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Navigating the Nexus: Competition Law, Data Privacy, and Regulatory Challenges in the Digital Economy

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A Thesis Submitted by

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ABSTRACT

Competition law and data privacy meet at a crucial point in the growing digital economy, making it essential to delve into their intricate relationship. This thesis investigates how competition law and data protection law interact within the digital market. It examines how data protection regulations influence market dynamics and competition, and how competition law affects data processing and individual rights during the digital transformation. By thoroughly exploring key themes, such as historical context, current challenges, and regulatory responses, this research aims to shed light on the changing regulatory landscape and its impact on future frameworks in the digital era. The thesis argues that a balanced approach is essential to promote innovation, protect consumer welfare, and safeguard individual privacy rights in the digital age. It delves into the challenges posed by zero-price markets, the impact of big data as a competitive advantage for tech firms, the legal framework governing data privacy, and the regulatory responses aimed at bridging the gap between competition law and data privacy, epitomized by the European Union's Digital Markets Act. Through this multidimensional exploration, the thesis aims to provide a holistic understanding of the intricate interplay between competition law and data privacy, shedding light on the challenges, opportunities, and implications for the future of regulatory frameworks in the digital age.

KEYWORDS: Competition Law, Data Privacy, Digital Economy, Zero-Price Markets, Big Data, GDPR, Digital Markets Act

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Introduction

Competition law as a regulatory tool aims to regulate market competition through three main pillars. These three pillars are the prohibition of abuse of dominant position, restriction of anti-competitive agreements, and control of mergers and acquisitions between firms. This law is mainly focused on economic factors. However, legal scholars and lawyers have long argued that one of the prominent goals of competition law is achieving consumer welfare. In recent years, there has been an ongoing debate on whether competition law should include data privacy considerations under the umbrella of consumer welfare. This debate is rooted in the fact that data privacy and market competition intersect in the digital realm. In other words, big tech platforms have been heavily mining personal data and using it for competitive advantages, which competition laws have failed to address in their assessments of dominant firms. The absence of data consideration in competition law has sparked the need for a new regulatory stance toward recognizing data as a competitive advantage.

In recent court cases, competition authorities have adopted data privacy in their assessment of abuse of dominant market position. One prominent example is *Facebook vs. FCO*, where the German competition authority issued a decision about Facebook's abuse of dominance due to its failure to collect sufficient consumers' consent for collecting and combining user data from its platform with data gathered from other Meta services and third-party websites.[1] This case has become a strong precedent for adopting data considerations in anti-competitive behavior assessment.

The intricate relationship between competition law and data protection law in the digital market, particularly exploring how these two legal domains intersect and influence each other amidst the challenges posed by the digital economy is essential as it presents both challenges and opportunities. A deeper understanding of this nexus is crucial for policymakers, regulators, and industry stakeholders are required to develop coherent and responsive frameworks that foster a thriving digital economy. By providing a comprehensive analysis of the key themes and challenges, this thesis offers insights into the effectiveness of current regulatory approaches and

[1] OPINION OF ADVOCATE GENERAL, RANTOS, Case C-252/21, Meta Platforms Inc., formerly Facebook Inc., Meta Platforms Ireland Limited, formerly Facebook Ireland Ltd., Facebook Deutschland GmbH v Bundeskartellamt, (Sep, 20, 2022).

the potential for integrating privacy concerns into competition law assessments. The thesis also aims to contribute to the ongoing discourse on the future of regulation in the digital age, underscoring the importance of balancing the interests of consumers and businesses through balancing personal privacy and fair competition.

The thesis embarks on a comprehensive exploration of key themes shaping this intersection, spanning historical perspectives, emerging challenges, and regulatory responses. It begins in chapter one with a historical journey through the evolution of competition law and the influential schools of thought that have shaped its trajectory. Chapter two delves into the complexities posed by zero-price markets and the unique regulatory dilemmas they present. The impact of Big Data on competition law is scrutinized, unraveling its role as a competitive advantage, implications for market power, and the regulatory concerns stemming from data concentration. In chapter three, the thesis transitions to the realm of data privacy, aiming to navigate through the legal frameworks governing personal data protection, particularly focusing on the EU's regulatory landscape and the intricate relationship between data privacy and competition policy. In chapter four, the thesis shift towards exploring the regulatory responses aimed at bridging the gap between competition law and data privacy, epitomized by the European Union's Digital Markets Act, is dissected to illuminate the evolving regulatory paradigms in digital markets. Through this multidimensional exploration, the thesis aims to provide a holistic understanding of the intricate interplay between competition law and data privacy, shedding light on the challenges, opportunities, and implications for the future of regulatory frameworks in the digital age.

I. A Brief History of Competition Law and Schools of Thought

This chapter explores the history of competition law, tracing its evolution and the schools of thought that influenced its development, especially in the USA. The chapter begins by examining the classical school, which dominated economic thinking until the late 19th century and advocated for minimal state intervention in the economy. The chapter then discusses the emergence of the Brandeisian school, which focused on breaking up big businesses to protect democracy and individual economic opportunity. Next, it explores the Harvard School, which emphasized structural analysis of markets and the presumption of illegality for actions that allowed firms to obtain market power. The chapter also touches on the Chicago School, which shifted the focus of antitrust policies toward achieving economic efficiency and consumer welfare. Additionally, it discusses key milestones in the development of the US legal competition framework, such as the *Standard Oil* case, the development of the Sherman Act in the United States, the Clayton Act, and the New Deal. Finally, this chapter further explores the evolution of EU competition laws. Through this exploration, the chapter aims to provide a comprehensive overview of the historical development of competition law and the schools of thought and historical events that have shaped its evolution.

A. US Antitrust Laws

When attempting to trace the origin of competition law, the roots can be traced back to the Roman era. Roman law granted business owners the right to take legal action against injury suffered due to the inducement of a competitor to the owner's employee in case such inducement resulted in the employee revealing the owner's trade secret. This included sharing the owner's customer lists, formulas, and business plans, or even encouraging the employee to destroy any of the aforementioned.[2] This legal ground was the *Actio Servi Corrupti* or the action for corrupted slaves. The rule of *Actio Servi Corrupti* governed the master-slave relationship. In his paper *Trade Secrets and the Roman Law; The Actio Servi Corrupti* Schiller claims that this legal concept was not limited to slaves as a form of employment, but also all kinds of employees, which included freemen and freedmen. Thus, we see in the Roman era that

[2] *See*, Schiller, A. Arthur, *Trade Secrets and the Roman Law; The Actio Servi Corrupti*, Columbia Law Review, 30(6), 837–845 (1930).

the roots of competition law were already present in the form of legal protection against unfair trade practices, such as stealing or sabotaging trade secrets. However, this was not a comprehensive or consistent system of competition regulation, but rather a specific remedy for business owners who suffered harm from their competitors' actions. The concept of competition law as a public policy to promote fair and efficient markets would emerge much later, influenced by various schools of economic thought.

