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WEBINAR

“REGULATING DIGITAL PLATFORMS:
WHERE DO WE STAND?”

(Roma Tre University, May 15th, 2021)

ABSTRACT.

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1. The webinar and its subject

On Thursday 15 May 2021, Roma Tre University held a webinar on digital platforms and their regulation process, which is currently underway in the European area. The webinar was organized, chaired and moderated by Margherita Colangelo, Associate Professor of Comparative Law and Competition Law at Roma Tre University, who started off by presenting the idea behind the conference. Over the last five years, digital platforms have represented the main point of the agenda of policymakers all around the world and the object of many investigations by antitrust authorities. The latter aspect is well demonstrated by the recent decision of the Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM), which fined Google over € 100 million for abuse of dominant position following its refusal to Enel X with regards to the interoperability with Android Auto. Cases like this reflect the ongoing debate on whether current antitrust rules are appropriate to deal with big tech companies, their practices and their business models. In this context, Professor Margherita Colangelo recalled that the webinar aims at discussing the main proposals elaborated both at a national and at European level, which foresee several important changes: UK's new competition regime for digital platforms with Strategic Market Status, Germany's Tenth Amendment to the Competition Act and EU's Digital Markets Act.

2. The British Proposal

The first speaker to take the floor was Amelia Fletcher, Professor of Competition Policy at Norwich Business School and Deputy Director at the Centre for Competition Policy at the University of East Anglia. Opening her intervention, she explained that in the last few years many digital platform markets have become highly concentrated and have extended their market positions into new services, creating whole digital ecosystems. Moreover, platforms act as gatekeepers between certain sets of users, particularly business users and their end customers, conferring them an additional degree of market power. Professor Fletcher pointed out that the factors which drove to such situation are both *within* and *across* markets, like strong trans-global economies of scale and scope, network effects and lack of interoperability, substantial mergers and acquisitions activity, consumer behaviour and strategic anti-competitive conduct. In this context, there are some static and dynamic reasons to be worried: if these markets

tip to monopoly and if these firms can be more successful than potentially innovative competitors, then this does not encourage innovation. It is true, in fact, that incentivising innovation requires some reward and that big tech companies have innovated a lot. Nevertheless, entrenched incumbents could have limited incentives to innovate further if they do not face serious challenges. Moreover, there is a risk that third party innovative challenge is restricted by limited access to relevant data, to users and to finance as well as by lack of rents in case of success. To face these concerns, the Furman Review¹ suggested there should be pro-competition regulation, which is justified on two main bases: firstly, some key drivers of concentration do not necessarily imply strategic anticompetitive behaviour and therefore antitrust cases do not seem applicable; secondly, even where antitrust could be used, cases turn out to be long, narrow and unsuitable for setting out a clear framework, not ensuring legal certainty and not promoting innovation. This means that regulatory design becomes crucial as it should be far quicker and more administrable than antitrust but without exceeding.

Professor Fletcher followed illustrating how the legislation overseen by the Digital Markets Unit (DMU) will look like. Primarily, the objective pursued by the new regime will be fair trading, open choices, trust and transparency. Then, a process of designating the platforms with Strategic Market Status (SMS) will be undertaken, which means that the regulation is intended to be only for those who hold a substantial, entrenched market power that provides them with a strategic position. Nonetheless, the rules will not apply to all their business, but only to the designated activities, which are those that really confer the market power. On the other hand, the code of conduct is expected to be principle-based, bespoke to each of the companies and developed alongside the designation of the abovementioned activities. It will also feature enforcement powers and sanctions. Finally, the regulators should be able to impose what are called pro-competitive interventions (PCIs) on the SMS firms following a market review.

Subsequently, Professor Fletcher quickly compared the British proposal to the DMA, stressing that the key difference between them concerns the obligations: in the

¹ *Unlocking digital competition: report of the Digital Competition Expert Panel*, published on 13 March 2019 (available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>).

UK, they will be developed in the designation process and bespoke, while in the EU they will be immediately displayed in the legislation. For this reason, many economists argue that the British proposal appears way more consumer-focused than the European one, which is seen as “one-size-fits-all” approach. However, the UK proposed principles present a lot of qualifying words like *undue* or *unreasonably*, which make them less clear and easy to self-execute. Professor Fletcher concluded claiming that the distinction between the two legislations is less clear than what many suggest, albeit there is certainly room for improvement in the DMA.

3. The German Competition Act and its new 19a section

The following country whose legislative measures were examined was Germany. Here, the legislator adopted the Tenth Amendment to the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), which introduces a few legal changes aimed at protecting competition in digital markets. Jens-Uwe Franck, Professor of Civil Law, Commercial Law and Competition Law at the University of Mannheim, explained it focusing especially on its major innovation: section 19a.

