Towards New Tools in Competition Law: Some legal and economic considerations, Competition forum, December 2020

Marie Cartapanis, Frédéric Marty

▶ **To cite this version:**

Marie Cartapanis, Frédéric Marty. Towards New Tools in Competition Law: Some legal and economic considerations, Competition forum, December 2020. 2020. hal-03186055

HAL Id: hal-03186055
https://hal.science/hal-03186055

Submitted on 18 Oct 2021

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

COMPETITION FORUM
LAW & ECONOMICS

November, 12th 2020

Towards New Tools in Competition Law
Some legal and economic considerations

Marie CARTAPANIS
Frédéric MARTY

To quote this paper: Marie Cartapanis, Frédéric Marty, "Towards New Tools in Competition Law", *Competition Forum: Law & Economics,* 2020, art. n° 0008, available at: https://www.competition-forum.com/.

Summary: *The treatment of digital platforms by competition laws is the subject of numerous reflections in the economic and legal literatures as well as in the sphere of public policy. The two preliminary impact assessments issued by the Commission, the "New Competition Tools" and the "Digital Services Package", are symptomatic of a possible paradigm shift in matters of competition laws enforcement. The novelty that these instruments could bring would be twofold. On the one hand, the injonction is detached from the finding of abuse. On the other hand, it is not the behavior that is targeted but the actual or potential market structure itself if the purpose is to prevent the creation of a dominant position that is feared to be perennial. The assumption is that the remedy may not sanction an anti-competitive behavior but may aim to shape the structure of the market in order to make the competitive process effective again. Even if we do not yet know the exact scope of the instruments that are intended to be put in place, this paper does not aim to address all the issues at stake; this would be too ambitious and chimeric. However, it would be advisable, as of now, to draw up lines of thought as to the effectiveness and efficiency of the tools envisaged. Finally, we consider the paradigm shift that the introduction of new technologies implies in competition, and drawing perspectives with a parallel between British and French national competition law.*

Introduction

The treatment of digital platforms by competition laws is the subject of numerous reflections in the economic and legal literatures as well as in the sphere of public policy.

For instance, on 1 July 2020, the UK Competition and Markets Authority (CMA) has proposed to the British Government to implement a specific regulatory framework to control the market power of two specific platforms, namely Google and Facebook. Pursuing the recommendations of the Furman Report, which was submitted to it in 2019, the CMA proposes the introduction of ad hoc regulation to counteract the effects of the concentration of the electronic platforms' economic power to make possible a competition on a level playing field and to prevent consumers and complementors (e.g. companies using the platform's services and providing services that are complementary to it) from being subject to abusive behavior. Similarly, in France, deputies Valéria Faure-Muntian and Daniel Fasquelle submitted an information report on 24 June 2020 on behalf of the Economic Affairs Committee of the French National Assembly about digital platforms[1]. Their proposals are likewise oriented towards the introduction of a specific regulation to complement the enforcement of the competition rules, itself equipped with new capacities and instruments.

Furthermore, a 10th amendment to the German Competition Act is proposed to deal with situations where market structures are such that operators hold and exercise economic power in several markets. This bill would introduce a new concept of "outstanding dominance across markets" that would allow to tackle the competitive issues related to digital ecosystems. As Budzinski et al. underlines such a notion could be all the more valuable from an economic perspective, as it emphasizes non-horizontal and less direct anti-competitive abuses of market power[2]. Such a concept might be relevant to consider the competitive issues related to systemic market powers. The German project aiming at adapting competition law to the digital environment also stresses the issues of structural dominance and highlights the competitive risks that are difficult to deal with and especially to remedy with the existing tools available to competition law enforcers.

These practices include the risk of distortion of competition within ecosystems (self-preferencing), the shift towards situations of

[1] Rapport d'information sur les plateformes numériques, available on this link.

[2] O. Budzinski, S. Gaenssle, and A. Stöhr, "The Draft for the 10th Amendment of German Competition Law: Towards a new Concept of 'Outstanding Relevance across Markets'?" (June 17, 2020). Ilmenau University of Technology, Institute of Economics, 2020, http://dx.doi.org/10.2139/ssrn.3629066.

ultra-dominance (tipping), the ability to extend one's market position to related markets through leverage, notably based on advantages in terms of data, to play strategically on the portability of data and the interoperability of services, or the possibility of benefiting from information asymmetries vis-à-vis the other players in the ecosystem.

Even more recently, a bipartisan report by the Antitrust Subcommittee of the House of Representatives' Judiciary Committee, "Investigation of Competition in Digital Markets", issued in October 2020, outlined ways in which US antitrust law could evolve to deal with the limited means of action related to the implementation of the Sherman Act. Among other proposals, the report insists on the possibility to rehabilitate monopolization law by introducing in the US legal framework notions as abuse of dominant position and by addressing more directly issues as refusal to provide competitors access to an essential facility or self-preferencing practices[3].

The two preliminary impact assessments issued by the Commission are part of a very broad movement (to which we could also link the report of the Stigler Center of the University of Chicago itself published in 2019[4]). As consultations with interested parties are now closed and the Commission's proposals are expected in December 2020, it is relevant to present some cross reflections from the legal and economic fields about the regulatory and competition issues raised by the Commission's initiatives. Why completing the toolbox of sector-specific regulatory authorities and competition authorities to tackle issues raised by the competitive situation of digital markets?

On 26 June 2020 in her intervention at the 15th ASCOLA conference, Competition in Digital Age: Changing Enforcement for Changing Times, Margrethe Vestager, Commissioner for Competition, stressed the irreversible risks to competition that could arise in a market in which a dominant platform could reach the tipping point towards overwhelming dominance, due to economies of scale and scope, network externalities, free services and data benefits. In other words, the hindrance of the competitive process may not result from the behavior of a given company but from the very structure of the market. In the Commission's view, such competitive risks entail an evolution of market regulations. The two consultations launched by the Commission on 2 and 4 June 2020 are particularly illustrative of a possible shift in competition policy in a direction that departs

[3] F. Marty, (2020), Vers une européanisation de l'Antitrust américain ?, *Medium*.

[4] For a comprehensive synthesis and in-depth analysis of the reports published on the competition issues related to the market power of Big Tech see: F. Lancieri and P. Sakowski, (2020), "Competition in Digital Markets: A Review of Expert Reports", *Stanford Journal of Law, Business, and Finance* (forthcoming).

substantially from the practice that has been followed over the last four decades.

The first initiative concerns the future legislative package on digital services[5]. It consists of a consultation on a possible instrument for the ex-ante regulation of major online platforms acting as gatekeepers.

The Commission's objectives relate to the supervision of platforms that are both gatekeepers to the market and exert a structuring power (i.e. private regulation) over the companies that use their services. Once their market positions are no longer contestable in competition-law related terms, fundamental principles of market access, fairness in trade relations, and loyalty[6] could be called into question. The Commission's consultation document is even more novel in that it refers to dimensions of general interest that go beyond the competitive and economic aspects.

As is usual in the preliminary impact studies carried out by the Commission, different scenarios are proposed. Among the options proposed, options 3a and 3b are of particular interest. Several tools are envisaged. Firstly, an ex-ante tool applicable to major online platforms and which would allow, on the one hand, the drawing up of a list of prohibited unfair commercial practices (option 3a), and, on the other hand, a new ex-ante regulatory framework, authorizing the European Commission to impose, after prior analysis, corrective measures such as obligations of access to non-personal data, requirements concerning the portability of personal data or interoperability requirements (option 3b of the consultation, relating to the creation of a new tool for the ex-ante regulation of major online platforms and option 2 of the proposal relating to the creation of a new tool in competition law).

Thus, the third scenario, the most radical one, is the most significant for our purpose. It is based on rules prohibiting certain ex-ante and per se practices. Two basic principles of the antitrust consensus born in the 1970s are potentially jeopardized, i.e. the effects-based approach and the consideration of consumer welfare as the sole decision-making criterion. The scope of the prohibitions would concern discrimination in favor of its own services

[5] According to M. Vestager, "our strategy, to make the 2020s Europe's digital decade, is every bit as much about building trust as it is about investing in digital innovation" (M. Vestager, "Speech : Building trust in technology", *EPC Webinar, Digital Clearinghouse*, 29 October 2020).

[6] In France, the promulgation of the law for a Digital Republic of October 7, 2016 imposes on online platforms an "obligation of loyalty", the purpose of which is to guarantee consumers information with protean contours (Loi n° 2016-1321, 7 October 2016 "Pour une République numérique"). See, J. Rochfeld and C. Zolynski, "La loyauté des plateformes. Quelles plateformes ? Quelle loyauté ?", *D.,* 2016, P. 520 ; L. Grynbaum, "Loyauté des plateformes: un champ d'application à redéfinir dans les limites du droit européen : À propos du projet de loi pour une République numérique", *JCP,* 16, 2016, pp. 778-781.

(e.g. self preferencing) or the imposition of unbalanced contractual clauses. Rules would also be prescribed with regard to access and neutrality of operating systems, algorithmic transparency, or the supervision of online advertising. These provisions would, moreover, be more akin to ex-ante rules than to sector-specific regulation.

This regulation could be handled by an European-level regulator. The latter could also impose specific requirements as access to non-personal data, data portability, or interoperability. This regulation would therefore lead to supplement the ex-post case-based approach inherent in the enforcement of competition rules (based on the assessment of the net effect of practices), with rules per se prohibiting certain practices and specific obligations. In other words, in the words of Mrs. Vestager (26 June 2020), it might consist of *do's and don'ts*.

The second initiative relates to a consultation on a possible new competition tool. It complements and does not replace the first one. The consultation focuses on structural competition problems that could not be addressed by competition tools, such as barriers to entry, consumer and trading partner foreclosures, or asymmetric access to data. One of the key elements of the European Commission's reflection is the impossibility to counteract the shift (the *tipping*) of even yet non-dominant platforms towards irreversible monopoly positions or to control the extension of their dominant positions from one adjacent market to another because of their structural advantages. This relates to the notions of structural risks to competition on the one hand and structural lack of competition on the other, as highlighted by the Commission in its consultation document. The second notion echoes failures in the competitive process that are not exclusively attributable to behavior that does not meet the conditions for competition on the merits.