1. Classical School

From the Roman era until the late 19th century and just a little after the Industrial Revolution, the role of the state in regulating market competition was almost absent, and the classical school of thought in economics was prevalent. Classical economists advocated that competition is a tool that organizes “conflicting self-interests of independently acting individuals and directs them to the attainment of equilibrium.”[3] In the classical era, classical advocates and literature did not clarify the characteristics of competitive behavior. Nevertheless, the *laissez-faire* approach was highly adopted. *Laissez-faire* was both a political and an economic philosophy that prevailed in the eighteenth century. The *laissez-faire* philosophy advocated that people would accomplish the greatest results for the society in which they live, by following their own individualistic goals. In the meantime, the role of the state should be limited to preserving order and security without interfering with people’s efforts to achieve their own objectives and economic choices.[4]

The *laissez-faire* theory laid the groundwork for the economist and philosopher Adam Smith in his book *The Wealth of Nations*.[5] Smith believed that “economic phenomena are a manifestation of an underlying order in nature, governed by natural forces.”[6] Smith promoted an economic system that was based on natural liberty, and decried those that ignored it. One of the main arguments that Smith used to support his vision of natural liberty was that state intervention disturbs the natural order and hinders economic development. He illustrated this

[3] Lefteris Tsoulfidis, *Classical vs. Neoclassical Conceptions of Competition*, (2011), https://mpra.ub.uni-muenchen.de/43999/ (last visited Nov 1, 2023).
[4] Bria 19 2 B social darwinism and American laissez-faire capitalism, Constitutional Rights Foundation, https://www.crf- usa.org/bill-of-rights-in-action/bria-19-2-b-social-darwinism-and-american-laissez-faire-capitalism.html (last visited Dec 16, 2022).
[5] Wood, John Cunningham, 'Adam Smith: Critical Assessments', (1984).
[6] *Id*.

point in the following passage, where he contrasted the outcomes of letting nature operate freely versus interfering with her course:

> projectors disturb nature in the course of her operations in human affairs; and it requires no more than to let her alone, and give her fair play in the pursuit of her ends that she may establish her own designs. Little else is requisite to carry a state to the highest degree of opulence from the lowest barbarism, but peace, easy taxes, and a tolerable administration of justice; all the rest being brought about by the natural course of things. All governments which thwart this natural course, which force things into another channel or which endeavor to arrest the progress of society at a particular point, are unnatural, and to support themselves are obliged to be oppressive and tyrannical.[7]

Smith strongly deemed that state interference in the economy is an act of oppression and tyranny. He argued that there is no point in interference in the economy as the economy is capable of operating harmoniously through the acts of the invisible hand. The concept of the invisible hand demonstrates that the pursuit of self-interest and happiness in a free-market economy can certainly lead to economic growth. The concept proposes economic decisions based on self-interest, such as buying or selling goods and services, resulting in positive outcomes for the whole. Smith believes that although humans prioritize their personal benefit, the invisible hand always guides them to generate benefits for society as a whole. In explanation for this concept, he wrote:

> The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency … [t]hey are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.[8]

The USA continued its period of laissez-faire capitalism throughout the majority of the 19th century, a period that is referred to in history as the *Gilded Age*.[9] During this period, the United States became the industrial center of the world, where new businesses arose, including petroleum refining, coal mining, and electrical power generation.Transportation had expanded

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[7] *Id*.
[8] *Id*.
[9] The Gilded Age refers to the period from the mid-19th century till the early 20th century. The term refers to when an object is covered in gold. This era was labeled in this term as it witnessed a period of rapid economic transformation, increase of wealth, and spread of corruption.

majorly, and the railroad industry was at its peak, integrating even the most distant sections of the country into the national market economy. Fascinated by the economic shift, the government did not interfere in the market, as the market seemed to function harmoniously on its own. However, the absence of regulations on market competition allowed firms to grow exponentially with no limitations, which gave birth to the formation of large single markets and enabled businesses to expand and exploit economies of scale and scope.[10] The USA has also witnessed a transformation in state law that granted more liberty to the creation of larger firms and permission for mergers and acquisitions.[11] Accordingly, the United States witnessed an unprecedented number of mergers and acquisitions aimed at achieving economies of scale and scope, which has led to lower costs and prices. As a result of an unmonitored market and vigorous expansion, companies encountered price wars, formed cartels, and established trusts to maintain high prices and margins, which resulted in harming smaller businesses.

a. Standard Oil v. United States

It can be agreed that the starting block of modern competition law was in the nineteenth century with the debut of the Sherman Act. The Sherman Act was enacted in 1890 by the American government in response to the establishment of trusts.[12] The Act aimed to enable state intervention in market competition to overcome the harm caused by big firms in the market.[13] The Sherman Act originated to regulate the large trusts that dominated the American market.[14] The trust phenomenon began to emerge in the US market in the early 1880s. They were characterized by the consolidation of multiple companies, whether in the same or different industries, under the control of one holding company. The notion of trust was first initiated in America by the businessman John Rockefeller. Rockefeller, who started his professional life as a bookkeeper, ended up becoming one of the richest men in American business and economic

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[10] *Supra* 4

[11] *See* Renneboog, L. D. R. "Review of the Book Creating Value from Mergers and Acquisitions, S. Sudarsanam, 2003." *European Financial Management: The Journal of the European Financial Management Association*, vol. 10, (2004), discussing the evolution history of mergers and acquisitions in multiple countries including the US.

[12] It should be clarified that although the Sherman Act is widely recognized as the first Anti-trust law in the modern era, the Canadian competition law preceded, but never gained the same popularity due to its weak enforcement. *See* Massimo Motta, Competition Policy: Theory and Practice (2004).

[13] Massimo Motta, Competition Policy: Theory and Practice (2004), https://danielmorochoruiz.files.wordpress.com/2015/09/massimo_motta_competition_policy_theory_and_prabookfi-org.pdf (last visited Sep 23, 2023).

[14] The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§ 1–7)

history.[15] Rockefeller engaged in acts of market monopoly in the oil sector by acquiring and merging multiple independent oil refineries and undertaking anti-competitive practices, which prominently included predatory pricing among many others. Such practices have led to driving smaller firms out of the market and granting his business control over eighty percent of the American oil industry.[16]

Rockefeller became a giant in the oil industry in the USA and expanded Standard Oil by buying out his competitors and driving his competitors out of the market. For example, in Cleveland, 21 of the 28 Cleveland refiners sold their companies to Standard Oil during a period of a few months.[17] The competitors were put under the stress that if they didn't sell their companies to Rockefeller, they would lose their value over time.[18] Not only did he target his competitor, but Rockefeller also controlled the oil supply and distribution industries by purchasing the operating companies in those sectors.[19] In 1868, Rockefeller began to manufacture his oil barrels to minimize his costs and cut them in half.[20] In addition, he owned his private warehouses and lighters and managed his shipping operation, which resulted in him having 78 tank cars for railroad transport by 1869.[21] As a result of his monopoly, Rockefeller faced difficulties doing business across states due to the increasing controversy and legal difficulties. Therefore, Standard Oil concluded the first trust agreement in 1879. The trust formation aimed to manipulate the reality of the octopus-like firm taking over the oil industry throughout the US by creating a new legal status; trusts. Following this action, multiple market leaders have adopted the same concept of trust to manipulate the reality of their monopolies.[22] Although the government was not concerned much with monopolies at this point, the small business owners have grown frustrated, and the American economy was controlled by a small number of giant firms. This has signaled the urgency for American lawmakers to respond to

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[15] Carol L. Thompson, *PROBLEMS OF INDUSTRIAL EXPANSION: IV. John D. Rockefeller: Consolidator*, 17 CURR. HIST. 216 (1949).
[16] See Rinehart, Will, et al. "A History of Failure: Government-Imposed Corporate Breakups." AAF, 28 June 2018, https://www.americanactionforum.org/insight/a-history-of-failure-government-imposed-corporate-breakups/.
[17] Thompson, *supra* note 15.
[18] *Id*.
[19] Lamoreaux, Naomi R. "The Problem of Bigness: From Standard Oil to Google." The Journal of Economic Perspectives, vol. 33, no. 3, American Economic Association, 2019, pp. 94–117, https://www.jstor.org/stable/26732323.
[20] Thompson, *supra* note 18.
[21] *Id*.
[22] *Id*.

the mounting pressure and adopt a new regulatory strategy and policy changes to regulate the abusive practices of dominant firms at both the state and federal levels.

b. The Sherman Act

The emergence of trusts as a new form of corporate organization challenged the existing legal framework and prompted the need for antitrust legislation. The Sherman Act was the first federal attempt to regulate the monopolistic practices of the trusts and protect free competition in the market. The Sherman Act was drafted to become a tool that would "protect trade and commerce against unlawful restraints and monopolies."[23] Article One of the Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."[24] While Article Two prohibited persons from "[…] monopoliz[ing], or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States [.]"[25]

