods and services that best meet their needs and the business partners from whom they intend to buy them. [23]

However, in its soft law, the European Commission clearly emphasizes

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[20] Christopher Townley, *Article 81 EC and Public Policy*, Oxford 2009, at 50 and 99.

[21] Similarly Alison Jones, Brenda Sufrin note that, although the modernization of competition rules has brought the promotion of consumer welfare to the fore among the objectives of the EU competition law, it should be taken into account that this law is not kept in isolation from other objectives of the Treaty, including the values listed in Articles 8–13 TFEU. Although in their opinion the objectives of the EU competition law should be viewed broadly, the possibility of taking into account non-economic considerations in the application of competition law is currently difficult, given the wider involvement of national authorities and courts in it, as a result of the decentralization of application of the EU rules competition law and actions to strengthen private its enforcement. A. Jones and B. Sufrin also pointed to the discrepancies in the understanding of the objectives of the EU competition law between the Commission and the CJEU. The Commission supports the primacy of the protection of the consumer welfare, while the CJEU perceives the objectives of competition law more broadly, noting the importance of other values, including those that originally dominated the ideology of the EU rules on competition. See Alison Jones and Brenda Sufrin, *EU Competition Law*, Oxford, 6th ed. 2016, at 39-43.

[22] According to Nihoul, the freedom of choice was the decisive factor in the decisions concerning the abuse of a dominant position including in the case C-202/07 P, France Télécom v. Commission,[ECLI:EU: C:2009:214]. This does not mean, of course, that ensuring the freedom of the consumer to choose is the only factor that is the basis for resolving competition protection cases. See Paul Nihoul, *Freedom of choice": the emergence of a powerful concept in European competition law*, [in:] Paul Nihoul, Nicolas Charbit, Elisa Ramundo (eds.), *Choice – A New Standard for Competition Law Analysis?*, Concurrences Review, New York 2016, at 9.

[23] *Id.*

the importance of promoting consumer welfare as a fundamental objective of EU competition rules.[24] On the other hand, the rhetoric of the Commission is not always confirmed in the practice both by the Commission itself and by the CJEU. This applies in particular to unilateral conduct.[25]

Admittedly, there are references to consumer welfare in the jurisprudence of the EU General Court. Moreover, in a couple of cases, the CJEU accepted the possibility of applying the "equally effective competitor test".[26] At the same time, however, the Court of Justice continues to refer to the Continental Can formula[27], emphasizing the need to protect consumer interests also by ensuring proper competitive

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[24] Communication from the Commission — Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements. O.J. C 11 of 14 January 2011, p. 1 at p. 269; Communication from the Commission — Guidelines on the application of Article 101 TFEU to technology transfer agreements, O.J. C 89 of 28 March 2014, p. 3 at p. 5; Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty O.J. C 101 of 27 April 2004, p. 97 at p. 13; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings O.J. C 31 of 5 February 2004 p. 5 at p. 61.

[25] See: Pinar Akman, *Consumer Welfare' and Article 82EC: Practice and Rhetoric*, Centre for Competition Policy, University of East Anglia, Working Paper 08-25, available at http:// competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Papers+08-25.pdf.

[26] See *inter alia* judgments in cases: C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, ECLI: EU:C:2011:83, C-280/08, Deutsche Telekom v. Commission, ECLI:EU:C:2010:603 and T-286/09 RENV Intel Corporation v Commission, ECLI:EU:T:2022:19.

[27] In recital 26 of the judgment in case C-6/72, Europemballage Corporation, and Continental Can Company Inc. v Commission (ECLI:EU:C:1973:22) the CJEU held that "the condition imposed by Article [102] is to be interpreted whereby in order to come within the prohibition a dominant position must have been abused. The provision states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) of article [102] (2), the provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one." Emphasis added.

structures of the market.[28] Nevertheless, the second judgment of the General Court in the Intel case issued in 2022, in which it explicitly called for the application of the equally effective competitor test, should be seen as an endorsement of the more economic approach.[29]

Summing up, the current ideological fundamentals of the EU competition rules must be seen as a conglomerate of values, including those of ordoliberal provenance like the freedom to compete, ensuring the proper market structure (as it was held by the CJEU in the Continental Can ruling), ensuring the competitor's access to the market and safeguarding effective competition. It is clear however that reforms of the EU competition law reform have strengthened the relevance of economic values within its ideological foundations. Nevertheless, it would be a mistake to say that this process has led to the removal of values previously dominating the EU rules on competition and replacing them with a new catalog. Rather, these traditional objectives have been supplemented by newer, economic ones thus forming an amalgam of values.