This consultation proposes the creation of a new tool in competition law, which would complement the initiatives in terms of ex-ante regulation of platforms. This would enable the European Commission to impose remedies according to a principle quite similar to the one previously outlined. Several areas of application are envisioned: in a first sense, this possibility would apply without a prior finding of an infringement of Article 102 TFEU, and would have either a horizontal scope (option 1) or a scope limited to certain sectors or companies (option 2). In the second variant, the Commission proposes an instrument that would apply without a finding of dominance, with a scope that is either horizontal (option 3) or limited to certain sectors or undertakings (option 4). This instrument would apply in two assumptions: where there is a structural risk that prevents the proper functioning of the internal market

or where the absence of structural competition impedes an effective competition of the internal market.

Once again, the most radical scenarios are the most interesting to consider. A first competitive tool could relate to situations of dominance (even arising from the specific merits of the considered platform) and could give rise, even without characterization of an infringement, to the communication of competition concerns that could result in commitments of a behavioral or structural nature, as soon as the dominant position would seem irreversible. The second tool, which would focus on the structure of the market, would aim to prevent the development of such dominance before it becomes effective[7].

The novelty that these instruments could bring would be twofold in relation to the consensus described above. On the one hand, the "sanction" is detached from the finding of abuse. On the other hand, it is not the behavior that is targeted but the actual or potential market structure itself if the purpose is to prevent the creation of a dominant position that is feared to be perennial. The assumption is that the sanction of anti-competitive behavior may be ineffective in restoring competition in the markets concerned.

Taking into account the fact that we do not yet know the exact scope of the instruments that are intended to be put in place, this paper does not aim to resolve all the difficulties; this would be too ambitious and chimeric, because subject to too many assumptions and hazards. However, it would be advisable, as of now, to draw up lines of thought as to the effectiveness (I) and efficiency (II) of the tools envisaged. Finally, we consider the paradigm shift that the introduction of new technologies implies in competition, and drawing perspectives with a parallel between the EU Commission proposals, the British experience of market investigations under the 2002 Enterprise Act and the French competition law (III).

I. Could these new instruments be effective?

On a legal point of view, the two consultations raise several issues. The main challenges concern their articulation with certain fundamental principles and ultimately the effectiveness of these tools, that is to say, their capacity to fit into practices and to be effectively applied[8]. The results of the public

[7] M. Bourreau and A. Perrot, "Digital Platforms: Regulate before it's too Late", Conseil d'analyse économique, note nº 60, October 2020.

http://www.cae-eco.fr/en/plateformes-numeriques-reguler-avant-qu-il-ne-soit-trop-tard

[8] See J. Carbonnier, "Effectivité et ineffectivité de la règle de droit", *L'Année sociologique*, LVII, 1958, p. 3.

consultation highlighted the need to develop a legally sound tool with a clear procedure. Several requirements are clearly apparent: clear procedure and procedural guarantees; legal security ; clear legal standard; efficiency and speed ; proportionality of the intervention, in particular, to avoid stifling innovation or discouraging entry[9]. Finally, respondents stressed the importance of having a tool subject to adequate procedural guarantees, including judicial review. In addition, the consultations question the place of competition law in regulating the structure of a market.

Articulation with the principle of subsidiarity

The first question raised by these two consultations is the conformity of proposals relating to the creation of a new tool for ex ante regulation with Article 5 TEU, as anticipated by the European Commission. The principle of subsidiarity enshrined in this article implies that the Union should intervene only if, and to the extent that, the objectives of the envisaged action cannot be sufficiently achieved by Member States.

In this respect, it is easy to admit that the cross-border and systemic nature of the services provided by some online platforms implies an intervention at the European level.

As the European Commission points out, the digital platforms referred to in the text - those that benefit from significant economies of scale and act as gatekeepers - can be legally established in a Member State and provide their services to virtually all European consumers.

Therefore, the objectives can be better achieved at the European level. It also avoids fragmentation of the single market into different - and potentially contradictory - regulations in Member States. This does not exclude that national competition authorities are competent to apply this law.

Articulation with the presumption of innocence?

Several criticisms of these new competition tools are based on the presumption of innocence. It is, therefore, necessary to

[9] Among many authors, M. Glader, *Innovation Markets and Competition Analysis, EU Competition Law and U. S. Antitrust Law,* New Horizons in Competition Law, Edward Elgar, 2006 ; M. A. Carrier, *Innovation for the 21st Century,* Oxford University Press, 2009 ; H. Hovenkamp, "Restraints on Innovation", *Cardozo L. Rev.,* vol. 29, October 2007, pp. 247-260 ; "Schumpeterian Competition and Antitrust", University of Pennsylvania Law School, *Faculty Scholarship,* nº 08-43, oct. 2008, pp. 1-11 *;* "Competition for Innovation", *University of Iowa,* Legal Studies Research Paper nº 13-26, 2012, pp. 1-28 ; "Competition Policy and the Technologies of Information", *University of Iowa,* Legal Studies Research Paper nº 14-18, juin 2014, pp. 1-13 ; P. Aghion, C. Antonin and S. Bunel, *Le pouvoir de la destruction créatrice,* Odile Jacob, 2020, 435 p. ; M. Cartapanis, *Innovation et droit de la concurrence,* LGDJ, 2017, (préf. D. Bosco), 510 p.

evaluate the articulation of the proposals made with Article 48.1 of the Charter of Fundamental Rights of the European Union and with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrine the presumption of innocence. It is known that competition law has a "penal color"[10] and that the judge of the Union considers that "where there is doubt, the benefit of that doubt must be given to the undertakings accused of the infringement. The Court cannot, therefore, conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of a decision imposing a fine"[11].

However, the new tools proposed are not based on the finding of an infraction[12]. On the one hand, it is easy to agree that there can be no presumption of innocence in the absence of incrimination or sanction. In such a case, i.e. in the absence of a sanction, criticism would be ineffective. This seems to be the position of the French Competition Authority, through the voice of its President[13]. However, some practitioners are concerned that this tool may be a roundabout way of filling certain legal loopholes in competition law (e.g. abusive acquisition of a dominant position). This fear is particularly emanating from lawyers, who, in their contributions to the public consultation, expressed their fears regarding jurisdictional protection. As expressed in the analysis of Marc van der Woude[14], which according "where the contested conduct of the public authorities is repressive in nature, it is hard to conceive, at least in free democratic societies, that citizens and firms can be condemned on the basis of estimates, approximations or guesses, even if they are informed ones. Uncertainty must then be balanced against the requirements of the presumption of innocence"[15].

Ultimately, the legitimacy of the Commission's actions under antitrust law does not, in our view, derive solely from the presumption of innocence, but more generally from the scope of the Commission's powers and the application of effective

[10] ECtHR, 11 June 2009, nº 5242/04, Dubus (Sté) c/ France.

[11] GC, 8 July2004, JFE Engineering / Commission, T-67/00, T-68/00, T-71/00 et T-78/00, pts. 177.

[12] In 2004, the question was raised before the European Court of Human Rights has to whether a Russian sectorial competition law pertained to the criminal sphere. The Court considered that this proceeding did not fulfill the criteria of a criminal charge on the grounds that it was limited to certain sectors and it aimed at preventing distortions of competition but not at punishing offenders. This reasoning could be transposed to the NCT (ECtHR, 3 June 2004, nº 69042/01, Neste v. Russia App). On this point, see M.-S. Garnier, "The New Competition Tool: A Trojan Horse to win the war against liberty", Competition Forum, 2020, art. nº 0005, https://www.competition-forum.com/.

[13] DGCCRF, Webinar, "The new competition tool: revolution or regulation?" 6 October 2020.

[14] See in particular the contribution to the public consultation from Freshfields Bruckhaus Deringer LLP.

[15] Marc van der Woude, "Judicial Control in Complex Economic Matters", *Journal of European Competition Law & Practice*, Vol. 10, nº 7, September 2019, pp. 415-423.

jurisdictional protection to the parties subject to these proceedings. It is, in this respect, the principle of proportionality that must be invoked.

Articulation with the principle of proportionality

One can ask whether imposing structural remedies on a company that is not in an infringement situation complies with the principle of proportionality of Article 5 TEU. According to this provision, the European Union must not, in the exercise of its powers, go beyond what is strictly necessary to achieve its objectives.

A distinction must be made between the application of this principle to the decisions of the authorities or the Commission and its application to the legislative power.

In the former case, several elements can be considered: the Alrosa case law and the relationship these new tools could have with the commitment procedure based on Article 9 of Regulation 1/2003; and the application of the principle of proportionality. In the second case, French law is a valuable source since the Constitutional Council has twice ruled on the conformity of structural injunctions with French constitutional requirements, namely the right of ownership and the freedom to undertake.

Hybrid tools, between commitments and injunctions?

Will the principle of proportionality apply to injunctions issued by the Authority or the European Commission[16]? Could we draw a parallel with the Alrosa case[17]? As a reminder, the Court of First Instance set aside the Commission's decision because other - less binding solutions than the commitments provided (in this case, a permanent ban on transactions between De Beers and Alrosa) - were possible in order to achieve the aim pursued by the disputed decision.

The Court of Justice therefore annulled the judgment of the Court of First Instance, considering that the European Commission is not subject to the principle of proportionality in the context of the commitment procedure under Article 9 of Regulation 1/2003 (or at least not in the same terms as in the context of Article 7 injunctions). In support of its argument, the Court states, first, that the commitments, within the meaning of Article 9, are intended to ensure an effective application of the competition rules in order to provide a quicker solution to the competition problems it has identified, rather

[16] On this subject, see A. Gautier and N. Petit, "Optimal Enforcement of Competition Policy: The Commitments Procedure under Uncertainty", Université de Liège, *SSRN*, 24 April 2014, pp. 1-36.

[17] EUCJ, 29 June 2010, C-441/07 P, Alrosa.

than acting by way of a formal finding of an infringement, and that the procedure has its own particularities[18]. Consequently, the Commission's obligation to ensure compliance with the principle of proportionality has a different scope and content from the framework of Article 7, which requires the finding of an infringement[19].

