Long abstract.

The road not taken: the interplay between antitrust law and data protection as a concrete proposal for an updated theory of harm suitable for the digital economy.

It is certainly true that the native concept of the Internet, as an endless freedom environment, characterized essentially by an autarchic nature according to John Barlow, is a thing of the past. The datification of society and the increasing pervasiveness of new technologies have turned the infosphere into a place for huge economic interests. Under the aegis of the big tech giants, the Internet has become a sort of instrument of dominance to increase their economic power as well as make them able to carry out functions generally belonging to public authorities. The contrast between the State and the market has come back to impose itself strongly. Until now, public institutions entrust antitrust law with the demanding task of assuring effective rivalry among competitors and guaranteeing the competitive process to curb "ungovernable" forms of capital growth. Nevertheless, public authorities are compelled to admit the insufficiency of traditional antitrust law categories in front of big tech companies' overwhelming power. In the light of the dilemma of "not to regulate or regulate" digital markets, European and US regulators have opted for the second one, albeit with different times and outcomes. In the US, the arduous and uncertain attempt to move away from the law and economics approach of Chicago scholars has encouraged the American Congress to discuss the possible adoption of several antitrust bills directed at big tech companies. But it seems that the approval of these laws is just wishful thinking. On the contrary, European Union has put a step forward. The EU competition law - conceived itself as a means of EU constitutionalism - has taken a new road, aiming at adopting a comprehensive regulation to address the power that these companies exercise across markets. After having decided to regulate big tech giants, European Commission has left behind its intentions to update the existing antitrust law and has adopted a new sector-specific ex-ante regulation, knowns as Digital Markets Act (DMA). The European authorities' willingness to take on a leading role in the regulation of the digital economy, in order not to follow slavishly US and China legislative choices in the race for technology supremacy, does not seem decisive. The EU Regulation 2022/1925 highlights several critical issues which prevent to control efficiently the tech giants' intermediation power. For this reason, it appears appropriate to wonder whether the antitrust law may stop the growth of digital monopolies on its own. The critical aspects of DMA allow us to give a negative response to this interrogative. Firstly, fairness and contestability - the objectives that DMA intends to pursue - forbid or discourage specific business practices. Thus, these goals are aimed at acting on the symptoms' platform power rather than dealing with its causes. Secondly, the ex-ante approach, even though it is advantageous in terms of intervention's promptness, takes the risk of being ineffective, given those obligations for gatekeepers which are susceptible to being further specified (article 6 DMA) and their updating (article 12 DMA) involve a considerable waste of time. Furthermore, the approach "one-size fits all" entails that the obligations are the same for all ecosystems, without taking into account the diversity of their business models. Consequently, it would have been better to provide the EU regulation with rules tailor-made for every business model, as occurred with UK's digital markets reform. Because of the obstacles to the approval of US antitrust bills and the numerous critical issues of EU regulation, it seems worth proposing to regulators an alternative normative solution based on the integration between antitrust and data protection law. Considering that actions speak louder than words, it is necessary to make concrete and effective this regulatory hypothesis. For this reason, it is time to take distance from the *BkartA v. Facebook* case which has compared anticompetitive conduct - such as excessive data collection - to a violation of GDPR and support the view of the US Federal Court in the case *FTC v. Facebook*, endorsed by the Advocate General Rantos in the German Facebook case, and recently confirmed by The European Court of Justice . As Judge

Boasberg has claimed, a violation of privacy implemented by big tech companies could be considered as an index from which regulators can deduce the existence of monopoly power or in the EU an abuse of dominance position.
This contribution recommends a regulatory proposal, alternative to DMA and US antitrust bills to the competition authorities based on an updated theory of harm in which the investigation of an eventual violation of data protection (or privacy laws), assessed as a reduction of quality component of the digital products and services, could be used as a non-price competition parameter from which inferring antitrust infringement during the investigations. Without taking the place of national Data Protection Authorities, competition authorities could take into account several violations of data protection such as unlawful processing of personal data because consent is not freely given or behavioral manipulation (e.g. the use of "dark patterns" violates transparency and purpose limitation principles). To make the integration of antitrust and data protection effective, public authorities should recognize that data protection has a pro-competitive value in the digital markets, and finally, they should overcome some commentators' wrong idea according to which antitrust and data protection pursue different goals. At a closer look, their point of convergence is the safeguard of the algorithmic consumer.

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