GIULIO PATRIZI*

ANTITRUST AND REGULATION FOR ONLINE PLATFORMS: CHALLENGES AND PERSPECTIVE

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On Thursday 5th December 2019, at the Council Room of the Law Department of the University of Roma Tre in Rome, a conference was held on "Antitrust and Regulation for Online Platforms: Challenges and Perspectives". The conference was organised by the Law Department within the activities of the course "European Competition Law", belonging to the 'Studying Law at Roma Tre' programme, and with the cooperation of the Italian Competition Authority. Professor Margherita Colangelo opened the conference and introduced the extremely qualified panel of experts from all over Europe.

Professor Colangelo argued that the development of technological innovation and digital economy came with several issues concerning the social, political and economic effects on markets and society, despite the commonly known benefits. In particular, she highlighted one of the most discussed topics in the current antitrust debate: the concentration of power by few large digital companies, including the so-called Tech Giants. Professor Colangelo explained that the conference would address some crucial topics, among which the issue related to the dichotomy between competition and regulation, questioning which of them may constitute the most suitable and appropriate means to deal with novel policy issues posed by digital platforms. Furthermore, it is debated whether the antitrust toolkit and rules are sufficient to deal with cases involving online platforms or new ones are necessary. These issues are far from being solved, considering the European competition authorities'

* Law Student, Roma Tre University.

fragmented approaches, as shown, for instance, by the dissimilar solutions adopted by the Italian, Swedish, French and German competition authorities in the cases involving *Booking.com*. However, some important documents published last year provide very valuable insights. Among these, Professor Colangelo mentioned three Reports containing policy proposals tackling with digital markets, *i.e.*, the Vestager Commission's Report,[1] the Stigler Committee's Report[2] and Furman's Report.[3] In particular, the Furman's Report is co-authored by Philip Marsden, who is the first speaker of the conference.

Philip Marsden, Professor of Competition Law at College of Europe, gave a speech about a possible European vision of Digital Competition. Professor Marsden illustrated the origin of the concerns about digitalization and its influence on human life through a very particular and "musical" approach. From the 1976 Eagles' "Hotel California", to the Queen's "Radio Ga Ga", just to use a couple of the several bands cited by Professor Marsden, the sense of power and the consumers' growing dependency from the tech giants have been told for decades. Professor Marsden considered artificial intelligence-based items in every house as possible threats and claimed the Report of the Digital Competition Expert Panel[4] provides a reliable approach to the problem. The Panel sustains to have found the necessary consensus on a consumer welfare standard to be defined as "dynamic" employing elements from both regulatory and antitrust approach supporters. The proposal is based on the introduction of a Digital Market Unit, composed by digital and competition experts and with the aim of enforcing a pro-competitive regulation. In Professor Marsden's opinion, bringing to the table Tech

1 "Competition policy for the digital era" a report by Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer, 2019, available at: <ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

2 Stigler Committee on Digital Platforms, 2019, available at: <research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms–committee-report–stigler-center.pdf>.

3 Report of the UK Digital Competition Expert Panel, "Unlocking digital competition", 2019, available at: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>.

4 I. Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, *Yearbook of European Law*, Volume 38, 2019, pp. 448-499 <https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729>.

Giants, consumers' stakeholders and governments would be fundamental to obtain a code of conduct fit for the purpose and easily enforceable by the Digital Market Unit and that this innovative approach would have the benefit of having a single response to the issue, shared by all the parties involved. Furthermore, it would avoid what Professor Marsden describes as a "regulatory winter" that would definitely reduce innovation incentives.

Inge Graef, Assistant Professor at Tilburg Law School, delivered a speech on "Differentiated Treatment and EU Competition Law in Platform-to-Business Relations". Her recent paper about regulation on big tech companies and her participation in the European Commission's expert group to the EU Observatory on the Online Platform Economy were useful basis for her presentation. According to Professor Graef, distinguishing the anti-competitive treatments that the big tech companies lead in the digital platforms' field is fundamental to understand how to deal with the issue. The speaker defined the first group of treatments as "pure self-preferencing behaviours", whereby vertically integrated platforms favour their own affiliated firms by giving them preferential ranking positions in the platform or preferential access to data, managing to exclude competitors from the market as recently shown in the *Google Shopping* case.[5] Professor Graef then explained the second group, named "pure secondary line differentiation", which describes a scenario where a dominant firm harms a market in which it is not active by guaranteeing a preferential treatment to a not affiliated retailer above the others. However, the inconvenience for a company of guaranteeing such kind of preferential treatments in a market where the company is not even present makes this kind of abuse more difficult to capture for competition authorities. Leading examples in this group are the better ranking treatments that platform like *Booking.com* or *Expedia.com* are suspected to reserve to particular hotels paying more commission fees. The last group is defined by Professor Graef as "hybrid discrimination" and presents elements of both previous groups, whereby a platform engages in differentiated treatment among non-affiliated services

5 European Commisssion, *Google Shopping,* 27 June 2017, Case AT.39740, <ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf>.