The common field of the new tools emerges: it is a question of both speeding up procedures to cope with the speed of change and to not find infringements, since the new tools aim precisely at alleviating structural competition problems that infringement procedures cannot solve (e.g. monopolization strategies by non-dominant companies with significant market power)[20].

Pursuant to the Alrosa case-law, and because the Commission is exempted from the obligation to classify and establish infringement, its role is limited to examining and possibly accepting commitments proposed by the undertakings concerned in the light of the problems it has identified[21]. Judicial review, on the other hand, is limited to the question of whether the Commission's assessment is manifestly wrong[22].

However, other lessons can be learned from this ruling.

First of all, the Court points out that, despite the particularities of article 9, "the principle of proportionality, as a general principle of European Union law, is nonetheless a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority"[23].

Secondly, and still, according to the Court, the lack of proportionality control is explained by the undertakings - which offer commitments on the basis of Article 9 of Regulation nº 1/2003 - consciously accept that concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination.

Moreover, the closure of infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a potential fine[24]. This is not the method envisaged by the European Commission with the *New Competition Tools*. There is a lack of

[18] E. Claudel, "Procédures négociées, accessoires ou alternatives à la sanction en droit de la concurrence : Raison garder !", *Concurrences,* nº 4-2015, pp. 13-39 ; M. Chagny., "Les dix ans de la procédure française d'engagements : engagez vous ! rengagez- vous ?", *AJCA*, 2014, p. 145.
[19] EUCJ, 29 June 2010, C-441/07 P, Alrosa, pt 38.
[20] Inception Impact Assessment, New Competition Tool ('NCT'), COMPA1, Ref. Ares(2020)2877634, 4 June 2020.
[21] EUCJ, 29 June 2010, C-441/07 P, Alrosa, pt 40.
[22] *Ibid.,* pt 42.
[23] *Ibid.,* pt 36.
[24] *Ibid.,* pt 48.

willingness on the part of the company concerned to commit itself.

The new tools would therefore be hybrid instruments: they are similar in nature to injunctions to those in article 7, and are closer in their aims to the objectives of article 9. In this respect, it seems that it would be appropriate to make the requirement of proportionality clear in the wording of the text. However, this would require a very precise identification of competition concerns justifying recourse to the new tool.

In this context, it should be noted that the results of the public consultation show that a majority of respondents recognized that the NCT should include the possibility to accept voluntary commitments from businesses in order to address identified and demonstrated structural competition problems[25].

Other questions remain unanswered. As for complying with injunctions, how can the proportional fine for non-respect be calculated when no anti-competitive behavior has been committed? Finally, what will be the binding force of the targeted remedies? If the remedies have a neutral or negative effect in practice, will changes be made? "*Rendez-vous"* clauses or review clauses, in the event of a change in circumstances, would allow, for example, an extension of time limits, lifting, or modification of remedies. Similarly, for compliance with injunctions, could crown jewels mechanisms, i.e. alternative but more costly remedies for the company, to which it commits if it does not fulfil its initial obligations, be envisaged?

Proportionality of tools with regard to fundamental rights: the contribution of the French Constitutional Council

Regarding to the legislative power of French law can be particularly instructive. Indeed, it seems possible to make a comparison with the structural injunction introduced in France with the Law No. 2015-990 of August 6, 2015, for growth, activity and equal economic opportunity (or "Macron Law"). Recall that its article 39 allowed the Authority to issue a structural injunction "in the event of the existence of a dominant position and the holding by a company or group of companies operating one or more retail stores with a market share of more than 50%", and as soon as the Competition Authority finds excessive concentration in the area under consideration and the existence of high prices or margins practiced by the company.

[25] This is for example the proposal made by Apple and Deliveroo, which fears a loss of legal certainty, a risk of the new instrument overlapping with Articles 101 and 102 TFEU, and according to whom NCT should facilitate the commitments process (Public consultation, Feedback from Apple). See European Commission, Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool, available on this link, p. 24.

The provision, now struck down by the Constitutional Council, has one thing in common with the proposals of the European Commission: both are intended to give the Authority in charge of applying competition law the power to provide remedies in absence of characterized abusive behavior, as soon as the market structure presents an excessive concentration. However, the Constitutional Council rejected the above-mentioned provisions of the Macron Law on the basis of a disproportionate violation of the right to property and the freedom of enterprise[26].

Could these solutions be transposed on a European level? The opportunity to impose obligations for access to non-personal data and requirements for portability of personal data and interoperability in the absence of abusive behavior or even a dominant position may conflict with Articles 16 (freedom to conduct business) and 17 (right of ownership) of the Charter of Fundamental Rights of the European Union.

Everything will depend on its wording, its objectives, and the precision of the standards of control (which include the division of competences between national authorities and the European Commission and the room for maneuver left to States) and its proportionality with the objectives pursued.

Let us recall that the French Constitutional Council analyzes the conformity of a provision with the Constitution according to several criteria inspired by the jurisprudence of the Union judge. The principle of proportionality and the control it authorizes is ternary: any measure restricting a fundamental right must, in order to be proportionate, satisfy a triple requirement: adequacy, necessity and proportionality[27].

First, the measure must be adequate, i.e. appropriate. This presupposes that it is likely to enable or facilitate the achievement of the desired goal.

Second, it must be necessary: it must not exceed, by its nature or by its terms and conditions, what is required to achieve the purpose pursued. The Council then assesses whether other means exist that are appropriate, but which would affect the persons concerned or the community in a less prejudicial manner Thirdly, the measure must be proportionate: it must not, because of the charges it creates, be out of proportion to the result pursued[28]. Moreover, in the area of

[26] French Constitutional Council, 5 August 2015, Decision n° 2015-715 DC, "Loi pour la croissance, l'activité et l'égalité des chances économiques", pt 32.
[27] V. Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel", *Cahiers du Conseil Constitutionnel*, n° 22, June 2017 ; A. Stone Sweet and J. Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach,* Oxford University Press, 2019, 256 p.
[28] *Ibid.*

economic freedoms, and particularly when the freedom of enterprise is at stake, restrictions are subject to a "limited" proportionality check: only infringements manifestly excessive in relation to the goal pursued are sanctioned. The room for maneuver allowed to the legislator is thus greater.

The formulation of the objective pursued is therefore critical. For example, in a major French decision in 1982, the French Constitutional Council ruled that the nationalization of several companies in the banking and industrial sector did not infringe on the freedom of enterprise or the right of ownership[29]. In this case, the goal of the law was broadly defined: to provide public authorities with the means to deal with the economic crisis, to promote growth, and to tackle unemployment, which was a matter of public necessity within the meaning of Article 17 of the Declaration of 1789.

More recently, when the Constitutional Council had to rule on the structural injunctions mentioned above, the objective set was formulated in a much more restricted manner. It was to enable the Competition Authority to issue, under certain conditions and in metropolitan France, structural injunctions requiring the modification of agreements or the sale of assets of a company or group of companies in the event of a dominant position and the holding of a market share of more than 50% by this company or group of companies operating one or more retail stores. According to the requesters - whose request prospered - this legislation infringed on the freedom to undertake, the principle of legality of offenses and penalties, and the objective of accessibility and intelligibility of the law[30].

The French Constitutional Council responded to these arguments in the following way: first of all, it recalls that the ultimate aim is to preserve public economic order and consumer protection[31]. However, the judges considered that the legislation in question was contrary to the freedom to conduct business for two reasons.

First, because the contested provisions could lead to the questioning of prices or margins practiced by the enterprise, or even to the obligation to modify, supplement or terminate agreements or acts, or to transfer assets, even though the dominant position of the enterprise or group of enterprises may have been acquired on the merits and no abuse was found.

[29] French Constitutional Council, 16 January 1982, Decision n° 81-132 DC, "Loi de nationalisation".

[30] French Constitutional Council, 5 August 2015, Decision n° 2015-715 DC, "Loi pour la croissance, l'activité et l'égalité des chances économiques", pt 29.

[31] *Ibid.,* pt 32.

Secondly, because the contested provisions applied throughout the territory of metropolitan France and to the entire retail sector, whereas the legislator's goal was to remedy specific situations in the food retail sector alone.

Lessons can be learned from this decision. First, the absence of an abuse of a dominant position may give rise to mistrust of fundamental rights. Secondly, the scope of the text, both geographically (the entire metropolitan territory) and by sectors (the entire retail sector) is particularly important. Following the constitutional logic, it is delicate, in order to respond to a specific problem, to put in place general solutions.

Another decision of the French Constitutional Council confirms these elements. In 2013, the Council validated such an injunction in the case of New Caledonia. The objective, more clearly defined, was "correcting or putting an end to the agreements and acts by which a situation of economic power was created that allowed for practices of high prices or margins"[32]. To this end, the text allows for structural injunctions to be issued against companies in the event of a dominant position. The Government of New Caledonia may notify its competition concerns and if there is no commitments proposed by the company or if these commitments are not likely to end to the competition concerns, the government may enjoin modification, completion or termination of all agreements and all acts by which the economic power has been constituted.

However, this text is very different from the one submitted to the Constitutional Council in 2015. First of all, the procedure requires, upstream, to solicit commitments. The structural injunction can therefore only be used as a last resort and after trying to find a solution based on the will of the companies involved. Secondly, its scope is limited geographically (the territory of New Caledonia), and materially, since the injunction relates only to "acts by which the economic power was constituted". Consequently, the Council considered that the measure did not disproportionately infringe on the freedom of enterprise[33].

To date, the exact wording of the purpose of the new tools is not yet known. We know that the objectives are as follows: "The general objective of this initiative is to ensure fair and undistorted competition in the internal market. In order to achieve this general objective, the initiative intends to address as specific objectives the structural competition

[32] French Constitutional Council, 3 May 2013, Decision n° 2013-3 LP, "Loi du pays relative à la concurrence en Nouvelle-Calédonie".

[33] *Ibid.,* pt 15.

problems that prevent markets from functioning properly and tilt the level playing field in favor of only a few market players"[34]. Therefore, it remains too early to conclude that such a tool could be questioned. Nonetheless, if we take French constitutional case law as a fulcrum, the choice of the option (horizontal for example) would be more likely to pose a problem than the more restricted option consisting of targeting only one market.