The Act laid as a dead letter, and the anti-trust act was not active until Theodore Roosevelt took office.[26] President Roosevelt believed that the harm done by the trust was detrimental to the market and its smaller competitors.[27] The Roosevelt administration targeted major American corporations such as Standard Oil, the American Tobacco Company, and AT&T due to the harm they caused by operating their monopolies.[28] Not so long after Roosevelt took office, his government sued Standard Oil trust, including the parent company and thirty-three of its subsidiaries, on the basis of monopolizing the oil market in the US, the formation of a cartel, abuse of dominance, and practicing predatory pricing. Although Standard Oil has appealed the claims against it, the ruling was in favor of the US government and resulted in the breaking of Standard Oil's trust into thirty-four companies.[29]

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[23] Sherman Anti-Trust Act (1890), NATIONAL ARCHIVES (2021), https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last visited Oct 31, 2023).
[24] *Id.*
[25] *Id.*
[26] Arthur M. Johnson, *Antitrust Policy in Transition, 1908: Ideal and Reality*, 48 MISS. VAL. HIST. REV. 415 (1961).
[27] *Id.*
[28] Rinehart, Will, et al. "A History of Failure: Government-Imposed Corporate Breakups." AAF, 28 June 2018, https://www.americanactionforum.org/insight/a-history-of-failure-government-imposed-corporate-breakups/.
[29] Standard Oil Co. v. United States - 221 U.S. 1, 31 S. Ct. 502 (1911).

After the successful application of the Sherman Act, the US Congress issued further acts and policies to strengthen the application of antitrust laws. However, the enactment of the Sherman Act was applied in the literal sense, which was limited to monopolization and restraint on interstate commerce. One example is the Trans-Missouri case, one of the first cases brought under the Sherman Act, the United States Attorney of Kansas, filed a bill against the Trans-Missouri Association. Before the ruling against the association by the Supreme Court, the district court discharged the case on the basis that "(1) that the agreement in question was not a contract in, restraint of trade within the meaning of that phrase as used in the Act […] (2) that common carriers were not within the provisions of the Act […]."[30] Another example of the restricted literal application of the Sherman Act was *United States v. E.C. Knight Company*, where the US government aimed to block the American Sugar Refining Co., the last few independent sugar refiners in the US.[31] Although the sugar trust had, after the acquisition, a 98 percent market share of the sugar refining industry, the court dismissed the government complaint. In its reasoning, the court expressed that the Sherman Act does not apply to manufacturing and it was limited to commerce, while disregarding the fact that the company had a monopoly over the refining industry. Subsequently, the Court found no violation of the Act as it did not involve intrastate commerce.[32] These cases illustrate the narrow and literal interpretation of the Sherman Act by the courts, which hindered the effectiveness of antitrust enforcement in the early 20th century. To address these limitations and expand the scope of antitrust law, a new school of thought emerged that challenged the classical view of competition and monopoly.

2. Brandeisian School

Contrary to the classical school, which favored a literal and narrow interpretation of the Sherman Act, a new school of thought emerged that advocated for a broader and more flexible approach to antitrust law. This school was influenced by the ideas of Louis Brandeis, who saw big business as a threat to democracy and social welfare. The Brandeisian school sought to

[30] Patterson - The Case of the Trans-Missouri Freight Association.pdf, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5516&context=penn_law_review (last visited Oct 30, 2023).
[31] W Kolasky Chief Justice Edward Douglass White And the Birth of the Rule of Reason, Antitrust, Vol. 24, No. 3, (2010).
[32] *Id*.

promote a decentralized market of small enterprises and to protect consumers from the harms of monopoly power. The trend of targeting big businesses came to be the main goal of the application of antitrust policies in the USA. The approach was strongly advocated by the lawyer and associate justice of the US Supreme Court, Louis Brandeis.[33] Brandeis believed that a market of small enterprises would nurture the individual's social development, which had been ignored in a centralized economy.[34] Brandeis strongly believed that anti-trust policies should take into consideration economic and social considerations. He worked on challenging the practice of monopolies and the incorporation of trusts. In his opinion, he believed that monopolies had a direct influence on democracy and individual economic opportunity, which he referred to as "the curse of bigness."[35]

In 1914, under the government of Woodrow Wilson, the Clayton Antitrust Act came into force in order to fill some of the gaps that the Sherman Act failed to address. The Clayton Act focused on the regulation of mergers and acquisitions and created a specific threshold within which such action is deemed anti-competitive. For example, the Supreme Court decided that the acquisition of stock by du Pont in General Motors was a breach of Section 7 of the Clayton Act as it resulted in a substantial decrease in competition between the two firms and restrained competition within the community.[36] Luckily enough, President Wilson and Brandeis shared the same vision regarding economics and the market, and they believed there should be a regulatory agency to apply anti-competitive policies. Brandeis believed that the state government should monitor competition, he stated that:

> Domination of an industry by a single giant firm or a handful of oligopolists ought not by itself be held violative of the antitrust laws; the government should be required to show that the monopoly power has been exercised to the detriment of the consumer.[37]

In the same year of drafting the Clayton Act, the US created its first competition regulatory

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[33] *See*, Levinthal, Louis E. "LOUIS DEMBITZ BRANDEIS." *The American Jewish Year Book*, vol. 44, American Jewish Committee, 1942, pp. 37–52, http://www.jstor.org/stable/23602574 (discussing Brandeis's journey of advocating against, and his position from, monopoly formation)
[34] *Id*.
[35] Burns, Arthur Robert. University of Pennsylvania Law Review and American Law Register 83, no. 6 (1935): 818–22. https://doi.org/10.2307/3308500.
[36] Hart - Du Pont General Motors Case.pdf, https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=4142&context=vlr (last visited Oct 30, 2023).
[37] "Mr. Justice Brandeis, Competition and Smallness: A Dilemma Re-Examined." *The Yale Law Journal*, vol. 66, no. 1, The Yale Law Journal Company, Inc., 1956, pp. 69–96, https://doi.org/10.2307/794087.

authority, the Federal Trade Commission. The federal commission had the power to initiate an investigation on anti-competitive acts and bring lawsuits against the breaching corporations.

In the early 1930s, the American economy faced a significant backlash during the Great Depression, which resulted in intensified government intervention in the economy. The consequences of the Great Depression affected all aspects of policymaking in the USA, including antitrust policies, and accordingly, the Keynesian economic theory was widely adopted to overcome this economic setback.[38] Keynesian economic theory advocated for government intervention in the economy to address short-term economic issues, like unemployment and recession while acknowledging that the economy can self-adjust in the long run. One of the tools the Keynesian theory proposed is the multiplier effect, where the government's increased spending leads to a chain reaction of growing demand and aggregate income.

As a result of the poor economic situation, the National Industrial Recovery Act of 1933 was enacted by the 73rd US Congress to allow the President, who was Roosevelt at the time, to regulate the industry by increasing salaries and pricing in order to accelerate economic recovery under the *New Deal*.[39] To achieve these increases, Congress passed industrial and labor policies to limit competition and raise labor bargaining power.[40] In a nutshell, Roosevelt's plan for reviving the economy was to raise prices and salaries by changing labor and industrial policies. Congress implemented industrial and labor legislation to restrain competition and raise labor bargaining power in order to attain these gains. At the time of the New Deal, antitrust laws were highly disregarded, in fact, Roosevelt's economic advisor, Hugh Johnson, claimed that "the economy expanded during World War I because the government ignored the antitrust laws."[41] This historical context of the National Industrial Recovery Act of 1933 and Roosevelt's economic policies is reflected in the Harvard School, which followed the interventionist policies of the Brandeisian school.

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[38] TOBIN, JAMES. "KEYNES' POLICIES IN THEORY AND PRACTICE." Challenge, vol. 26, no. 5, Taylor & Francis, Ltd., 1983, pp. 5–11, http://www.jstor.org/stable/40720180.
[39] Handler, Milton. "THE NATIONAL INDUSTRIAL RECOVERY ACT." American Bar Association Journal, vol. 19, no. 8, American Bar Association, 1933, pp. 440–83, http://www.jstor.org/stable/25710154.
[40] *Id*.
[41] *Id*.