No matter what the catalog of competition law objectives from among those listed above is adopted, it is clear that the ideological fundamentals of the EU competition law do not stand in the way of its application to anticompetitive conduct taking place in non-price/attention markets. Even if the objectives of the EU competition rules are considered to be limited to promoting consumer welfare, it is certainly understood broadly and not limited to high output and low prices. Quality seems to be an important parameter of competition, strongly anchored in the notion of consumer welfare.[30]

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[28] See *inter alia* judgments in cases: C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, ECLI: EU:C:2011:83, p. 24, C-209/10, Post Danmark A/S v. Konkurrencerådet, ECLI:EU:C:2012:172, p. 20. See as well judgments in cases: C-8/08, T-Mobile Netherlands *et al.*, ECLI:EU:C:2009:343 and C-501/06 P, GlaxoSmithKline Services *et al.*. v. Commission *et al.*, ECLI:EU: C:2009:610 in which the Court referred to the objective of protection of the competitive structure of a market in the context of the application of Art. 101 TFEU.

[29] Judgment in case T-286/09 RENV Intel Corporation v Commission, ECLI:EU:T:2022:19.

[30] Anyway, even the Chicago school paid attention to quality as an important competition driver. Suffice it to mention Chicago's classic theories regarding procompetitive effects of vertical restraints including RPM, where RPM is supposed to serve an elimination of the free-rider effect, what in turn is supposed to improve quality of distribution despite of the probable increase in price.

IV. THE EU ACTIONS AGAINST ANTICOMPETITIVE CONDUCT ON NON-PRICE MARKETS

The European Union has taken numerous legislative and enforcement actions to challenge both the competition and privacy threats posed by the digital platforms. In 2016 the EU enacted the General Data Protection Regulation (GDPR) which entered into force in 2018.[31] The GDPR introduced one of the most rigorous standards for data protection in the world containing various legal measures to strengthen the rights of individuals to protect their data including the right to be duly informed by a data controller about the data being collected[32], the right to be forgotten[33] and the right to data portability.[34]

In addition to measures to protect data privacy in digital markets, the European Union has also taken initiatives to counteract the use of market power by giant digital platforms including those active in non-price markets. The threats to competition related to their activities have been noticed by the EU Commission on the conceptual level. As held in the Commission's Report of 2019 "Competition Policy for the digital era", "despite the many benefits that digital innovation has brought, much of the enthusiasm and idealism that were so characteristic of the early years of the Internet has given way to concerns and scepticism. There are fears such as data theft and loss of privacy, replacement of labour by machines, domination of the economy by a few ecosystems and platforms, and reinforcement of economic inequality by new

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[31] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) (OJ L 119 04.05.2016, p. 1).

[32] Art. 13(1) GDPR.

[33] The right to be forgotten refers to the obligation of a data controller to remove all data of a data subject when certain conditions are met, including withdrawal of his or her consent to process data. See Art. 17(1) GDPR.

[34] The right to data portability covers the right of a data subject to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used, and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided. See Art. 20 (1) GDPR.

technologies."[35] The Report enlisted the following key characteristics of the digital economy in general:

1. Extreme returns to scale, being a consequence of the cost of production "less than proportional to the number of customers served."[36]
2. Network externalities resulting from positive relation between the convenience of using technology or service and the number of its users. This may result in the "incumbency advantage" that may discourage users from switching to other even better or cheaper services or technologies.
3. The increasing role of data which influences the ability to develop new technologies and services.[37]

In response to the problem of the market power of technological giants, the European Union has taken legislative measures, the key element of which is the planned Digital Markets Act (DMA). The DMA's final draft has been hammered by the representatives of the EU Parliament and the Council in March 2022 and the act is expected to be adopted in 2023[38]. The DMA is going to introduce certain *ex-ante* regulatory measures addressed to the biggest technology companies fulfilling the criteria of the so-called gatekeepers – i.e. digital platforms being strong intermediaries, linking a large user base to a large number of businesses.[39]
DMA will prohibit several unfair practices including:

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[35] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, Competition Policy for the digital era. European Commission, 2019, at 12 (available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[36] Similarly Australian Competition and Consumer Commission, Digital Platforms Inquiry. Final Report. June 2019, (available at: https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf), at 73.