It will depend on three elements: first, the scope of the tools - and therefore the option chosen - then, the formulation of the objectives pursued by the tools, and, finally (and above all) on the standard of activation of those tools and rights of the parties.

Thereon, European Commission public consultation shows encouraging results: First, a majority of respondents approved the possibility for the parties to an investigation to comment on the desirability and proportionality of the remedies envisaged (112 respondents answered yes and 13 no). Secondly, some respondents explained that the parties concerned should also be able to comment on the effectiveness and the adequacy of the envisaged solution to resolve the structural competition problems identified. Third, some respondents proposed that external experts should be involved[35].

Regarding standard of activation, we know that DG Competition works in close collaboration with the British authority, which is familiar with similar tools through "market studies" and "market investigations"[36]. The purpose here is not to detail all of the rules in place in the UK. Let us recall that two procedures coexist: studies and market investigations. These procedures are accompanied by several texts, the main ones being as follows: Market investigations references (OFT511)[37]; Market studies (OFT519)[38], Market Studies and Market investigations: supplemented guidance on the CMA's approach (CMA3, January 2014, revised in July 2017)[39].

Regarding market investigations, pursuant to Section 131 (1) of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013, the Market Authority of

---

[34] Inception Impact Assessment, New Competition Tool ('NCT'), COMPA1, Ref. Ares(2020)2877634 - 04/06/2020.

[35] European Commission, Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool, available on this link, p. 24.

[36] P. Freeman, "UK Merger Control, Where Do We Stand", 9, *Competititon L. J.*, 26, 2010 ; D. G. Goyder, "Public Control of Mergers", *The Modern Law Review*, Vol. 28, 6, November 1965, pp. 654-674 ; M. Krakowski, "The requirements for EC merger control", Intereconomics 24, pp. 120–126, 1989 ; D. Brault, "Current Developments in Competition Policies", 22, *Antitrust Bulletin*, 157, 1977 ; L. Idot, "Le contrôle des concentrations", *Revue internationale de droit économique,* 2002/2, t. XVI, pp. 175-205.

[37] See OFT511 - Market investigation references.

[38] See OFT519 - Market studies.

[39] See Market Studies and Market Investigations: Supplemental guidance on the CMA's approach.

Competition may initiate a market investigation if it has reasonable grounds to suspect that a characteristic, or a combination of the characteristics, of a UK market for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any good or service in the United Kingdom or part of the United Kingdom. However, a referral cannot be made by the OFT when an engagement has been accepted instead of a referral or when a ministerial referral on the same subject has been made but not determined by the CC"[40].

This may relate in particular to the structure of the market, any behavior of one or more persons who supply or acquire goods or services in the market concerned. In order to complete its analysis and its decision to open a market investigation and possibly impose injunctions, the authority can first undertake a "market study" ending with a decision to open a market inquiry. Thus, a market inquiry is one of the possible outcomes of a market study.

Without going into detail[41] - what we will do in part III - on the different methods of these inquiries, it should be noted that they are subject to special supervision of duration (a market investigation must be completed and the report published within 18 months of the date of reference), of the nature of concerns (cases raising public interest considerations and cross-market references), in terms of procedures and investigative powers or even on the subject of the nature of the injunctions that may be imposed by the CMA. Thereupon, we need to examine efficiency and economic relevance of the tools proposed by the two consultations.

II. Could these new instruments be efficient?

The Commission's two consultations raise several issues in the economic field. They concern the link between a dominant position, an abuse of this one, and its sanction, the notion of structural failure, the practicability of competition on platform markets, and eventually the dividing line between sector specific regulation and the enforcement of competition rules.

Per se dominance sanctions and economic efficiency concerns

The first issue relates to the disjunction between the characterization of an abuse of a dominant position and the competitive sanction. The acquisition or maintenance of a dominant position is not sanctioned in itself.

[40] For a detailed analysis of UK Market Investigations and its relationship with NCTs, see A. Fletcher, Market Investigations for Digital Platforms: Panacea or Complement? *CCP Working Paper* 20-06.

[41] A. Fletcher A., *ibid.*

Competition law only has to sanction practices that lead to the acquisition of such positions on a basis other than the merits. There is a risk of hindering practices that generate efficiency or undermining a market structure that benefits consumers (e.g. in case of increasing returns to scale as is often the case in digital markets). Economic analysis applied to competition rules then requires considering the inherent trade-offs between short and long-term efficiency.

The proposal for an ex-ante regulatory framework within the Digital Services Act package reflects in the presentation of its "context" the consideration of dimensions that go beyond economic efficiency, such as fairness, market access, innovation but also public policy objectives that go beyond competition or economic considerations.

The Commission's proposals are part of a wider debate on the competitive treatment of issues that are not those of absolute but relative market power. The issue here is the legitimacy of competition rules to address contractual imbalances. Since the latter ones have an impact on the dependent firms' capacity to invest and innovate, the effect of possible distortions is not limited to a question of surplus sharing but concerns the very efficiency of the market process. The damage is not limited to one trading partner but becomes a damage to the economy.

It is also worth considering whether this approach can be reconciled with the effects-based one promoted for now fifteen years by the Commission and which is applied for more than for decades in the United States[42]. The underlying issue relates to the definition of the relevant market. Targeting particular ecosystems implies simultaneously capturing them on several relevant markets and, if necessary, having regulation focus on markets where a dominant position has not yet been acquired. Prohibitions per se are also consistent with a rules-based competition policy; they are not consistent with the application of a rule of reason based on a balance of effects.

The notion of market structural failure

The second question is related to the notion of market structural failure. The proposed tools may revive the debate on non-fault monopoly. It is indeed worth noting that in the different scenarios presented in the consultation on the new competition tool, two notions already at the center of the antitrust debates fifty years ago are present. First of all, the issue of the appropriateness of requiring structural remedies from companies

[42] The Judiciary Committee report related to the inquiry of competition in digital markets is all the more important that it could announce a major shift in US Antitrust laws enforcement. However, such proposals remain conditioned to their endorsement by the Supreme Court.

that owe their dominant positions solely to their merits as soon as the market does not appear as longer contestable. It is then an issue of questioning the possibility and the relevancy of intervening to counteract the natural tendency of certain markets to tilt towards ultra-dominance even if this convergence takes place based on the merits and even if the measures are taken against companies not yet in a dominant position.

This echoes the American debates of the 1970s. The prevailing concerns at the time focused on the concentration of economic power. They are instructive to compare with our current ones. In 1968, the Neal Report was published which, among other things, proposed measures to deconcentrate US industry[43]. This report was at odds with the approach of the 2nd Chicago School which was to become dominant in the late 1970s[44]. It kicked off a decade described by Harry First of Woodstock Antitrust[45].

At the core of the concerns was the question of sanctioning no-fault monopolization (or no-conduct monopolization). If a firm is in a position to have a position of ultra-dominance on a durable basis without this position being eroded by its competitors, this is a structural market failure which must be corrected by the competition rules, even if this market position only stems from the firm's past merits in the sense of the Supreme Court's Grinnell jurisprudence[46].

Against this background, the concept of no-fault monopoly was the subject of a proposal to incorporate it into the Sherman Act in the form of a section 2A specifying that "every person who is found in a government proceeding to possess monopoly power in any relevant market would be subject to an appropriate remedy[47]".

The arguments that were put forward at that time were very similar to those we know today. Even without a monopolization strategy sanctioned through Section 2 of the Sherman Act, industries appeared increasingly concentrated and this concentration was seen as collectively detrimental in terms of prices and innovations incentives. Even before the case law turning point at the end of the 1970s, such monopolies, which stemmed from the structures of the market, could not be sanctioned under conventional antitrust

[43] H. Hovenkamp, "The 1968 Neal Report: An Introduction and Reprint", *CPI Journal, Competition Policy International*, vol. 5, 2009.
[44] P. Bougette, M. Deschamps and F. Marty, (2015), "When Economics met Antitrust: The Second Chicago School and the Economization of Antitrust Law", *Enterprise and Society*, vol. 16, iss. 2, June 2015, pp. 313-353.
[45] H. First (2018), "Woodstock Antitrust", *CPI Antitrust Chronicle*, April 2018.
[46] O. Williamson, (1972), "Dominant Firms and the Monopoly Problem: Market Failure Considerations", *Harvard L. Rev.*, Vol. 85, p. 1512.
[47] K. Hart K. (1980), "Comments on the proposal of professor John J. Flynn on no-fault monopoly", *Antitrust L. J.,* 48(3), pp. 897-905.

procedures. Hence, the proposal to base the illegality of the situation on the length of time the dominant position has been held, as an indication of the inability of market forces alone to overturn it[48].

These debates disappeared with the Chicago turn of antitrust in the late 1970s. However, some of their characteristics can be considered in order to put the current proposals into perspective. First, the justifications put forward for these proposals made reference to the significant inter-firm contractual imbalances that resulted from these structural failures. Secondly, the procedure proposed is similar to the one envisaged under the new European competition tool. In John Flynn's proposals cited above, a procedure based on the possible section 2A of the Sherman Act was not to be accompanied by financial fines and characterization of an infringement to the Sherman Act likely to encourage follow-up actions for compensation. The same approach prevails in Option 1 of the new competition instrument: the Commission would not characterize an infringement to the EU competition rules, would not impose fines, and then would not favor civil actions.

More broadly, what prospects and insights are possible for reflection in the European Law? The debate of the 1970s regarding the issue of the concentration of market power echoes the current one related to Big Tech. The validity of no-fault monopoly approach is considered in the US legal literature[49] and the Judiciary Committee report proposes to add a Section 2A to the Sherman Act as it was also the case during this *Woodstock Antitrust era* : "Strengthening Section 2 of the Sherman Act, including by introducing a prohibition on abuse of dominance and clarifying prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying, and anticompetitive self-preferencing and product design[50]".

The analysis of the responses to the consultation initiated by the Commission suggests that the recommendations put forward are in line with a differentiated treatment between markets that have already moved towards a situation of possibly irreversible ultra-dominance (markets where harm has already affected the market) and markets that are likely to experience this evolution (markets where harm is about to affect the market).