3. Harvard School

Unlike the Classical and Brandessian schools, the Harvard School emerged in the mid-twentieth century and focused on the structural analysis of markets and the presumption of illegality for any mergers, joint ventures, or agreements that allowed firms to obtain, enhance, or exercise market power, regardless of whether the conduct had the potential to benefit consumers.[42] The scholarship convinced many judges to presume the unlawfulness of actions by dominant firms, irrespective of their impact on consumers. This was evident in the 1945 case of United States v. Aluminum Co. of America, where Judge Learned Hand found Alcoa guilty of monopolizing the aluminum manufacturing market. Alcoa had expanded its manufacturing capacity to capitalize on economies of scale, enabling it to provide consumers with high-quality products at affordable prices. Judge Hand's ruling essentially penalized Alcoa for engaging in aggressive competition, which, in reality, benefited consumers.[43] Another case that was influenced by the same approach was the United States v. Philadelphia National Bank, which involved a proposed merger of the Philadelphia National Bank and Girard Trust Corn Exchange Bank. This case established a presumption that mergers covering at least 30 percent of the relevant market were likely anti-competitive regardless of the bank's claims that such mergers would result in better services to their Philadelphia customers. The Court stressed the importance of preventing excessive market power concentration. Therefore, it can be concluded that the Harvard School adopted a highly interventionist and pessimistic view of market competition, which often resulted in undermining the efficiency and innovation of dominant firms. The Harvard School's approach to antitrust law was challenged by a new school of thought that emerged in the second half of the 20th century.

4. Chicago School

After the survival of this economic crisis, competition policy resumed to adopt the Brandeisian approach of antitrust policies and decentralization of market powers, however, it was not long before the policy approach took another turn. In the 1960s, the application of competition law shifted towards achieving economic efficiency and consumer welfare. The approach was

[42] Piraino, Thomas A., Jr., Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century, Indiana Law Journal (Bloomington) 82, (2007).
[43] *Id*.

initiated by Supreme Court judge Robert H. Bork, who adopted the Chicago School approach to competition law, which advocated for a more free-market and consumer-centric discourse.[44]

Later in his work, Bork seemed to criticize the applications of anti-trust policies in the USA and introduced a new interpretation of the Sherman Act, which was met with both acceptance and opposition. In his book, *The Anti-trust Paradox,* Robert expressed his view that competition policies should not solely work in favor of protecting small market players, but should focus on consumer welfare.[45] This approach has prominently reshaped the application of antitrust law in the USA. The true paradox, from Robert's point of view, of the application of anti-trust policies in the USA, i.e., the Sherman Act, was that such policies have led to harm to the consumers. The adoption of the Sherman Act has resulted in many conflicting decisions that worked in favor of increasing competition in the American market, however, it disregarded the effect that such an application would have on consumers and the price of goods.[46] The application of the Sherman Act has focused only on preventing businesses from getting bigger.[47] This approach to policy application, which demonized big businesses, was heavily criticized from Borke's point of view. He also believed that providing no attention to consumers by applying anti-trust policies is detrimental to their welfare and the market process.

Although Bork's influence on antitrust law was significant and lasting, as he challenged the traditional assumptions and goals of the policy, his approach also faced criticism and opposition from those who saw it as too lenient and permissive towards market concentration and corporate power. As a result, a new school of thought emerged in the 2010s, which revived some of the ideas of the original Brandeis school and advocated for a more comprehensive and structural approach to antitrust. This school is known as the New

[44]*See*, Bork, Robert H. "Legislative Intent and the Policy of the Sherman Act." The Journal of Law & Economics, vol. 9, [University of Chicago Press, Booth School of Business, University of Chicago, University of Chicago Law School], 1966, pp. 7–48, http://www.jstor.org/stable/724991. (arguing that the means in which the Sherman's act was applied was not in any way beneficial to the economy or the consumer's welfare)

[45] SCHWARTZ, R. (1979). [Review of *The Antitrust Paradox*, by R. H. Bork]. *The International Lawyer*, *13*(1), 198–201. http://www.jstor.org/stable/40705928

[46] Id.

[47] Burns, [Review of The Curse of Bigness; Miscellaneous Papers of Louis D. Brandeis, by O. K. Fraenkel, C. M. Lewis, & L. D. Brandeis], University of Pennsylvania Law Review and American Law Register, 83(6), 818–822(1935). https://doi.org/10.2307/3308500

Brandeisian movement, and it aims to address the challenges posed by the modern economy and its dominant players.

5. New Brandeisian School

The New Brandeisian movement emerged in 2010, and was inspired by the classic Brandeis school. For many, the Chicago School no longer exists. This New Brandeisian School advocates for a broader antimonopoly approach that is concerned with private power, the structure of the economy, and market conditions necessary to promote competition. The New Brandeisian movement opposes the school of thought in modern antitrust law that antitrust should center on the short-term price effects of mergers and more on improving the market structure.

Now that a new approach to antitrust policy has been raised, it has invited us to rethink the application of competition policies and alter their focus from protecting small market players to protecting consumer welfare, i.e., providing them with the best quality at a fair price. This new approach did not pay as much attention to monopoly busting and distorted the Brandeisian approach to policy. In the previous decades, the American market has seen an increase in market monopolies, especially in the tech market.[48] Enterprises like Google, Amazon, and Facebook have dominated the American market, which has given rise to the re-adoption of the Brandeisian approach under a so-called movement for neo-Brandeisianism. Currently, the competition policy arena in the USA is torn between Broke's and Brandeisian's approaches by applying a flexible approach to competition policy, which leaves the application of the policy unable to predict.

As we have seen, the evolution of competition law from the Roman era and Classical School to the New Brandesisan varied from supporting a free market economy to busting big business and finally protecting consumer welfare. Competition law in the EU, on the other hand, as we will see, presents a different journey with distinct goals.

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[48] Ma, Winston. "Breaking the Big Tech Monopoly: The Coming Decade of Big Tech Regulations." Horizons: Journal of International Relations and Sustainable Development, no. 18, Center for International Relations and Sustainable Development, 2021, pp. 166–79, https://www.jstor.org/stable/48614120.

B. EU Competition Law

From the history of the USA's antitrust laws, it can be argued that competition law has a plurality of goals according to the political and jurisdictional environment surrounding it. It becomes challenging to set one definite goal for competition law as it is heavily impacted by the constitutional and jurisdictional dimensions of the state. For instance, according to some earlier writers, there is a conflict between economic freedom and consumer welfare in the spirit of German ordo liberalism.[49] A prominent proponent of German ordoliberalism, however, challenges the prevailing notion that economic freedom and welfare cannot coexist.[50] This dichotomy of identifying the goals of competition law can be found within the EU competition rules, as said rules aimed to serve different purposes throughout the history of the development of competition law. This subchapter will shed light on the historical development of EU law at its two jurisdictional levels, the national and the supranational, with a focus on its supranational framework. However, one must note that most national laws have predominantly similar features to the supranatural laws that were introduced by the Treaty of Rome. However, the Treaty of Rome is not the origin of the EU competition law.