in an effort to favour its own business. An example may be a platform blocking an app that interferes with its ability to gain revenues through advertising. Therefore, the motive has a double face: excluding competitors and exploiting the market. A clear example of this scenario is provided by the *Amazon Marketplace* ongoing investigation of the EU Commission.[6] Professor Graef offered an analysis of the outcomes of differentiated treatments, such as refusal to deal, blocking of access to the platform and to the services offered by the dominant company. Later, she quoted the leading cases in this field: the investigations promoted by the Italian Competition Authority on *Google*, which refused to give access to the android auto system to *Enel*, and the *Disconnect*'s claim against *Google* for being removed from the Google Play Store. Possible solutions to all the three differentiated treatments were also addressed in her speech. For the first group of treatment Professor Graef proposed a theoretical framework based on the application of the differentiated treatment used for the competitors of the affiliated companies and seeing if the dominant company's business is still effectively competitive whereas, for the second group, the proposed solution might be trying to device unfairness clauses fit for platform-to-business relations. For the last group, Professor Graef suggested to include in the legal notion of coercion these anti-competitive behaviours. Professor Graef claimed that the main area where EU competition law currently does not offer effective protection is the situation where a business is blocked from a platform without legitimate justification. To address harm in such cases, she suggested to give a stronger role to economic dependence both within and outside EU competition law.

Rupprecht Podszun, Professor of German and European Competition Law at the University of Dusseldorf, gave from remote his presentation on the most recent German proposals and cases about regulation of the data economy. First, Professor Podszun described the German Competition Authority's approach. In the German experience there is a dichotomy between the two lines of thinking, the first one that finds essential to put a break to the competition power of GAFA (Google, Apple, Facebook and Amazon) and an alternative view, called "help Siemens", that seems to

6 European Commission press release, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 17 July 2019, <ec.europa.eu/commission/presscorner/detail/en/IP_19_4291>.

be nearer to the needs of the big European companies. The *Bundeskartellamt* has an organisation in divisions similar to a court with a bottom-up approach, there is not a fully-fledged strategy and this may lead to different lines of action. The first group of cases analysed by Professor Podszun were based on MFN (Most Favored Nation) clauses and were held in front of big companies such as *Amazon* and *Booking.com*.[7] The cases against *Google News* and *Asics* [8] are examples of the "help Siemens"' view, as the *Bundeskartellamt* sided with these companies, rather than contesting their irregularities. In several merger cases, the *Bundeskartellamt* adopted a curious approach. In Professor Podszun's opinion, the *Bundeskartellamt* used especially merger cases involving German and European companies[9] to elaborate and put in practice new concepts and strategies for later use in abuse cases of bigger companies. This approach could be considered a success in the case against *Amazon*,[10] where the company at the end cooperated and changed its policy on resolution conditions with retailers. This did not happen in the well-known *Facebook* case[11] and it is worth mentioning that the Higher Regional Court of Düsseldorf suspended the *Bundeskartellamt*'s decision. In the same years these

7 *Bundeskartellamt*, *Amazon removes price parity obligation for retailers on its Marketplace platform*, Case B6-46/12, 2013, B6-46/12, www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf;jsessionid=1F7BE2F3F590C9FCCA9461EEFDB6F5BB.2_cid381?__blob=publicationFile&v=2; and *Bundeskartellamt*, *'Best price' clause of online hotel portal Booking also violates competition law*, 22 December 2015, b9-121/13, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/ 2016/B9-121-13.pdf?__blob=publicationFile&v=2>.

8 *Bundeskartellamt*, *Decision according to Section 32c German Competition Act in the dispute Google versus various press publishers and VG Media about the use of the ancillary copyright of press publishers*, 8 September 2015, B6-126/14, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf ?__blob= publicationFile&v=2>; and *Bundeskartellamt*, *Unlawful restrictions of online sales of ASICS running shoes*, 26 August 2015, B2-98/11, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2>.

9 *Bundeskartellamt*, *Clearance of merger between online dating platforms*, 22 October 2015, B6-57/15, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2016/B6-57-15.pdf?__blob =publicationFile&v=2>.

10 *Bundeskartellamt*, 17 July 2019, B2-88/18, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5>.

11 *Bundeskartellamt*, *Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing*, 6 February 2019, <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3>.

decisions were made, the German legislator did not lack of reacting. In 2017, the 9th Amendment to the German Competition Act was published with new elements such as criteria for dominance of platforms and a transaction value-based merger threshold of 400 million euro, which introduced a duty to notify the merger to the *Bundeskartellamt*. The draft of the 10th Amendment to the German Competition Act was released last January. It included innovations such as a special regulation of undertakings with paramount significance across the market and provision against tipping abuse. In conclusion, according to Professor Podszun, despite of the efforts made by the legislator, the greatest role in dealing with the digital market is still played by the courts, especially because the *Bundeskartellamt* has not yet reached a common strategy.