This provision foresees a two-step mechanism. In the first place, the German Competition Authority needs to decide whether a platform is of ‘paramount significance for competition across markets.’ If it does so, it can then prohibit the firm from engaging in specific types of practice which are presumed to be abusive: self-preferencing by vertically integrated firms; hindering supply or sales activities of other firms; hindering competitors in markets where the 19a firm may rapidly expand its position; using collected data to raise market entry barriers or requiring users’ permission for such use; hindering competition by denying or impeding interoperability or portability of data; withholding information on the 19a firm’s performance; demanding disproportionate compensation from business customers. Both the declaratory and the prohibition decision can be challenged before the German Federal Court of Justice, which will decide as the first and only avenue of appeal. Furthermore, in the event of a violation of prohibition decisions, instruments of public and private enforcement (like fines or actions for injunctions and damages) will be applied.

Professor Franck underlined that the 19a tool conceptually deviates from traditional competition law, especially when considering four of its specific features.

First of all, the provision addresses unilateral conduct of digital platforms because of their position as intermediaries and gatekeepers, regardless of whether they dominate a defined market. Secondly, it provides for an explicit shift of the burden of proof applicable to the above-mentioned list of practices presumed to be abusive. Thirdly, the obligations envisaged by it are not self-executory, which implies that the *Bundeskartellamt* enjoys discretion in this regard. Lastly, as already mentioned, the provision foresees an abridged judicial review in contrast with the regular two-level system.

Successively, Professor Franck drew the attention to the potential addressees of the 19a tool. In order to precisely define them, it is necessary to scrutinize the prerequisites and criteria mentioned in the provision. Firstly, section 19a(1) addresses only firms that are ‘active to a significant extent on markets within the meaning of section 18(3a)’ of the Competition Act. The latter rule refers to ‘multi-sided markets and networks’, which implies that section 19a shall apply to firms that operate as two-sided platforms and act, therefore, as intermediaries between different user groups that are linked through cross-group network effects. But the essential requirement that must be taken into account is the ‘paramount significance for competition across markets.’ Under this aspect, the second sentence of section 19a(1) presents a non-exhaustive list of five criteria that aim at identifying the firms which put competition at risk: dominance on one or more markets; financial strength and access to resources; vertical integration and activities on otherwise related markets; access to data relevant for competition and, ultimately, gatekeeper position. In this context, the ‘Big Five’ (the so-called ‘GAFAM’) are likely to be included, since important parts of their activity satisfy the above-mentioned criteria. Nevertheless, there remain some margins for the German Competition Authority to consider other firms than GAFAM to be potential section 19a addressees, like Booking or CTS Eventium.

Professor Franck also emphasized what is stated in the explanatory memorandum to the Bill, i.e., that within the context of objective justification, a balancing of interests is required, which, on the one hand, takes into account the law’s objective of protecting free competition and, on the other hand, the legitimate freedom of business and possible procompetitive elements of the conduct. It can therefore be deduced that section 19a pursues the long-term objectives of limiting economic power, keeping markets open and protecting the competitive process. However, in the context

of digital markets, risks of underenforcement (the so-called ‘false negatives’) should be considered more carefully.

At the end of his speech, Professor Franck made some concluding remarks, stating that Section 19a sits between traditional competition law and sector regulation and that it rebalances the power between Big Tech companies and the German Competition Authority. At the same time, there is the risk that the listed practices will be interpreted as per-se prohibitions since they were drafted in wide terms. From this point of view, the *Bundeskartellamt* and the Federal Court of Justice have a great responsibility to avoid that scenario. The legislator seems to be aware of this uncertainty, as section 19a requires its provisions to be evaluated after four years.

4. A critical analysis of the EU Digital Markets Act

The next legislative initiative to be scrutinized was the Digital Markets Act, which was unveiled by the European Commission on 15 December 2020. Alexandre De Streel, Professor of European Union law at the University of Namur and Academic co-Director at the Centre on Regulation in Europe (CERRE), took the floor and presented the main findings of the proposal and his view in this respect.

His intervention began by explaining why the European Commission has come up with such proposal and which are their objectives. Firstly, there is a perception that, to some extent, we have lost control to the Big Tech companies. Therefore, behind the economic rationale, there is a political and more fundamental drive to take back control which pushed the legislator. Second, the main goal of the DMA is to increase the contestability and the fairness of the digital economy in the European Union. Contestability aims to decrease entry barriers to digital markets and to level the playing field among existing gatekeepers and other firms offering digital services that may substitute or complement the services already offered by the first ones. Differently, fairness relates to distribution of the value created by digital markets, as it aims at achieving the balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the digital gatekeepers.

Once he settled these matters, Professor De Streel focused on the analogies and the differences between the proposal and existing competition law. He stressed that, for instance, the scope of the DMA covers only eight Core Platforms Services (CPS) like

B2C intermediation services, online search engines or video sharing platforms, while that of Article 102 TFEU concerns all economic activities.