1. European Community of Steel and Coal and Market Integration

The EU competition law can be traced to the European Community of Steel and Coal (ECSC). The ECSC was created in 1951 through the Treaty of Paris. The ECSC started as a proposal on May 9, 1950, by the French Foreign Minister Robert Schuman, who is considered to be the architect of the EU integration project.[51] The Shuman plan signifies a turning point in global collaboration between the national governments of Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. The six countries joined forces for two main reasons: the first was to diminish the overpowering of the German state and control over coal and steel by transferring domestic decision-making power in the coal and steel industries to a new supranational entity.[52] The second reason was to establish free market competition between the member states of the ECSC. The very essence of the ECSC, which was to ensure market

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[49] Anca D Chiriţã, *A Legal-Historical Review of the Eu Competition Rules*, 63 INT. COMP. LAW Q. 281 (2014).
[50] *Id*.
[51] Glockner, Iris & Rittberger, Berthold, The European Coal and Steel Community (ECSC) and European Defence Community (EDC) Treaties, (2012), 10.1057/9780230367579_2.
[52] Massimo Motta, *Supra* note 13.

integration, boost coal and steel production and limit the effects of global cartels in the coal and steel industries, was clearly established in Article 2 of the treaty, which stipulated how aimed to create a common market for coal and steel that would foster economic growth, social welfare, and stability among member states:

> The European Coal and Steel Community shall have as its task to contribute, in harmony with the general economy o£ the Member States and through the establishment of a common market as provided in Article 4, to economic expansion, growth of employment and a rising standard of living in the Member States [and] shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States.[53]

As stated above, the goals of the ECSC can be summarized as establishing and expanding a common market in order to ensure the growth of employment and the improvement of living standards while rationalizing the distribution of production and building a stable economy among member states. Article 4 of the treaty has established some prohibitions on the undertakings and states in the coal and steel industry as follows:

> The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:
> (a) import and export duties, or charges having equivalent effect, and quantitative restrictions on the movement of products;
> (b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier;
> (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;
> (d) restrictive practices which tend towards the sharing or exploiting of markets.[54]

According to Article 4 of the ECSC, any action that could result in restrictions on the movement of goods among the community, discrimination between producers, purchasers, or consumers, and exploitation of sharing the market shall be considered a breach of the treaty. In case of breach of any of the obligations established by the treaty, the community enjoyed the legal personality and higher authority to impose monetary fines or periodic penalty payments on the undertakings in breach. Such penalties amounted to a maximum of one percent of the

[53] The European Coal and Steel Community, Treaty Establishing the European Coal and Steel Community (ECSC), (art. 2), (1951), https://eur-lex.europa.eu/eli/treaty/ceca/sign
[54] *Id*. (art.4)

undertaking's annual turnover, and five percent of the average daily turnover in the event of delaied payment of the original fine.[55]

Therefore, it can be concluded that the main objectives of the Schuman Plan were to create a common market, prevent price-fixing, and control production, technical development, and market division through agreements.[56] It also aimed to create the conditions necessary to achieve the highest level of productivity and the lowest price for the two products. Accordingly, it can be argued that this economic approach of resource pooling and market integration has resulted in interpreting the competition law goal prominently as market integration and elimination of cartels.

2. The Treaty establishing the European Community

The Treaty establishing the European Community was renamed the Treaty on the Functioning of the European Union (TFEU), and the term Community was replaced by Union throughout the text. The aim of the treaty is to outline the goals and guiding principles of the European Union as well as the range of possible actions within its policy domains, it also provides a precise framework for EU legislation.[57] The treaty lays out the EU institutions' functional and organizational elements and fosters economic growth within the Union. The treaty is also committed to promoting agriculture and fisheries, developing regional cooperation, and boosting trade amongst its member states. The TFEU was signed in 1957, in Rome and expanded beyond a single market. The treaty aimed to establish the foundations of the EU's single market and promote the free movement of goods, capital, services, and people among the member states. The TFEU has undergone several modifications and amendments over the years, but the objective of ensuring fair market competition between member states remains at the forefront of the EU's priorities. The TFEU continues to regulate the EU's single market and competition rules. The treaty sets out the principles of the EU's competition policy, which aims to promote fair competition and prevent the abuse of dominant market positions by companies. The TFEU

[55] *Id*. (art.47)
[56] Chiriţã, *supra* note 49.
[57] Treaty on the Functioning of the European Union (TFEU) | Practical Law, https://content.next.westlaw.com/practical-law/document/I43e1d2781c9a11e38578f7ccc38dcbee/Treaty-on-the-Functioning-of-the-European-Union-TFEU?viewType=FullText&transitionType=Default&contextData=(sc.Default) (last visited Nov 17, 2023).

also establishes the rules for state aid, which are intended to prevent EU member states from distorting competition by providing financial support to companies.

It was identified in the articles of the Treaty establishing the European Community that EU law aims to promote "harmonious development, […] strengthening of its economic, social and territorial cohesion" and ensure that "competition is not distorted."[58] The EU internal market counts as the cornerstone of the treaty, as goods and services could be traded freely between countries and across borders inside the EU. The creation of a single market has been a significant success for member states, which have seen their economies grow substantially as new businesses have opened up across Europe. Economic integration among its member countries has also helped break down trade barriers between them and enabled greater cooperation on policies at both national and international levels. The creation of an internal market has granted the citizens of the EU four main freedoms, which are: free movement of persons, free movement of services, free movement of goods, and free movement of capital.[59]

The treaty included very specific rules governing market competition and providing the legal framework for EU competition law. The EU's competition rules are designed to ensure fair and open competition in Europe's markets. They prevent big firms from abusing their market power and harming smaller businesses, by making sure that companies do not abuse their power to buy up competitors or charge higher prices than those of competitors. They also ensure that mergers aren't completed unfairly by checking all the facts relevant to the economic effect resulting from the merger. The rules were established in Articles 101 and 102 of the treaty. Article 101 prohibits anti-competitive agreements and abuses of dominant market positions, while Article 102 addresses the abuse of a dominant market position by one or more companies. The EU competition rules are enforced by the European Commission, which has the power to launch investigations and impose fines on companies that breach said rules.

The EU competition law has faced two main criticisms. The first criticism was the fact that the law was broadly drafted, which could lead to an overly general application that might result in treating all agreements alike regardless of their benefit to consumers.[60] Another

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[58] *Id.*
[59] *Id.*
[60] TONY STOREY PIMOR ALEXANDRA, UNLOCKING EU LAW (5 ed. 2018).

criticism was that the broad application of the law would lead to member states promoting their national interests over the community's interests.[61] However, it is argued that articles 101 and 102 of the treaty were broadly drafted in order to grant the European Commission and the European Court of Justice the ability to interpret the articles according to the anti-competitive behavior commenced by the undertakings.[62]

Article 101 lists examples of what to be considered anti-competitive behavior when entering into an agreement between undertakings:

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>   (b) limit or control production, markets, technical development, or investment;
>   (c) share markets or sources of supply;
>   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts […]
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>   — any agreement or category of agreements between undertakings,
>   — any decision or category of decisions by associations of undertakings,
>   — any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[63]

On the other hand, Article 102 focuses on actions undertaken by a single firm that enjoys a dominant market position:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

[61] *Id.*
[62] *Id.*
[63] Treaty on the Functioning of the European Union (TFEU) | Practical Law, *supra* note 57.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[64]

Unlike the Sherman Act, the consumers have been an essential element of the TFEU competition rules text. The word consumer appeared in both, Articles 101 and 102. Also, consumer welfare was a core concern in the Guidelines on the application of Article 81(3), now 101, of the Treaty, which set the objective of the article "to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[65] The majority of the policy texts use the term consumer and customer rather than the term consumer welfare.

C. Definition of Consumer Welfare

Consumer welfare is an economic term that can be measured through consumer surplus. Consumer surplus is achieved when a consumer is willing to pay more for a product than its market price. For example, if a consumer is willing to pay 2x the amount for a meal, but they actually pay x amount, saving half of what they intended to pay, then there is a consumer surplus. As the goal of competition policies is to regulate market competition and achieve consumer welfare, economists have argued that the goal of competition rules is to achieve total welfare.[66] Although consumer welfare is part of the total welfare, reaching the latter does not necessarily entail the attainment of consumer welfare. Total welfare consists of both consumer and producer surplus, where producer surplus is reached when producers sell for a higher price than they are willing to sell for, resulting in more revenue. However, because welfare is based on an individual's utility from consuming a particular commodity or service, it can be quite hard to measure as it involves a lot of subjectivity.