The contribution of Gregory Crawford, Patrick Rey and Monika Schnitzer, members of the Economic Advisory Group on

[48] F. Turner, (1969), "The Scope of Antitrust and other Regulatory Policies", *Harvard L. Rev.*, 82, p. 1207 et s.
[49] R. H. Lande and R. O. Zerbe (2020), "The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration", *American University Law Review*, Vol. 70 (forthcoming).
[50] Judiciary Committee (2020), *op. cit.*, p.21.

Competition Policy (EAGCP) set up within DG Competition, is particularly instructive[51]. They propose a differentiated treatment according to the effectiveness of this tipping mechanism.

A broad design of the NCT should prevail in markets for which tipping is already effective and which are facing a situation of structural lack of competition that renders it impossible to achieve a competitive equilibrium. In this situation, Crawford et al. recommend the implementation of a tool with some of the characteristics of the British Market Investigations that we will present below.

For markets that have not moved towards a situation of potentially irreversible structural dominance, Crawford et al. recommend strengthening the tools available to competition authorities[52]. This reinforcement could take the following forms: a lowering of the thresholds enabling investigations to be triggered, increased control of keystone diversification strategies that could have offensive (extending dominance to related markets) or defensive (taking control of related markets to protect one's core business from potential entry) characteristics, and finally the implementation of competitive remedies likely to preserve competition in the market.

Such remedies could include, for example, prohibiting restrictions on the multi-homing of various ecosystem members, lowering the swiching costs related to ecosystem shifts, etc. We shall see below that the implementation of these remedies to preserve competition between ecosystems can take a quasi-regulatory form.

At this stage, a double arbitration can therefore be drawn up. The first trade-off concerns the respective perimeters of the tools related to a competition logic (ex post sanction of a behaviour) and those that could be envisaged in a regulatory logic. The second trade-off is a differentiation of intervention between markets where competition is still effective and those that have already moved towards a situation of ultra-dominance. In one case, the aim is to preserve competition in the market; in the other, to ensure that

[51] G.S. Crawford, P. Rey and M. Schnitzer, (2020) "An Economic Evaluation of the EC's Proposed 'New Competition Tool", Economic Advisory Group on Competition Policy, DG Comp, October 2020.

[52] A same perspective can be underlined in the report co-authored by Massimo Motta and Martin Peitz. They advocated for the implementation of the NCT as a way to fill the gap between conventional antitrust procedures and sector-specific regulatory schemes. According to them "an NCT investigation should identify what are the mechanisms which lock competition in the market and hence what are the interventions which should possibly neutralize those mechanisms and unlock competition. Whatever the theory of harm that may justify a NCT investigation, in order to address consumer harm in a meaningful way, the EC must have the power to implement suitable remedies". M. Motta and M. Peitz, *Intervention triggers and underlying theories of harm,* Expert advice for the Impact Assessment of a New Competition Tool, DG Comp. European Commission, October.

competition for the market remains possible[53].

III - Perspectives

The purpose of this section is to outline some perspectives while awaiting the communication by the European Commission of the conclusions of its consultations in the course of December 2020. NCTs induce two evolutions: the first concerns the objectives of competition law and the second concerns the line between competition laws enforcement and market regulation. Taking into account this important change in competition law, national laws can be used to enrich policy discussions.

A practicable competition in digital markets : which goals for Competition Law ?

A first question relates to the goals of competition law as such. Should the goal be to achieve an outcome (efficiency) or to secure a process? In the second case, dominance must be avoided or corrected whatever the cost. This was the argument of the pre-war University of Chicago liberals (Frank Knight, Henry Simons...) and that of the ordoliberals[54]. A market in the wake of a tipping point can be efficient from the economic point of view. This is the very consequence of increasing returns to scale. Marco Iansiti and Karim Lakhani in a recent book have shown how the development model of large ecosystems makes it possible to obtain such increasing returns in contrast to the economic models of the actors of the "traditional" economy[55]. As well as efficiency, the data collection, generation, and processing capabilities enable them to deliver ever-increasing performance in predicting customer needs and market trends, and an unprecedented ability in economic history to make rapidly evolve the boundaries of different "relevant" markets. The analysis by Iansiti and Lakhani therefore places the emphasis on the notion of *collision*, which may call into question the ability of third-party operators to compete with these platforms, even if only on their own merits.

Such capabilities therefore pose problems both in terms of inter-platforms and intra-platform competition. The competition within the platform itself is a legitimate competitive concern. The keystone player determines the rules of the game for the companies that operate on the platform and create value there, but at the same time, the keystone operator can be a competitor of its

[53] N. Petit, *Big Tech and the Digital Economy – The Molygopoly Scenario,* Oxford University Press, 2020, p. 175.
[54] P. Bougette et al., (2015), *op. cit.*
[55] M. Iansiti and K. Lakhani, (2020), *Competing in the Age of AI: Strategy and Leadership When Algorithms and Networks Run the World*, Harvard University Press, 2020.

own "complementors" and generate distortions for its own benefit. This dual role calls into question the freedom of access to the market and the objective of a level playing field. It may therefore call for the regulation of intra-platform relations to control the way in which the pivotal firm exploits its economic and technical power vis-à-vis its complementors[56].

However, the very scope of the regulation and its objectives must be questioned in view of the diversity of the companies concerned, both in terms of technical aspects and business models[57]. To echo the conclusions of Caffarra et al., ecosystems whose financing is based on the sale of equipment (Apple) or software licenses (Microsoft) may have different strategies from those of aggregators competing in the attention market (Facebook or Google). These differences can be observed notably with regard to their ability to appropriate the value created for and by the users (both consumers and complementors). The first platforms mentioned (Apple, Amazon and Microsoft) can in part internalize this "externality" through prices. The second ones (Google or Facebook) cannot do it as easily. They can enhance their value through the advertising market. The issues for competition laws as well as for consumer laws can be very specific from one platform to another and call for specific regulatory supervision differentiated for each of the platforms concerned, which is further away from the antitrust model.

In search of a dividing line between competition laws enforcement and market regulation

Apart from the fundamental question of the possible redefinition of the goals of European competition law[58], this also questions the

[56] C. Caffarra, F. Etro, O. Latham and F. Scott Morton, (2020), "Designing regulation for digital platforms: Why economists need to work on business models", Vox – *CEPR Policy Portal*, June 2020.

[57] D. S. Evans, "Competition and Regulatory Policy for Multi-sided Platforms with Applications to the Web Economy", *Concurrences*, n° 2-2008, pp. 57-62; "The Economics of the Online Advertising Industry", *Rev. of Network Economics*, vol. 7, iss. 3, sept. 2008, pp. 359-391; "The Antitrust Economics of Free", *CPI,* vol. 7, n° 1, 2011, pp. 71-89 ; M. Armstrong, "Competition in Two-Sided Markets", *The RAND J. of Economics*, vol. 37, n° 3, 2006, pp. 668-691 ; F. Bien, T. K. Cheng, A.-S. Choné-Grimaldi and E. Claudel, "Les plateformes d'intermédiation" in *L'application du droit de la concurrence au secteur numérique*, Nanterre, 17 November 2016, *Concurrences*, n° 2-2017, pp. 44-63. On this diversity of models and roles played in the economy, see, for example, EUCJ, 20 December 2017, C 434/15, Asociacion Profesional Elite Taxi c/ Uber Systems Spain SL.

[58] M. E. Stucke, "Should Competition Policy Promote Happiness. How Digital Assistants Can Harm Our Economy, Privacy, and Democracy", *81 Fordham L. Rev.* 2575, 2012-2013. More broadly, see H. First, "Antitrust's Democracy Deficit", *Fordham L. Rev*, vol. 81, 2012-2013, pp. 2543- 2574 ; J. F. Brodley, "The Economic Goals of Antitrust : Efficiency, Consumer Welfare, and Technological Progress", *New York University L. Rev.*, vol. 62, 1987, pp. 1020-1053 ; D. W. Carlton, "Does Antitrust Need to Be Modernized ?", *J. of Economic Perspectives*, vol. 21, no 3, 2007, pp. 155-176 ; K. J. Cseres, "The Controversies of the Consumer Welfare Standard", *The Competition L. Rev.*, vol. 3 iss. 2, mars 2007, pp. 121-173 : J. Drexl, "Real Knowledge is to Know the Extent of One's Own Ignorance : On the Consumer Harm Approach in Innovation-Related Competition Cases", *Antitrust L. J.,* vol. 76, 2010, pp. 677-708. In France, for example, recently, the French Competition Authority made several explicit references to the "functioning of a democratic society" in the context of the analysis of the serious and immediate attack on the sector (in

articulation between competition law and regulatory law. Until now, it has been accepted that competition law is distinct from regulatory law.

These two bodies of rules have indeed diverse and evolving objectives that do not merge. Competition authorities carry out a general ex-post and discontinuous market surveillance activity, assessing compliance of certain practices with the maintenance of the competition process. Regulatory authorities are in charge of ex-ante and continuous monitoring in an identified sector[59].

However, it has been said that when the European Commission explicitly proposes tools to regulate major online platforms, it calls into question the universal scope of competition law[60] (option 3b of the consultation relating to the creation of a new tool for the ex-ante regulation of major online platforms and options 2 and 4 of the proposal relating to the creation of a new tool in competition law), not without recalling the notion of "crucial operator" highlighted in regulatory law[61].

In many ways, the implementation of these market investigations, whether they are general in scope or more restricted by targeting only digital platforms, induces a profound change of paradigm and philosophy in competition law. From this point of view, a horizontal tool would be preferable to a tool limited to the digital sector or to certain platforms. The European Commission could, in this respect, be more explicit and choose the option of regulation. Regardless the choice, the standard wording would be clear and well defined.

terms of protective measures). See French Competition Authority, 9 April 2020, Decision 20-MC-01, "relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse" (pt. 272). For others, in the digital economy, we must protect consumer autonomy. On this concept, see W. Averitt et R. H. Lande, "Consumer Sovereignty : a Unified Theory of Antitrust and Consumer Protection Law", *Antitrust L. J.,* vol. 65, 1997, p. 715 ; P. Behrens, "The Consumer Choice Paradigm in German Ordoliberalism and its Impact on EU Competition Law", in P. Nihoul, N. Charbit et E. Ramundo, *Choice – A New Standard for Competition Law Analysis ?*, Concurrences, 2016*,* pp. 123-152 ; M. E. Stucke, "When More is Better and When Less is More : Behavioral Antitrust and Choice", in P. Nihoul, N. Charbit et E. Ramundo, *Choice – A New Standard for Competition Law Analysis ?*, Concurrences, 2016*,* pp. 283-302 ; M. Cartapanis, *Innovation et droit de la concurrence,* LGDJ, 2017, (préf. D. Bosco), 510 p., in particular, pts. 464-470. More recently and for a legal consecration see P. Marsden, R. Podszun, "Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement", 2020, available at this link.