[37] *Id.*, at 2 and 20.

[38] For the legislative procedure see: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0374(COD)&l=en

[39] According to the draft DMA gatekeepers are undertakings fulfilling the following criteria:
having a strong economic position, significant impact on the internal market and is active in multiple EU countries
having a strong intermediation position, meaning that it links a large user base to a large number of businesses
having (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time.

- blocking users from un-installing any pre-installed software or apps,
- combining personal data collected from the core platform services with data obtained through other services provided by gatekeepers or third parties,
- prohibiting use of the most favorable nation clauses i.e.: prohibiting business users to offer the same products or services to end-users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper, and
- requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper.

This together with a parallel draft Digital Services Act[40] should provide for a comprehensive procompetitive and pro-consumer regulatory environment. They reflect the belief that classic antitrust enforcement measures are not sufficient to challenge the threats posed by the biggest digital platforms and accordingly they must be supplemented, though not substituted, by specific ex-ante regulatory instruments. At the same time, the use of regulatory measures excludes the possibility of antitrust enforcement, and the decisions of the European Commission and the CJEU case law confirm that EU competition law may be applied to non-price markets.

The European Commission has already issued several important decisions regarding Big-Tech unilateral conduct. The most notable so far is the 2017 decision in the Google Shopping case.[41] In this decision, largely upheld in November last year by the General Court[42], the Commission imposed a 2.4 billion EUR fine for the abuse of a dominant

[40] Digital Services Act is designed to comprehensively regulate the online content developed by digital services providers. The act is planned to be enacted in 2022. For the legislative procedure see: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0361(COD)&l=en.

[41] Commission Decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (case AT.39740 – Google Search (Shopping)), unpublished.

[42] Judgment of the General Court in case T-612/17, Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763.

position consisting of systemic favorable treatment to Google Product Search in search results.

Since Google's first price comparison platform "Froogle", launched in 2004, appeared to be not successful, Google changed its strategy. It finally renamed the platform into Google Shopping and started to treat it in a substantially better than rivals way in Google's search engine (Google Search). Google Shopping had been constantly given a privileged position in Google search queries, while competitors' shopping services were downgraded respectively. In effect, Google Search users got first Google Shopping results, while top-ranked competitors were placed on average on page four of the results list. Consequently, competitors lost their sales by even more than 90%. As Commissioner Margrethe Vestager held in her speech concerning the decision, "dominant companies cannot abuse their strong market position to hinder competition in the market they dominate or in any other market. In other words, they are not allowed to leverage it is to abuse their dominant power in one market to give themselves an advantage in another."[43] The Commission noticed as well that barriers to entry were high and resulted *inter alia* from data-driven network effects. Referring to the outcomes of the decision Commissioner Vestager expressly underlined that data was a form of payment for the Google service: "Google's flagship product is the Google search engine. It provides search results to consumers, who pay for the service with their data. Every year, Google makes almost 80 billion US dollars worldwide from adverts, such as those it shows consumers in response to search queries. So the more consumers see and click on those adverts, the more revenue Google generates."[44]

The Commission issued yet another two decisions against Google in

[43] Statement by Commissioner Vestager on the Commission decision to fine Google €2.42 billion for abusing dominance as a search engine by giving an illegal advantage to its own comparison shopping service of 27 June 2017, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1806.