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[64] *Id.*
[65] Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), (2004), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2807%29 (last visited Nov 19, 2023).
[66] Svend Alb, Consumer Welfare in EU Competition Policy, Aims and Values in Competition Law, (2013).

As we have seen above, the evolution of competition law in both the US and EU shares a common origin and a similar goal of promoting consumer welfare. At the same time, they do not always align in their interpretation and application of the relevant rules and standards, resulting in different outcomes and implications for firms and consumers. The next chapter builds on this historical and comparative analysis by examining a new and emerging challenge for competition law: the phenomenon of zero-price markets, where goods and services are offered for free to consumers, but generate significant profits and market power for the providers. This chapter will explore the complexities and controversies of these markets, and how they challenge the traditional tools and concepts of competition law.

II. The Challenge of Zero-Price Markets in Competition Law

In recent years, a new type of trade based on zero-price has emerged, presenting unique challenges to competition law. This chapter explores the complexities of zero-price markets, examining how they operate and the difficulties they pose for traditional competition policy application. This chapter examines the characteristics of zero-price markets, the challenges they present for identifying relevant markets and market power, and the strategies firms use to profit in these markets. It also assessess the tools and approaches regulators use to address these challenges, including the SSNIP test and the price correlation test. Finally, the chapter discusses arguments and case laws that have shaped the debate around competition law's applicability to zero-price markets, highlighting the need for new regulatory approaches to address the unique dynamics of these markets.

A. Zero-price Market

In the past years, markets have witnessed a new breed of trade based on zero-price. The fact that zero-price trade truly involves nothing in return will be addressed later in this chapter, but for now, let's explore what the zero-price market is. Although the zero-price market has recently been under the spotlight with the expansion of the digital economy, people have been paid zero-price for a long time. For example, the service of listening to the radio has been available free of charge since the 1920s, and general-purpose credit and debit cards have been utilized since their launch in 1950.[67] Free services have developed nowadays to become a crucial part of our day-to-day lives. Some examples include navigation services provided by various map apps, internet searches, online shopping, or merely scrolling through social media platforms. Indeed, free is good, at least from a consumer's point of view. The idea of paying in exchange for the services we have utilized free of charge for so long, such as paying to conduct a Google search or navigate through Google Maps, would not be welcomed by almost anyone. Yet, free is not as good when it comes to the regulatory framework and monitoring market competition. The structure of a market based on zero prices is different from that which has given rise to modern

[67] David S. Evans, *Antitrust Economics of Free*, (2011), https://papers.ssrn.com/abstract=1813193 (last visited Sep 22, 2023).

competition policies;[68] traditional tools used to define a market mainly rely on price considerations when assessing relative markets and evaluating market power. Defining a market counts as the first step toward assessing the market power of a firm. A relevant market is identified by the ability of a group of products within a specific geographical area to affect competition and cause constraints on one another.[69] However, before explaining the tools for identifying the relevant market, it is important to understand how the zero-price market operates.

1. Characteristics of a Zero-price Market

One of the challenges of regulating zero-price markets is defining the relevant market in which the firms operate. According to a definition set by the UK Office of Fair Trading, there are two essential components of market definition: the product market and the geographic market.[70] The product market constitutes the sale of goods and services, and the geographic market is the geographic location in which the market operates. Demand and supply are both also taken into account when identifying a market.[71] Within the relevant market, the demanded product must be interchangeable for the consumer. The classification of a geographical market, whether national, regional, or international, is based on the location of buyers and sellers. The degree of competition may be overstated if we apply a broad definition for product and regional markets, and if they are defined too narrowly, we cannot regulate competition due to the exclusion of substantial elements. In other words, market definitions that are too wide or too restrictive result in understatement or overstatement of market share and concentration of powers.

In addition to the above standards for markets, there are two key economic variables to measure competition in the market. One type is a perfect competition market and another one is the monopoly market.[72] A perfect competition market is a type of market consisting of small businesses where each of them competes equally with no entry and exit barriers. Such markets consist of many firms, and prices are stable enough to attain revenue for competitors and consumer welfare. The second type of market is the monopoly market, where one market player

[68] John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 UNIV. PA. LAW REV. 149 (2015).
[69] Massimo Motta, *Supra* note 52.
[70] Commission Notice on the definition of relevant market for the purposes of Community competition law, (1997), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 (last visited Oct 9, 2023).
[71] *Id*.
[72] Shelby D. Hunt & Robert M. Morgan, *The Comparative Advantage Theory of Competition*, 59 J. MARK. 1 (1995).

controls the full market, and therefore has the ability to control prices, which results in creating market entry and existing barriers. Although these types of markets are extreme and far from reality, as the market can neither attain perfect competition nor be controlled by a single entity, they are used as indicators for market competition.[73] For example, if the market tends to drift closer to the perfect competition side on the market competition axes, this shall indicate that the market is achieving sufficiently equal competition. On the other hand, if the market shifts towards the monopolistic measurement point, it shall indicate that such a market operates with a high level of power concentration.[74] Therefore, understanding the nature and characteristics of zero-price markets requires a careful analysis of the market structure, the degree of competition, and the potential sources of market power for the firms involved.

2. Zero Price Business Models

A market with no pricing is structurally distinct from the marketplaces that gave origin to current antitrust legislation and theory. To become able to economically provide goods and services at zero price in the long run, a firm must aim to make a profit in some way that does not include those goods and services, but the question here is how? There are multiple ways in which firms generate profits which can be divided into two groups: sustainable and unsustainable.[75]

a. Sustainable Models

Sustainable business models are those that can maintain their profitability and competitiveness without relying on price as the main source of revenue. These models often involve creating value for customers or users in other ways, such as offering convenience, quality, innovation, or network effects. In this section, we will discuss some of the common types of sustainable business models that operate at zero price, and how they differ from traditional pricing strategies.

1) Tying and Complementary Models

The first group is known as the tying and complementary models refers to firms that undertake tying, complementary product strategies. Tying strategies are where consumers are conditioned

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[73] *Id*.
[74] *Id*.
[75] Newman, *supra* note 68.

to purchase a tied product in order to receive another product.[76] One example of this behavior can be clearly established from Google's actions towards mobile manufacturers trying to obtain Android mobile software licenses. Google tied its search and browser app to its software and forced manufacturers to pre-install the apps on all the devices sold in the European Economic Area.[77]

Another commonly used model is the complementary products model. It is where companies sell products at no cost while frequently also selling related goods. This could happen through tying the two products or non-tying. Tying a complementary product involves combining two separate products that do not depend on each other to operate.[78] One example of that could be witnessed in the *U.S. v. Microsoft Corp.* case where complaints were filed against Microsoft for allegations of "illegally tied[ing] two purportedly separate products, Windows and Internet Explorer…, in violation of [article] 1" of the Sherman Act.[79] Examples of providing complementary products through non-tied means could be found in online platforms providing travel services by offering both airline and hotel bookings. More often than not, two services are used together as they complement each other. However, consumers have the ability to choose between which service they are willing to use, either one or both of them, without any means of coercion over their decision.

2) Freemium Model

In addition to the tying and complementary models, companies may also adopt a model referred to as the freemium model. Freemium as a term is a combination of the terms free and premium. This business model is where consumers enjoy a free product or service provided in a basic version, with an option to upgrade to a version with better features by paying a fee. This is a very common model adopted, especially in mobile apps and games.

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[76] *Id.*
[77] Antitrust: Commission fines Google €4.34 billion for abuse of dominance regarding Android devices, EUROPEAN COMMISSION - EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (last visited Sep 25, 2023).
[78] Newman, *supra* note 76.
[79] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)

3) Multi-sided Business Model

Finally, one of the most common models is the multi-sided business model. Many companies, especially online platforms, operate through a multi-sided business model. The multi-sided platform is a model that caters to two or more different customer groups, where at least one of the groups is receiving services at zero price while the others are being charged. However, being on the same platform as the other consumer group is important to at least one of the customer groups. At least one of the consumer groups values the existence of the other in a multisided platform market. One example of the multi-sided model could be a shopping mall. Usually, one does not pay in exchange for a walk at the mall or using its facilities, however, shops in return pay rental and maintenance fees to the mall in order to have their shops at this location. In exchange for their payment, the shop owners receive an opportunity to showcase the product they intend on selling and the chance of their products being seen and bought by the public.