[59] Based on the dissent of Justice Scalia in Eastman Kodak (Eastman Kodak Co. v Image Technical, Servs Inc, 504 US 541, 1992), Nicolas Petit highlights "Placing industries under permanent Government supervision is alien to the 'discrete' nature of antitrust enforcement", N. Petit, *op. cit.*, p.175.

[60] P. Choné, "Droit de la concurrence et régulation sectorielle. Entre *ex ante* et *ex post"*, in M.-A. Frison-Roche, *Les engagements dans les systèmes de régulation,* Dalloz, 2006, pp. 49-72.

[61] M.-A. Frison-Roche, "L'apport de la notion d'entreprise cruciale à la régulation des plateformes", in *Économie de plateformes : réguler un domaine dominant ?*, Telecom-Paris Tech, 23 oct. 2014, *Concurrences*, nº 2-2015, p. 2.

Opting for regulation?

Opting for regulation implies targeting specific ecosystems and, in this case, specific companies. It is rather particular companies that would be regulated than sectors of activity. Not only would the companies concerned face specific and asymmetrical regulation, but the question would also arise as to who should be the regulator. Several dimensions could be distinguished.

A European regulator could guarantee equal treatment from one member state to another, but non-economic regulatory issues, such as the defense of pluralism, remain the responsibility of the member states. In the same way, should regulation be the responsibility of a vertical regulatory authority or a competition authority? The German proposals move towards the second option and the report of the Economic Affairs Committee of the French National Assembly towards the first.

Indeed, two options are available. The first is a regulation prohibiting per se certain practices by the companies concerned. The second is a more competition-law based procedure, which reverses the burden of proof as proposed in the Crémer, de Montjoye and Schweitzer report[62] and requires firms to objectively justify their practices[63]. The procedure envisaged in Germany therefore differs from the European proposals. Potentially implemented by the Bundeskartellamt, it would consist first in identifying market power (be it absolute, relative, collective or systemic) and then deriving obligations on an individual basis in order to prevent the abusive exploitation of this power. In view of the specificities of each ecosystem, this procedure could, in the words of Oliver Budzinski and his co-authors, be better adapted to the dynamics of digital markets than a one-size-fits-all regulation.

Furthermore, the question of the economic cost of regulation must be raised. The informational investment required by the regulator will be significant because of the very opacity of ecosystem functioning, and asymmetric regulation can be the subject of influence strategies by the various stakeholders.

Several avenues of reflection can indeed be explored with regard to the perspectives that are opened up in terms of the management of digital markets.

A first question may relate to the adequacy of the competition tool to meet the challenges

[62] J. Crémer, Y.-A. de Montjoye and H. Schweitzer, (2019), *Competition Policy for the Digital Era*, Report of the DG Competition.

[63] Budzinski et al., (2020), *op. cit.*

raised by the concentration of such economic power. The case of algorithmic biases or the case of filter bubbles in information matters does indeed stem from the concentration of economic power and the locking up of users in one of the silos constituted by ecosystems[64]. However, deconcentration measures are obviously not an adequate remedy and it is not certain that economic regulation can effectively tackle these problems.

A second issue relates to the trade-off between sector-specific regulation and the enforcement of competition rules. The two options would not be considered as equivalent.

Indeed, whether in European or American cases, sectoral regulation and the application of competition rules cannot be considered as substitutable. Regulation differs from competition-law enforcement in several ways. It intervenes not only through ex-ante requirements but also through day-to-day behavioral monitoring. Moreover, it is specialized (whereas the application of competition rules must be identical whatever the sector of activity concerned) and it can be asymmetrical. Of course, the dominant operator is subject to a specific liability, but this creates limitations on its freedom of behavior and does not target its market position. Finally, regulation has broader objectives than competition-laws implementation: it can aim to rebalance the bargaining positions of the various market players and it can also have an effect on the sharing of the economic surplus among them.

The position of the Supreme Court in the Trinko decision in 2004 reflected this very logic: granting access to an essential asset to a competitor makes sense in the field of sector regulation, but not in the antitrust sphere[65]. This position - at the very least opposed to that adopted by the European Union's competition law - belongs to a conception in which Antitrust only targets market practices that hinder allocative efficiency. Under no circumstances is it a question of dealing with the sharing of the rent between the actors. As Richard Posner indicated in 1969, antitrust is not an alternative to regulation in that it has nothing to say about the level of profitability of dominant firms[66]. However, the regulator acts within an imperfect informational framework and can be captured. Posner's recommendation for a cautious approach to the use of regulation follows[67], in particular through a question that has a very particular resonance with respect to our problem: is it

[64] M. Vestager, (2020), "Algorithms and democracy" – *Algorithm Watch Online Policy Dialogue*, 30 October 2020.
[65] Verizon v. Law Offices of Curtis V. *Trinko*, LLP, 540 U.S. 398 (2004).
[66] R. A. Posner, (1969), "Oligopoly and the Antitrust Laws: A Suggested Approach", *Stanford L. Rev.*, 21, pp. 1562-1597.
[67] R. A. Posner, (1969), "Natural Monopoly and its Regulation: A Reply", *Stanford L. Rev.*, 22, pp. 540-546.

possible to create competition in certain markets? Would it not be more effective to promote competition for the market?

We find here the issues of digital ecosystems. The competition within the ecosystem is illusory with regard to the position of their respective keystone players. Should we regulate the functioning of ecosystems, which implies "regulating" the contracts between the different stakeholders in order to rebalance the contractual balance of power? Would it not be better to promote competition between ecosystems, i.e. competition for the market? In such an endeavor, intervention would not really take the form of asymmetrical regulation of competition (or more precisely of the coopetition) in ecosystems, but of rules set out ex-ante to lessen the lock-in effects between ecosystems (data portability, interoperability, reduction of switching costs, the examination of exclusivity clauses, etc.).

A third issue relies on the possible weakening of competition rules. The marginalization of criteria and rules that can lead to under-enforcement are not bad things in themselves. Per se rules can also strengthen the legal security of firms. However, crafting such rules requires making economic trade-offs ex-ante. It implies to accept risks and to renounce potential efficiency gains. These risks have to be weighed against the costs associated with competition law enforcement. What could be the social cost to renounce to assess a market practice through an ex-post balance of the effects associated with the practice? If the cost is potentially a durable monopoly perhaps, should we accept such an approach in which the cost of false negative is seen as higher than the cost associated with false positives? On the contrary, if markets remain contestable from the economic point of view, it can be excessively costly in terms of welfare and can have a chilling effect on competition. In the same way, and especially in the context of the proposals made by the US Judiciary Committee report, how can we reconcile the necessary understanding of the competitive issues at the level of an ecosystem as a whole with the necessary guarantees associated to antitrust litigation, which are primarily based on a definition of the relevant market?

As we can observe, the economic issues underlying regulation are vast. The same is true from the point of view of the definition of the norm.

Legal standard?

The tools proposed by the European Commission, regardless of the option chosen, imply delimiting their scope. Nevertheless, the ex-ante approach also raises questions about the normativity of the proposed rules.

The option of applying the new tools to certain sectors or companies raises the question of their definition, i.e. the concept referred to. What will be the criteria for qualifying "digital"? Alternatively, what is referred to, at this stage, as "large online platforms"? In order to consider elements of a response, one may turn to the proposals formulated by the French Competition Authority and its conception of "structuring platforms"[68].

In this respect, it should be recalled that the French Authority considers three necessary conditions for this qualification: the firm provides online intermediation services with a view to exchange, buy or sell goods, content, or services; the firm holds a structuring market power due to the importance of its size, its financial capacity, its community of users and/or the data it holds, and which enables it to control access or significantly affect the functioning of the market(s) in which it operates; this power is held with respect to its competitors, its users and/or third-party companies depending on access to the services it offers for their economic activity. The European Commission emphasized elements very similar to those highlighted by the French analysis. These are network effects, the size of the user base and/or the ability to exploit data across markets, market power, and the connectedness of economic activities.

In addition to the problem of definition, it is the normativity of the rules that is questioned. As has been said, NCTs involve a profound change in the philosophy of competition law, more preventive, which in some respects had already been debated during the implementation of merger control[69]. The concerns were close to the current concerns: it is a question of establishing a preventive law[70]. However, the tools proposed by the Commission give rise, as they stand, to questions as to their normativity.

Competition law comes here to organize the market to correct its imbalances without infringement. This evolution had been initiated, to a lesser extent, with the antitrust commitment procedure. The undertakings procedure presupposes an intervention before any sanction (and ideally in the absence of any sanction) but the remedy is fixed, at least in theory, bilaterally[71]. The tools envisaged by the Commission in the text

[68] French Competition Authority, Contribution to the debate on competition policy and digital issues, 20 February 2020, available on this link. See, on this subject, A. Bamberger and O. Lobel, "Platform Market Power", *Berkeley Tech. L. J.,* 32, 1051, 2017.

[69] It was after seventeen years of discussions that the Community regulation on the control of merger operations between undertakings, which was finally adopted by the Council in December 1989.

[70] See G. Stigler, "Mergers and Preventive Antitrust Policy", *University of Pennsylvania Law Review*, vol. 104, nº 2, November 1955, pp. 176-184; N. Petit, "Digital Markets and the Incipiency Attitude in EU Antitrust Law", *Le Concurrentialiste*, 30 September 2020.