The conference proceeded with Andrea Pezzoli, General Director of the Italian Competition Authority. His speech was about the Italian experience and perspectives on digital economy. Despite the efforts made by the EU Commission and by national competition authorities, the Tech Giants' power does not seem to be undermined, and the smaller companies still suffer from being on the "wrong" side of the market. The Italian responses to the issue are in the hands of the triangle of agencies, i.e., the Competition Agency, the Data Protection Agency and the Communication Agency, which are making efforts to have a coordinated approach to the digital market. The cooperation between the Agencies has led to two interim reports, and to a final report on Big Data, published last February.[12] The goal of the report was to provide a better understanding of the digital economy, by using the competence of the Communication Agency on pluralism issues and the competence of the Data Protection Agency on privacy issues. The analysis, conducted on new forms of market power, on the relation privacy-antitrust and on developments on data acquisition and profiling, led to some important conclusions. According to Andrea Pezzoli and to the outcomes of the report, a new digital agency is not necessary. The tools that the Italian Competition Authority already has, *i.e.*, antitrust rules and cooperation between agencies, are all needed. The

12 The final report is available at: <www.garanteprivacy.it/documents/10160/0/Indagine+conoscitiva+sui+Big+Data.pdf/58490808-c024-bf04-7e4e-e953b3d38a9a?version=1.0>.

only two interventions that could lead to an improvement are more power to collect information, an essential weapon while dealing with digital giants, and an innovative market friendly public policy.

Then Andrea Mantovani, Associate Professor of Economics at the University of Bologna, presented his extensive research on *Booking.com* cases. Digital platforms, especially OTA (Online Travel Agencies), usually charge retailers with fees around 20/30% that sometimes even reach 50%. This incredible power for digital platforms was sustained by the existence of the so-called wide price parity clauses or MFN clauses. With regard to digital markets, there are basically two types of MFN clauses, according to whether the clause ensures that the price and terms quoted through the platform will not be higher than those available on the upstream supplier's website ("narrow MFN") or on other platforms or any other channel ("wide MFN"). Different approaches have been adopted by national competition authorities: whereas the Italian, Swedish and French competition authorities have settled with *Booking.com* committing to remove the wide MFN and maintain the narrow one, The *Bundeskartellamt*, on the other hand, in similar cases – firstly against the portal HRS and later against Booking – did not accept even the narrow MFN. Professor Mantovani's recent work[13] presents the first results of such kind of approach through an extensive analysis and comparison between the reaction of the *Booking.com*'s digital market in Corsica, after the *Macron Law*,[14] and in Sardinia, after the Italian equivalent new policy.[15] According to the data collected by Professor Mantovani and his co-authors, in the short run, effects on prices are detectable in the amount of a 4% reduction just for hotel chains. However, this represents a small part of the hotel market in both regions. By extending the Corsica's analysis to the medium run (1 year), the results are much more relevant: a 4% prices reduction for non-chain hotels and a 12% prices reduction for hotels chains. According to Professor

13 A. Mantovani-C. Piga-C. Reggiani, *Much ado about nothing? Online platform price parity clauses and the EU Booking.com case*, 2020,<questromworld.bu.edu/platformstrategy/files/2019/07/PlatStrat2019_paper_33.pdf>.

14 Law 2015-990 of 6 August 2015 "*pour la croissance, l'activité et l'égalité des chances économiques*".

15 2017 Competition Law, Legislative Decree No. 3/2017.

Mantovani, results are not disappointing but also not impressive. According to Mantovani, a possible improvement could be achieved by investing on research on an optimal commission fee for each market sector.

The last speaker to take the floor was Thibault Schrepel, Assistant Professor of European Economic Law at Utrecht University. Professor Schrepel defined the concept of Predatory Innovation as the modification of one or more elements of a product not to improve it but to eliminate competition. According to Schrepel, this concept is central, but too often ignored in digital market discussions. There have been cases where elements of such concept were present. The investigations which led the French government to fine *Apple* and *Samsung* for slowing down their phones is one of them. However, despite the notion has been mentioned in some of the digital market reports that have been recently published, competition authorities seem to avoid a direct discussion on the phenomenon and just few Europeans countries have started working in-depth with the concept. According to Professor Schrepel, innovating the competition authorities' personnel with computer scientists, coders and developers could be a solution for a better understanding of the issue. The second part of the speech was dedicated to blockchain and the concept of "Code is Law and Law is Code", which takes inspiration from the Lawrence Lessig's book.[16] From an informatics point of view, the entire digital system is based on codification. At the end, every site, platform or program is nothing than an order of numbers written by a programmer: a code. Therefore, in Professor Schrepel's opinion, in a market governed by codes, law should take the same shape. Law should be translated into a code and included in the codes digital platforms are written with. As a consequence, it would be the same codification of the platforms to exclude in the first place the behaviours the law wants to prevent. Of course, incentives for the platforms' owners would be necessary. In order to face the technical difficulties of codifying law, answers could be found in quantum computing, coupled with the constraints that Lessig's book describes as future rulers of the human behaviours in and outside digital platforms.

16 L. Lessig, *Code and other Laws of the Cyberspace*, Basic Books, 1999.