Thus, we see that these models - the tying, the complementary, the freemium, and the multi-sided - provide a way for companies to leverage their existing products or services and create additional value for different customer segments. These models can enhance customer satisfaction, loyalty, and retention. However, these models also involve a lot of challenges in terms of pricing, quality, privacy, and competition.

b. Non-Sustainable

On the other hand, non-sustainable business strategies are strategies on which firms cannot depend for a long period of time to generate profit. Examples can be found when firms conduct promotional campaigns to increase their market shares or when new firms aim to attract customers.[80] Other examples that do not seek financial rewards can be found in non-profit organizations offering free services. However, these strategies are often short-lived and may not provide a competitive advantage over rivals in the long run. For instance, promotional campaigns may lose their effectiveness as consumers become accustomed to them or as competitors match them. Similarly, new firms may face difficulties in retaining customers who switch to other

[80] Newman, *supra* note 78.

providers that offer better quality or lower prices. Therefore, non-sustainable business strategies are risky and may not guarantee success in a dynamic and competitive market environment.

B. Identifying Market Power

For competition law to assess the market power of a firm and its ability to affect competition in a relevant market, regulators have adopted in their assessment a set of tools to reach their answers. The set of tools has been traditionally adopted and developed to evaluate firms' power within a relevant market by evaluating the relationship between a product's price and demand as explained below. These tools are the SSNIP Test, price correlation, Granger-causality tests, unit-root tests, and co-integration, which will be explained in detail in the following points.

1. The Small but Significant and Non-Transitory Increase in Price Test (SSNIP)

The test that is widely adopted, especially in merger cases, by regulatory authorities worldwide is the SSNIP test, or the Hypothetical Monopolist test. This test was first introduced by the US Department of Justice (DOJ) and gained wide popularity due to its accuracy in identifying a relevant market.[81] The hypothetical monopolist test seeks to identify the smallest market within which a hypothetical monopolist could impose a small significant non-transitory increase in price of 5% for at least 12 months. To understand how the SSNIP test operates we can assume there is a fictitious monopolist who is the exclusive provider of natural leather belts who wishes to increase the product's price by 5-10%. The result of the price increase should be one of two scenarios, and each shall detect whether natural leather belts are treated as a separate market on their own or whether they are part of a bigger market. In the first scenario, after the monopolist increased the price of natural leather belts by 5–10%, the price increase resulted in profit, and the natural leather belts demand was not heavily impacted. This will imply that there aren't many things that can significantly replace natural leather belts. That way, when the price of natural leather belts is raised, the hypothetical monopolist won't experience a large drop in demand. As a

[81] Øystein Daljord, *et al*, *THE SSNIP TEST AND MARKET DEFINITION WITH THE AGGREGATE DIVERSION RATIO: A REPLY TO KATZ AND SHAPIRO*, Journal of Competition Law & Economics, Volume 4, Issue 2, June 2008, Pages 263–270, https://doi.org/10.1093/joclec/nhm032

result, natural leather belts will be regarded as a separate market, and the test has already provided an answer.

In the second scenario, after the monopolist increased the price of natural leather belts by 5–10%, the price increase resulted in a drop in demand and a loss of profit. Following the price increase, a sizable portion of demand was switched from natural leather belts to synthetic leather belts. Since other items exert a competitive constraint on natural leather belt sellers, this suggests that natural leather belts should not be treated as a separate market on its own. With these results, the test should go on to investigate a bigger market, like natural and synthetic leather belts combined. Would a hypothetical natural and synthetic leather belt monopolist find it profitable to raise the cost of these products by 5% to 10% over their current price? Once more, the relevant market for our inquiry will be discovered if the price increase is profitable. Otherwise, until a distinct market has been identified, the test should continue to include those products that exercise a constraint on natural and synthetic leather belts.

From the example above, it is evident that when identifying a relevant market, we do not look at the specific product only, but it expands to include products that act as a perfect substitute for it. However, when looking at a substitute, we need to keep some factors into consideration in order to assess whether this substitute can exercise a competitive constraint on the product.[82] This substitutability does not arise only from the shift in consumers' demand from one product to another, i.e., consumers have shifted from buying natural leather belts to buying synthetic leather belts. In fact, substitutability can exist also from the side of supply and the ability of other producers to enter the natural leather belts market. For example, if a natural leather shoe manufacturer possesses the needed skills, materials, and machinery which would result in him being able to enter the natural leather belts market without incurring sunk costs, then competitive constraints shall arise from the fact that lower prices have attracted new entrants to the market.[83]

The SSNIP test serves as a very useful tool when identifying relevant markets, however, the example provided above is merely a high-level explanation of how it operates. When implementing the hypothetical monopoly test, further price factors are considered. When

[82] Massimo Motta, *Supra* note 69.
[83] *Id.*

assessing the profitability aspect when a firm increases a product's price, whether the price increase would lead to profitability or not, one factor that will affect the result of this assessment is the own-price elasticity. Own-price elasticity is identified by calculating the percentage of change in the product's demand when faced with a one percent price increase. In other words, it assesses the responsiveness of customers to the quantity demanded when changing a product's price. By estimating a company's own price elasticity with regard to a product, it can be determined how consumers will respond to price adjustments and how sensitively a company's sales are to shifts in those of competitors. If competitors are unable to effectively react by increasing their output in reaction to a firm's price rise or decrease in output, a firm would experience reduced demand elasticity which therefore reflects higher market power.[84]

Another consideration that is assessed when identifying a relative market and whether a product is subject to competitive constraints is cross-price elasticity. Cross-elasticity focuses on the price of a related product, which may act as a substitute or complement to the original product. Reflecting on the above example, if the demand for synthetic leather belts does not increase when the price of natural leather belts increases, it shows that synthetic leather belts do not act as a substitute for natural leather belts. Accordingly, natural leather belts have a separate market from other belts.

2. Price Correlation Test and Other Tools

Although the SSNIP test might be the most common, other approaches – tests – have been adopted when determining the relative market based on the assessment of price factors. One of the tests that is also common when identifying a market is the price correlation test. This method was suggested by Stigler and Sherwin in 1985, who argued that the central role played by "price in defining a market is the reciprocal side of this relationship between price determination and market determination."[85] The price-correlation test can be simply summarized as follows: upon the assessment of two or more products, if we indicate parallel price movements, this indication illustrates that the prices are in the same market. However, if we indicate significant nonparallel

[84] OECD Competition Policy Roundtables, Evidentiary issues in proving dominance,(2006), https://www.oecd.org/daf/competition/41651328.pdf (last visited Sep 24, 2023).
[85] George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J. LAW ECON. 555 (1985).

price movements, this indication illustrates that the products are not in the same market.[86] To identify relevant markets, economists and regulators have used even more tools, such as Granger-causality tests, unit-root tests, and co-integration which all heavily depend on price factors in their analysis.[87]

It is clear that there are multiple tools available for identifying relevant markets which then leads to reaching the conclusion of whether a specific firm enjoys a dominant position. However, what they all have in common is the fact that they cannot reach a conclusion without price considerations, which could be, somewhat, absent from a number of firms providing free services in the digital arena. As a result, it can be argued that competition policies have fallen short in formulating an adequate response before the development of the zero-price economy.[88]