[71] On this point, see F. Marty and M. Mezaguer, "Quelles garanties pour la procédure d'engagements en droit de la concurrence de l'Union européenne ?", *Revue internationale de droit économique*, 2016/1 (t. XXX),

commented on here provide the power to intervene, both before and without any sanctions, but also in a perfectly unilateral manner. In this way, competition law is oriented towards regulatory law.

But evolution goes even further. The Commission's proposals bring about a development that already triggered heated debate when merger control was adopted, which is not based on the finding of an infringement either. However, it should be noted that even in this case, the application of competition law is conditional on a voluntary act to trigger the rule, i.e. a merger (companies exceeding the thresholds must notify their operation)[72]. This brings us back to the question of the effectiveness of such tools: the effectiveness of a standard depends either on the conformity of behaviors followed by its addressees or on the sanction pronounced against those disrespecting the rule[73].

However, the normative character could be lacking: how to ensure the effectiveness of a standard not fixing upstream *what must be* (here the behavior its addresses must respect)? Despite the diverging interpretations of the anti-competitive effects of competition practices, Articles 101 and 102 TFEU have a normative character. Companies know in advance that they must not abuse their dominant position, and are aware that an abuse can be heavily sanctioned by a monetary fine and injunctions. Similarly, under Article 101 TFEU, they are aware that markets must not be agreed upon, failing which the company is liable to a penalty. But what is the prohibited behavior in the case of NCTs?

It is not a question of requesting authorization (as in merger law), nor of finding an infringement (as in the antitrust law). For example, UK Market Investigations are not intended to capture behaviors, but to tackle any and all 'features' of markets which are found to adversely affect competition. The term is very broad. These characteristics conceal a wide range of possibilities: company behavior, market structure, the presence of network effects, an increase in prices, freedom of choice, "winner takes all" effect, bottlenecks…

For no lawful conduct has been fixed in advance: what may pose competition

p. 55-89. DOI : 10.3917/ride.301.0055, and M. Mezaguer, *Les procédures transactionnelles en droit antitrust de l'Union européenne. Un exercice transactionnel de l'autorité publique*, Bruylant, 2015, 584 p.

[72] In this sense, the contribution of the cabinet Vogel & Vogel during the public consultation.

[73] On this point, see, L. Kaplow, "Rules versus Standards : an Economic Analysis", *Duke L. J.*, vol. 42, nº 3, December 1992, p. 560 ; R. M. Dorkwin, "The Model of Rules", *Yale L. School*, Paper no 3609, 1967, pp. 14-46, and more broadly, Hans Kelsen, *Reine Rechtslehre (Théorie pure du droit)*, Paris, Dalloz, 1962, p. 15 ; H. Hart, *The Concept of Law*, Presses de l'Université Saint-Louis, 1961 ; Jean Carbonnier, "Effectivité et ineffectivité de la règle de droit", *L'Année sociologique*, LVII, 1958, p. 3. see, also, ECJ, 31 March 1971, C-22/70, *Commission c/ Conseil*, pt 42.

problems on one market will not pose any on another market or in another context. This means, therefore, that no conduct has deviated from what economic public order required. How could it be otherwise? There is no wrongful behavior, since the new instruments aim to prevent damage to the economy. And that's what's at stake.

Otherwise, these instruments would lose sight of their purpose. It is therefore a question of striking a subtle balance between the normativity of the rule and the prevention of damage to the economy. This question, admittedly theoretical in some respects, shows that the paradigm shift here is very profound.

One can approve or oppose this approach. The objective of the European Commission is, in our opinion, perfectly commendable.

There is today a quasi-consensus on the need to rebalance power in markets linked to online intermediation platforms. Given the major stakes involved in these markets, is competition law best placed, and is it sufficient to pursue this objective?[74] We must recognize that these two reform projects call into question the permeability of boundaries between competition law and regulatory law.

Are these two methods of market intervention incompatible? In our opinion, not necessarily, but they are not substitute. Apart from the formal and temporal distinctions, it is essential to remember that the decision to regulate a sector must be taken by the legislator, as part of a democratic debate, and not by the European Commission alone, using "complex economic analyses". Positive national law can provide valuable insights.

Considerations on the field of current national law

On the one hand, British law is a direct source of inspiration. French law, on the other hand, could indirectly but usefully contribute to the debate.

British experience of Market Investigation

We can, first, drawing a parallel between the British experience of Market Investigations and the EU Commission proposals regarding the Digital Services Act and the New Competition Tool.

In a recent speech, Mrs. Vestager indicated that the Commission's program will be based

[74] For a more general answer, see in particular, P. Marsden, R. Podszun, "Restoring Balance to Digital Competition - Sensible Rules, Effective Enforcement", available at this link ; F. H. Easterbrook, "The Limits of Antitrust", 63 *Tex. L. Rev.,* 1, 1984 ; A. Ezrachi, "Sponge", 5, *J. Antitrust Enforc.* 49, 2017 ; J.-C. Roda, "Réflexions sur les objectifs du droit français de la concurrence", *D.*, 2018, 1504.

on two pillars: ex ante regulation and new investigative powers to maintain the contestability of markets and even address structural problems that impede competition[75].

Analyzing these two points makes it possible to weigh up the possible proximity of the Commission's initiatives with British practices. This possible confluence, which seems to be taking shape, was not so obvious when reading the two inception impact assessments published in June 2020. As Mrs Vestager states: "The first of those pillars will be a clear list of *do's and don'ts* for big digital gatekeepers, based on our experience with the sorts of behavior that can stop markets working well."

These ex ante rules tend to constitute per se prohibitions or behavioral prescriptions rather than sector-specific regulation. The practices specifically targeted by the Commissioner for Competition correspond to self-preferencing (as the practices sanctioned in the Google Shopping case) and the strategic use of data produced by complementors within the same ecosystem in order to compete with them with an informational advantage (as the formal procedure opened against Amazon).

Ex ante rules should also make competition practicable even if the structural advantages of the dominant operator - for instance, in terms of access to essential resources (e.g., information) - make a level playing field unattainable. The tools that DG COMP could acquire would be preventive in nature: either to hinder tipping before it becomes effective, or to control the conglomerate expansion of dominant operators from one market to another as they diversify their activities.

The second pillar directly mirrors the market investigations as implemented by the CMA: "the second pillar of the Digital Markets Act would put a harmonized market investigation framework in place across the single market, giving us the power to tackle market failures like this in digital markets, and stop new ones from emerging. That would give us a harmonized set of rules that would allow us to investigate certain structural problems in digital markets. And if necessary, we could take action to make these markets contestable and competitive".

This leads us to look in more detail at this British precedent and to consider what could be the implications of a possible transposition of this tool within the EU. A working paper recently published by the Centre for Competition Policy of East Anglia University

[75] Vestager M., (2020), "Building trust in technology", *op. cit.*

may allow us to glimpse what the implementation of such a tool could mean in view of the British experiences[76].

As we have indicated above, the market investigations were introduced in UK legislation by the 2002 Entreprise Act. This tool does not aim at addressing anticompetitive conducts in same way that conventional enforcement of competition laws does. It enables the CMA to identify and if needed to remedy situations in which the core structure of the market may impair the competitive process. It may complement ex-ante tools aiming at protecting a competitive structure of the market (as mergers control) and ex-post ones sanctioning anticompetitive practices. It is presented as a pro-active (and participative) instrument used as a competition enhancer in markets characterized by structural failures or a lack of contestability. It can address both structural concerns and behavioral induced ones.

Such instruments may be all the more relevant for digital markets that the competition process may be seen as structurally impaired by technical characteristics as economies of scale and scope, barriers to entry (technological, financial, data-based…), and network effects. The British procedure does not aim at setting the rule of the game as a legislation does, to establish a legal precedent as a judgement but to fix a competitive situation seen as not satisfying. As Amelia Fletcher states "market investigations can also address markets which have become 'stuck' in bad equilibria, which are good for neither firms nor society, but where some form of intervention is required to make the shift to a better equilibrium". It pertains to a logic of competition building in a broader sense than conventional competition-law enforcement based remedies and in a larger perspective (in terms of temporal horizon for instance). Concisely, these remedies could be used to make the market more competitive despite its natural tendencies[77] (and perhaps at the cost of consumers' benefiting efficiencies).

Market investigations based remedies may echo some concerns already expressed about remedies negotiated under commitment procedures[78]. We may stress issues about adequacy and proportionality and issues related to the lack of an effective judicial control. Some of these concerns were also pointed in the economic literature about merger remedies. For providing only an example, we might quote a contribution authored by Farrell characterizing some of these remedies as corresponding to scalp,

[76] A. Fletcher, (2020), *op. cit.*

[77] S. Deakin and S. Pratten (1999), "Reinventing the Market? Competition and Regulatory Change in Broadcasting", *J. of L. and Society,* 26(3), pp. 323-350.

[78] F. Marty and M. Mezaguer (2018), "Negotiated Procedures in EU Competition Law", *in* A. Marciano, G. Ramello (eds), E*ncyclopedia of Law and Economics,* Springer, New York.

broad scope or overfixing bias[79]. The scalp corresponds to a (too) far-reaching remedy imposed to a dominant operator as a sanction to its dominance or to its past (un-sanctioned) behavior. The broad scope corresponds to the absence of a direct link between the competition concerns and the remedies. In other words, the remedy aims at addressing several competition concerns not directly raised in the case. The last bias is the over-fixing. It echoes a situation in which the remedy's purpose or expected effect is to make the market more competitive than it was before the merger (or before the anticompetitive practice sanctioned).

Similarly, to negotiated procedures and to the NCT proposed by the EU Commission, the Market Investigation procedure does not implies a characterization of competition laws infringement. Such a logic can make sense if we consider the competition damage is not due to a given market practice but to the structural features of the market. However, to some extent, the EU competition law notion of special duty of dominant operator could equally address such a situation.

A second characteristic of this procedure is that it does need to fit within other legal precedents as a conventional decision has to. If this point raises several concerns in legal terms (how to guarantee the consistency of the case law?), several can be questioned in economic ones. For instance, the requirements in terms of relevant market definitions are lessened and the goals followed by the enforcer can be broader than the ones traditionally taken into account in antitrust procedures, as consumer or privacy protection, fairness consideration …).