Moreover, concerning the services, the trigger for intervention indicated by the DMA is a legally defined CPS, while for competition law is an economically defined relevant market. At firms' level, on the other hand, European Commission's proposal finds in the gatekeeper position the trigger to intervene, unlike Article 102 TFEU which finds it in the dominant position. From this point of view, since there is no clear definition of 'gatekeeper' in EU law, the designation is done by the European Commission on the basis of three cumulative criteria: their large size and impact on the EU internal market; their control of an important gateway for business users to reach end-users and, lastly, whether the control in question is entrenched and durable.

But above all, Professor De Streel drew the attention to the obligations imposed by the proposal, which he defined as “the 18 commandments.” These can be divided into a black list that includes seven directly applicable detailed obligations which are mostly prohibitions and a grey list which comprises 11 other obligations which may need to be specified further by the Commission.

The sanction regimes are relatively similar, as both the DMA and competition law foresee, for example, the application of fines.

For what concerns the enforcement of the European proposal, Professor De Streel highlighted that it is mostly bilateral and possibly adversarial and that it is centralised at the Commission, which has a fully-fledged regulatory power. On the contrary, national regulators have a limited role and the function of other stakeholders such as business and end-users remains unclear.

Next, Professor De Streel argued that it is not easy to give a single answer when asked if the DMA is a revolution. On one hand, it is because it represents the first asymmetric EU law on digital platforms. On the other, it is based on the traditional EU policy choices since it uses *ex ante* regulation to complement *ex post* antitrust and not to substitute it. The Commission chose to open the platforms instead of breaking them up, to foresee rules rather than standards and to prefer a centralised EU enforcement over a decentralised national one.

Professor De Streel concluded his critical analysis of the DMA by illustrating how it can be improved in order to make their rules more resilient and effective. In

particular, he affirmed that the objectives and the logics behind the obligations should be clarified and that the administrability and the flexibility should be better balanced. Furthermore, the rules and the enforcement should improve over time with the support of regulatory experience, thus putting into practice a self-learning process. The institutional design should be perfected as well by allocating regulatory tasks on the basis of the comparative advantages of EU and national institutions. Lastly, Professor De Streeel made some suggestions also on the enforcement level, arguing, for instance, that independent national authorities should have an additional role and that an alternative dispute resolution should be established.

5. The practice of self-preferencing between competition and regulation

The final speaker was Pedro Caro de Sousa, competition expert with the Organisation for Economic Co-operation and Development (OECD). He discussed one of the most debated practices in the context of digital markets: self-preferencing. Its treatment under antitrust rules, in fact, is contentious and a lively debate has arisen in the literature on the possibility to assess this conduct in accordance with the established categories of abuse.

In particular, de Sousa focused on the *Google Shopping* case, which is emblematic from this point of view. Google, a search platform, started providing search services for a number of shopping services as well. It also had its own shopping service and favoured it by showing it up in the first page and relegating the ones of his potential competitors on a related market in the sixth or the seventh page. The European Commission decided that it was a typical leveraging abuse, whereas Google argued before the General Court that it could provide services to whoever it wanted and that it did not discriminate the other shopping service providers.

This case provoked very different reactions. Some authors claimed that although some practices among leveraging are anti-competitive, not all of them are. In fact, it would be odd to say that every company which favours its own products is engaged in anticompetitive conduct. On the contrary, others framed the practice in terms of discriminatory leveraging, whereas others focused on the fact that Google service was effectively essential and argued that the competitors were excluded from the market because people used Google in order to access their services.

In de Sousa’s opinion, the main point is that the definition of these markets is not exactly clear, because there are ecosystems as well as gatekeepers within them. This kind of practices can be framed as anti-competitive from a variety of perspectives, but they are not a neat fit still. The result is that many inherent tensions emerge between different competition law schools.

The legislations that have been examined offer a range of solutions which go from an easier EU enforcement to a pure regulatory approach. But there is not a sharp line dividing these two approaches, in fact they influence each other, because competition and regulation overlap. In conclusion, de Sousa said that it is necessary to question what is going to be the interface between competition and regulation once these instruments have been adopted, especially in light of the fact that authors have been complaining for decades of the risk of a regulatory competition law. Unquestionably, it will be very interesting to see what will happen next.

6. Conclusions

Pedro Caro de Sousa’s speech was followed by a round of comments of the speakers, which especially focused on the tendency towards a regulatory approach as well as on the advantages and disadvantages of the proposals addressed in their presentations.

In conclusion, the last speaker to take the floor was Vincenzo Zeno-Zencovich, Professor of Comparative Legal Studies at the University of Roma Tre. He strongly criticised the DMA arguing that, from his point of view, it presents two main flaws. Firstly, the fact that it responds to a 19th century’s positivistic approach. The DMA, in fact, is part of a large set of EU legislations which is very difficult to comply with and, above all, it contains a considerable amount of protectionism. Secondly, the proposal lacks an international, global perspective, being written in what the speaker defined “Brussels’ English.” Professor Zeno-Zencovich closed his speech by questioning whether (unrealistically) optimistic expectations are related to the economic advantages of the DMA.