[44] *Id.*

the Android case of 2018[45] and the AdSense case in 2019.[46] In the former, the Commission levied a record high fine of 4.34 billion euros for three types of restrictions that Google had imposed on mobile device manufacturers and network operators to ensure that the internet traffic goes to Google Search. These restrictions covered *inter alia* the requirement imposed on manufacturers to pre-install Google search and browser applications on Android smartphones they produced, the tying of Google Chrome with the Play Store and the Google Search app as well as providing payments to devise manufacturers and network operators in exchange of the exclusivity of Google's search and browser applications on their devices. The Commission underlined the role of access to personal data as the important source of Google's revenues and one of the main drivers of Google's market power.[47]

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[45] In the Google AdSense decision the Commission imposed on Google a fine of 1.49 billion euros for abuse of a dominant position in search advertising brokering. As held by the Commission Google infringed Art. 102 TFEU by imposing exclusivity provisions and other clauses under which the most commercially important Google clients (so-called Direct Partners) were prevented or limited from sourcing search ads from Google's rivals, on any of their websites. Moreover, Google abused the dominant position by requiring certain publishers to reserve the most prominent space on their search results pages for a minimum number of search ads from Google and for the contractual clauses requiring certain publishers to seek Google's approval before making changes to the display of competing search ads. This decision has been appealed to the Court of Justice and the ruling is yet to come. See Commission Decision of 20 Mar. 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (case AT.40411 – Google Search (AdSense)), unpublished.

[46] Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (case AT.40099 – Google Android), unpublished.

[47] The Commission referring to the product market definition noticed that "Google obtains substantial amounts of data on consumer behaviour and device use from Google Android devices, its proprietary applications and APIs for Android. (...) These data can be valuable for Google, even in the absence of direct monetisation through advertising." The Commission quoted as well the Oracle answer to one of the questions of the Commission's request for information: "In addition to allowing Google to maintain and deepen its dominance in online advertising, its data collection has allowed Google to entrench its dominance in search. As the EC is well aware, the advantage conferred to Google by its scale in data – combined with the anti-competitive conduct Google employs to protect its position – has raised insurmountable barriers to entry in the markets for general search and in particular specialized search services. [...] In addition to giving Google an advantage in search and online advertising, the data Google collects gives it an advantage in optimizing its mobile (and PC) services such as YouTube and Maps, as well as in predictive technologies

There are more formal investigations against Big-Tech companies pending including a formal investigation against Apple launched in June 2020[48], Facebook started in June 2021,[49] and Amazon.[50] These investigations and decisions prove a high level of activity of the EU Commission in challenging the anticompetitive conduct of digital platforms active on non-price markets. With the subsequent CJEU rulings concerning the appealed Commission decisions, expected to come in the nearest future, we will learn whether this resolute policy against Big-Tech will attain necessary support on the level of the Court.

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such as Google Now. For example, one way Google can gain competitive insight into user behaviour is to understand which apps are installed, or removed, by users on its platform." (See Oracle's non-confidential response to Question 1 of the request for information of 24 Mar. 2017 (Doc ID 7835).

[48] The investigation aims to assess whether Apple's rules for app developers on the distribution of apps via the App Store violate EU competition rules. The investigations concern in particular the mandatory use of Apple's own proprietary in-app purchase system and restrictions on the ability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps. The investigations concern the application of these rules to all apps, which compete with Apple's own apps and services in the European Economic Area (EEA). The investigations follow-up on separate complaints by Spotify and by an e-book/audiobook distributor on the impact of the App Store rules on competition in music streaming and e-books/audiobooks. See the European Commission Press Release of 16 June 2020 "Antitrust: Commission opens investigations into Apple's App Store Rules", available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

[49] The Commission assesses whether Facebook violated EU competition rules by using advertising data gathered in particular from advertisers in order to compete with them in markets where Facebook is active such as classified ads. The formal investigation will also assess whether Facebook ties its online classified ads service "Facebook Marketplace" to its social network, in breach of EU competition rules. See the European Commission Press Release of 4 June 2021 "Antitrust: Commission opens investigations into possible anticompetitive conduct of Facebook", available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848.