Despite these risks, the Market Investigation model can be seen as an attractive benchmark for shaping the New Competition Tool. It can allow an intervention in markets in which the demonstration of an anticompetitive practice is particularly difficult to realize because of the standard of the proof (see for instance cases related to algorithms manipulations). It can address, according to its promoters, structural market failures independent from any market behavior. It can help to prevent an irreversible damage to competition before the tipping as soon as we suppose the market would not be longer contestable. Such Market Investigations could be used in a proactive way to thwart the concentration of market power or its diffusion through leveraging strategies even if they do not rely on exclusionary practices. They are also an interest in terms of limiting the scope of exploitative strategies from dominant operators.

[79] J. Farrell (2003), "Negotiation and Merger Remedies: Some Problems", *in* Lévêque F. and Shelanski H., eds., *Merger Remedies in American and European Union Competition Law*, Edward Elgar, Cheltenham, U.K., pp. 95-105.

Such a model may fit very well with EU Commissions' proposals. The remedies that can result from this procedure can build an ex-ante regulation framework based on a *do or don't* logic, as advocated by the EU Commission. The examples proposed by Amelia Fletcher (through a review of the market investigations already completed by the British CMA) show as such a procedure can be used to meet the EU Commission objectives: imposing disclosure requirements, data portability, mandatory non-discriminatory practices; binding the access to essential inputs; banning paying for default position schemes; requiring assets divestitures…

The note written by Crawford et al. [80] for DG Competition is largely consistent with Fletcher's analysis. They consider the experience of British Market Investigations provides a good benchmark for broadening the range of tools available to the competition authorities - notwithstanding the fact that the situations targeted by the various British market investigations could, in their view, have been dealt with by the traditional tools for the repression of anti-competitive practices.

Notwithstanding this point, the experience of market investigations appears relevant to prevent tipping situations or to restore competition in markets that have already tipped. For instance, the competition between ecosystems can be reinforced or restored by measures enhancing the mobility of users from one ecosystem to another[81]. Other investigations have resulted in structural remedies aimed at restoring competition in the market by reducing its concentration[82].

The remedies resulting from market inquiries can also be put into perspective with the concerns raised by digital platforms as far as they relate to restrictive contractual clauses or access to essential resources.

However, as Crawford et al. note, sector inquiries may, depending on the circumstances, result in competition-law type remedies (in that they refer to those that could result from a commitment procedure) or sector regulation. This was, for example, the case for the CMA Market Investigation on online platforms and digital advertising. In that case, the identification of the structural market characteristics hindering

[80] G.S. Crawford et al., (2020), *op. cit.*

[81] See for instance, the case of the open banking standard. FCA, (2015), *Making current account switching easier: The effectiveness of the Current Account Switching Services (CASS) and evidence on account number portability*

[82] See for instance, the case of London Airports. As they controlled more than 80% of London runways capacities, underinvested, and delivered, according to the market inquiry a poor quality service, three airport divestitures were mandated. CMA, (2016), *BAA Airports: Evaluation of the Competition Commission's 2009 market investigation remedies.*

competition[83] led to the implementation of a pro-competitive ex-ante regulatory regime under the responsibility of a dedicated entity (Digital Market Unit).

Thus, as Amelia Fletcher states the Market Investigations are both substitutes and complements to a sector-specific regulation. Such an architecture could make sense within the EU Commission projects but also raises several concerns both at the economic and legal point of view. French jurists ask themselves whether there are not, in French law, under-exploited rules that would make it possible, on the one part, to rebalance certain economic relations and, on the other, to provide relevant returns of experience on European law.

French competition law

The new tools of competition law are intended to remedy the economic imbalances created in certain markets driven by large platforms. It is questionable whether, in some respects, competition law - in the broadest sense - does not already contain relevant rules. Let us mention three elements of French law that could fuel discussions on the regulation of platforms and the taking into account of economic imbalances.

The first text is article L. 420-2 al. 2 of the Commercial Code, which sanctions a specific type of behavior, and therefore the equivalent does not exist in European law. According to this article "is prohibited, since it is likely to affect the functioning or the structure of competition, the abusive exploitation by a company or a group of companies of the state of economic dependence in which it finds itself a client or a supplying company. These abuses may consist in particular of refusal to sell, tied selling, discriminatory practices referred to in Articles L. 442-1 to L. 442-3 or range agreements"[84].

The article aims to punish abusive behavior as soon as there is a situation of economic dependence of one undertaking on another and when the abuse results in an actual or potential affectation of the functioning or structure of the market. Dominance, within the meaning of Article 102 TFEU, is irrelevant. The judge focuses on economic

[83] These structural failures correspond to network effects and economies of scale, the influence of by-default settings on consumers' decision (e.g. the structuring power resulting from platform's architecture discretionary choices), unequal access to data (between ecosystem's members), lack of transparency, and risks associated to the keystone position vis-a-vis its complementors).

[84] In French : « est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires visées aux articles L. 442-1 à L. 442-3 ou en accords de gamme » (art. L. 420-2 al. 2 du code de commerce).

dependence which is characterized, according to an *in concreto* analysis, by several criteria: the supplier's reputation, its importance on the market in question, the size of turnover achieved by the supplier with the distributor, the distributor's role in marketing the products concerned and the impossibility for the reseller to obtain equivalent products from other suppliers.

It is in this context that the French Competition Authority has characterized an abuse of economic dependence committed by Apple on its so-called "premium" independent resellers (Apple Premium Resellers, or "APR")[85]. Is this article not an underestimated tool to rebalance the balance of power between players in digital markets[86]? In our opinion, the question deserves to be explored further.

The second text often referred to in France as a "small competition law", establishes a list of anti-competitive behaviors prohibited per se and whose logic echoes the "*do's and don'ts*" proposed by M. Vestager. Among these prohibitions is article L. 442-1 of the French Commercial Code, according to which "engages the responsibility of its author and obliges him to repair the damage caused by the fact, within the framework of the commercial negotiation, the conclusion or the execution of a contract, by any person carrying out activities of production, distribution or services: 1) obtain or attempt to obtain from the other party an advantage that does not correspond to any consideration or is clearly disproportionate in relation to the value of the consideration granted; 2) to subject or attempt to subject the other party to obligations creating a significant imbalance in the rights and obligations of the parties."

Could this text not find here a favorable ground to apply to platforms? Such was the case, for example, in the French Amazon case, in which the Commercial Court of Paris, on September 2, 2019, held that[87] the retail giant's liability for reserving "the right to amend any contractual provisions [...] at any time and at [its] sole discretion". The French judge was not insensitive to economic arguments and analyzed Amazon's power and its ability to submit its partners, taking into account its leadership position, its turnover, its notoriety, network effects and the costs of change involved, and its unavoidable nature

[85] French Competition Authority, 16 March 2020, decision nº 20-D-04 relative à des pratiques mises en œuvre dans le secteur de la distribution de produits de la marque Apple (See J.-C. Roda, "Google contre les éditeurs et agences de presse : 0-1", *D.*, 2020, p.1181). Confirmed on appeal (Paris Court of Appeal, 8 October 2020, nº 20/08071), V. Giovannini, "Interim measures confirmed against Google in the press publishers' case", *Competition Forum,* 2020, art. nº 0004, https://www.competition-forum.com/.

[86] See, J. Beuve, M. Bourreau, M. Péron and A. Perrot, "Plateformes numériques et pratiques anticoncurrentielles et déloyales", Conseil d'analyse économique, *Focus,* nº 050-2020, October 2020.

[87] Commercial Tribunal of Paris, 2 September 2019, nº 2017050625, M. le Ministre de l'Economie et des Finances c./Amazon.

(the absence of real alternative solutions for third-party sellers). The Court ordered Amazon to modify or delete the clauses deemed unfair and fined it 4 million euros.

The third text has a more general scope and is based on civil liability. French law, in article 1240 of the Civil Code, provides that "any act causing damage to another, obliges the one by whose fault it occurred, to compensate it". Its implementation, in the competitive sphere, has been widely deployed and could contribute to the regulation of platforms, a fortiori in French law because the judge does not require the demonstration of a competitive relationship between companies[88].

Conclusion

The issues implied by the new competition law tools are vast and numerous. From the point of view of competition law, there are questions relating to respect for fundamental rights and the meaning of competition policy and its supervision by the judge (right of defense, proportionality). There are also questions that have been a source of inspiration for the law for several years and with which the lawyer is sometimes uncomfortable: that of the role and objectives of competition law - or of law in general - and its capacity to adapt to the movement of the contemporary economy, and to the dynamic process of competition.

The sanction for an infringement has been replaced by the procedure for initiating proceedings in response to a competition "concern". We are now at the stage of injunctions based on the "characteristics" of a market. Is prevention better than cure? Underlying these developments is *anticipation*[89], which now feeds into the sap of the law: by moving from a punitive to a preventive law, competition law is moving away from the binary logic of licit/illicit to an analysis based on a gradation of the damage caused to the economy. And this must also

[88] This idea was notably developed by J.-C. Roda, during an oral intervention, "The emergence of a platform law", 21 October 2020, Lyon III University.

[89] M. Delmas-Marty, "Quel droit pour un monde instable ?", *S.E.R, Études*, 2018/6, pp. 53-64.

include accepting certain risks associated with the digital economy and the market regulation. This is, perhaps, the key to legal anticipation.

This is a part of global trend: loss of confidence in a market economy where competition is free and undistorted. However, it is important to keep in mind that platforms themselves present very varied economic forms and models difficult to summarize here. This diversity of platforms also implies a wide range of contracts and issues: innovation, competitiveness, diversity, pluralism, labor law, maintenance of democratic process, privacy, consumer sovereignty and autonomy, capture the attention of users... Can competition law deal with all these issues? It is therefore a question of choices of competition policy in the strong sense of the term and not of simple technical adjustments. Is this what the Court of Justice already sensed by the term "well-being of the Union[90]"? Nothing is less certain…

Marie CARTAPANIS

Frédéric MARTY

[90] EUCJ, 17 February 2011, C-52/09, Konkurrensverket / TeliaSonera Sverige AB, pt 22, "The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union". In French, the end of point 22 is worded in these terms "contribuant ainsi au bien-être dans l'Union" which, literally, is translated thus contributing to well-being *in* the Union.