[50] The purpose of the investigation opened in July 2019 is to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules. The information regarded in particular: third party sellers, products listed by third party sellers or transactions with third party sellers on Amazon's marketplace, for the purposes of Amazon's retail activities. See the European Commission Press Release of 17 July 2019 "Antitrust: Commission opens investigation into possible anticompetitive conduct of Amazon", available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291. In this case the Commission send the Statement of Objection in Nov. 2020.

V. ABUSE OF THE DATA PRIVACY LAW AS THE ABUSE OF A DOMINANT POSITION.

The answer to the question of whether an infringement of personal data protection law may as such constitute a violation of competition law should come just as quickly, with the CJEU preliminary ruling in the Facebook case pending before the CJEU.[51] In this case, a German court referred to the CJEU with a series of questions regarding the validity of the theory of harm applied by the German Bundeskartellamt in its abuse of a dominance decision issued against Facebook. In this case, the German competition authority held that certain violations of GDPR including collecting and exploitation of excessive load of data without the explicit consent of customers leaving them no choice constituted at the same time anticompetitive unilateral conduct. The theory of harm applied by the Bundeskartellamt was vastly based on the violation of the right to privacy guaranteed by the German constitution. Finally, the Bundeskartellamt issued certain injunctive measures including an action plan to change the way data is being collected and processed by Facebook.[52]

The Commission's practice so far has been based on the assumption that personal data protection and competition law were two separate policies. Accordingly, violations of the GDPR have not been considered by the Commission as included in the antitrust theory of harm.[53] The expected ruling could change the Commission's position and answer crucial questions regarding the nature of the relationship between competition and the data privacy law. The ideological foundations of EU competition law do not prevent the adoption of a theory of harm

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[51] Request for a preliminary ruling from the Oberlandesgericht Düsseldorf in Case C-252/21 Facebook Inc. *et al.* v. Bundeskartellamt.

[52] More on this case in: Anne C. Witt, *Excessive Data Collection as a Form of Anti-Competitive Conduct – the German Facebook Case*, (2021) 66(2) Antitrust Bulletin at 276, Viktoria Robertson, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, (2020) 57 Common Market Law Review 161, Marco Botta, Klaus Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, (2019) 64(3) Antitrust Bulletin 428.

[53] See the European Commission decision of 3 Oct. 2014 in case COMP/M.7217 – Facebook/WhatsApp, p. 164.

based on a violation of data privacy. Both the objectives of the EU competition law and the concept of abuse of a dominant position are flexible and roomy enough to do it. The close relations between data privacy and antitrust and the role of data as an equivalent of money justify the adoption of a broad theory of harm covering also GDPR infringements.

However, from the enforcement perspective, this could be problematic since it could lead to a discrepancy in the interpretation of GDPR between data protection authorities and competition authorities applying GDPR.[54]

V. CONCLUSIONS

The high level of the European Commission enforcement activity leaves no doubt that the free nature of the services is not an obstacle to the effective application of the EU rule on competition to tech giants. The Commission seems to perceive data privacy as one of the competition parameters and a functional equivalent of a price. It is not entirely clear to what extent the CJEU will support the Commission in its, what is sometimes referred to, as a crusade against Big-Tech. The General Court has so far supported the Commission by upholding its decision on Google Shopping. We still have to wait for further judgments in cases of violations of competition in non-price markets. Anyway, in the European Union, questions are no longer asked about whether to enforce competition law in the non-price markets, but rather how to do it and what should be the methods and limits of challenging them, including what role in this process should be assigned to *ex-ante* regulation.

Equally important is finding a proper model of relations between the EU data protection regulation and the EU competition law. Should these legal orders remain separated or should the competition authorities have the right to intervene when the privacy law is violated? The answer to these questions should be known soon in the judgment of the

[54] See Anne C. Witt, *Facebook v. Bundeskartellamt – May European Competition Agencies Apply the GDPR?* (Apr. 21, 2022). Competition Policy International, TechREG CHRONICLE, Apr. 2022, Available at SSRN: https://ssrn.com/abstract=4089978. As held by this author the adoption of a theory of harm based on a violation of the data privacy "may undermine the GDPR's system of allocating competences between national supervisory agencies" established in Article 56(1) GDPR.

CJEU in the case C-252/21 Facebook Inc. et al. v. Bundeskartellamt.