C. Challenges to identifying Relevant Market in Zero Price Economy

As established in the section above, it is clear that market definition and market power analysis are mainly concerned with identifying the set of competitive constraints that determine whether or not a firm can engage in harmful behavior with respect to its customers.[89] In theory, market definition and market power are usually identified through the aforementioned set of tools. However, empirically, the tools are not sufficient when the product has a price of zero as it becomes challenging to identify the firm's market share when it offers products or services at no price. The American economist David S. Evans points to the problems inherent in this approach:

> [m]arket share calculations become problematic. Basing shares on the value of sales would not make sense since it would ignore the constraint coming from the free products; basing shares on unit sales does not take into account quality differences for which price is a common proxy. There is no good mathematical solution for this problem and qualitative and judgmental analysis becomes necessary.[90]

In the modern economy, traditional anti-trust policies continue to cast aside digital platforms as a threat to market competition for too long. As a matter of fact, there have been a number of arguments against the fact that companies such as Google and Facebook should be eligible for

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[86] *Id.*
[87] Yannis Katsoulacos et al., *Quantitative Price Tests in Antitrust Market Definition with an Application to the Savory Snacks Markets*, 12 J. AGRIC. FOOD IND. ORGAN. 1 (2014).
[88] Newman, *supra* note 80.
[89] Evans, *supra* note 67.
[90] *Id.*

competition law regulations.[91] Digital platforms were considered incapable of disrupting market competition and exercising a competitive constraint on a product. In a famous opinion published by Robert Bork, a legal scholar and the author of the book The Antitrust Paradox which has majorly contributed to the antitrust development and courts' application in the USA, he argued in favor of Google when it faced allegations of monopoly and abuse of dominance in the internet search market:

> [c]onsumers can switch search engines without cost instantaneously. This is why an argument that a search engine will bias results in favor of its own or sponsored sites makes no economic sense. […] Google's current position in information search doesn't establish market power over advertising. The share of clicks on Google includes all information searches, which can't be a measure of market control because most clicks have nothing to do with advertising. The competitive market is more accurately defined as all advertising, including newspapers, television, radio and other media, plus vertical search sites. In that case, Google's market share is trivial.[92]

The discourse that supports the idea that competition law does not apply to products that have no price has gained major support from lawyers, economists, and even courts. This support was endorsed by the belief that without a price, there will be no markets, and without markets, there is no place for competition law intervention.[93] This also can be found in case precedents such as the *Kinderstart.Com LLC v. Google, Inc.* court decision.[94] In March 2006, Kinderstart, a website that offers resources and information on parenting, sued Google for arbitrarily and unfairly reducing Kinderstart's website's page rank, which is a gauge of a website's value. This action has led to a sharp decline in traffic and sales on Kinderstart's website.[95] Accordingly, Kinderstart accused Google of conducting anti-competitive activities and claimed damages. Furthermore, KinderStart claimed that there was an attempt by Google to monopolize two markets according to Section 2 of the Sherman Act.[96] The markets were, according to the claimant, the search market, which includes search engine development, implementation, and usage in the United States, and the ads market, which includes advertisers seeking online advertising to target and

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[91] Matt Stoller, et al, Addressing Facebook and Google's Harms Through a Regulated Competition Approach, American Economic Liberties Project, https://www.economicliberties.us/wp-content/uploads/2020/04/Working-Paper-Series-on-Corporate-Power_2.pdf (April 2020)
[92] Antitrust and Google, CHICAGO TRIBUNE (2012), https://www.chicagotribune.com/opinion/ct-xpm-2012-04-06-ct-perspec-0405-bork-20120406-story.html (last visited Oct 3, 2023).
[93] Newman, *supra* note 88.
[94] Keith Uyeda, *Kinderstart.Com LLC v. Google, Inc.* (2007).
[95] *Id.*
[96] *Id.*

reach Internet browsers and users of search engines in exchange for monetary values.[97] The Court decided against KinderStart on the basis that the claimant had failed to provide sufficient support for its claims related to the attempted monopolization allegation and concluded that the relevant market was not sufficiently and adequately outlined to its claim.[98] In this example, it is clear that the court did not recognize the search market as a relevant market and disregarded all allegations of monopolization by Google, which were rooted in the fact that the search market couldn't be identified as a relevant market, because of the zero price factor.

This chapter has examined the challenges and limitations of applying traditional antitrust policies to digital platforms, especially those that offer zero-price products such as search engines and social media platforms. It has shown how the concepts of market definition, market power, and consumer welfare are difficult to apply in the context of digital markets, where network effects, data, and innovation play a crucial role. It has also discussed some of the arguments and cases that have been raised in favor of or against the regulation of digital platforms under competition law. The next chapter will explore some of the alternative approaches and proposals that have been suggested to address the competitive issues raised by digital platforms and their impact on the economy and consumers.

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[97] *Id.*
[98] *Id.*

III. Big Data and its Impact on Competition Law

This chapter delves into the impact of big data on competition law, examining its definition, ecosystem, role as a competitive advantage, and its implications for market power. We begin by defining big data as the vast amount of information that tech firms process and control, characterized by high volume, velocity, and variety. The discussion then moves to the ecosystem created by data, where companies offer a range of services under one umbrella, aiming to simplify user experiences and retain customers within their ecosystem. This strategy allows firms to collect vast amounts of personal data, which is often referred to as the "new oil" or currency of the digital world. The chapter further explores how data has become a competitive advantage, enabling firms to improve operations, understand consumer behavior, and enhance customer engagement. However, the concentration of data ownership in a few tech firms has raised concerns about monopolistic practices and barriers to entry for new market players. This chapter also addresses the implications of data on market power, including barriers to entry, self-preferencing behavior, weaker data protection, and the surge in mergers and acquisitions by tech giants to control data and maintain dominance. Through this analysis, we aim to provide a comprehensive understanding of how big data is reshaping competition law and its enforcement.

A. Defining Big Data

The term *big data* is currently being used in the context of competition law in referring to the size of data tech firms process and control. Big data is defined as "high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation."[99] The three Vs help to define the nature of big data and the challenges associated with managing and analyzing it.

1. Volume

Volume refers to the amount of data that is generated and collected on a daily basis. With the proliferation of digital devices and sensors, as well as the growth of the internet, the volume of

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[99] Definition of Big Data - Gartner Information Technology Glossary, GARTNER, https://www.gartner.com/en/information-technology/glossary/big-data (last visited Oct 7, 2023).

data being produced has increased exponentially. This data comes from a variety of sources, including social media and online platforms, mobile devices, sensors, and wearable digital devices.

2.Velocity

Velocity exhibits the speed at which data is generated and collected. In many cases, data is generated in real-time or near-real-time, requiring organizations to process and analyze it quickly to derive actionable insights.

3.Variety

Variety indicates the different types and sources of data that make up big data. This includes structured data, such as data stored in databases, as well as unstructured data, such as text, images, and videos.

In addition to the three Vs above, there are additional characteristics that are often for big data, including veracity, variability, and value. Veracity indicates the quality and accuracy of data, as well as the trustworthiness of its source. Variability shows the diversity of data formats and sources. And finally, value is the potential insights and benefits that can be derived from analyzing big data.

B. Eco-system

The term eco-system was introduced in market competition in the early 1990s by a number of economist in aims to describe rapid the evolution of companies. In one of the leading literature on eco-systems, the economist James Moore believed that companies are seeking to grow more and more in scope and scale, he compares this evolution progression with species evolution through the natural selection process, where only the fittest shall survive.[100] In his paper, Moore argued that the evolution of an eco-system, regardless of what industry, is modeled through a process of co-evolution through "complex interplay and cooperative business strategies"[101]

[100] Moore, James, Predators and Prey: A New Ecology of Competition, Harvard Business Review, (1999).
[101] *Id*.

Moore has also argued that the creation of an eco-system consists of four stages.[102] Stage one of creating a business ecosystem is knowing what the customer wants. In other words, like any business, the business needs to have a unique product. In this stage, the company often spends more than it generates in order to promote for its products and make them accessible to customers. In the second stage in a creation of a business ecosystem is to "expand to conquer broad new territories."[103] In said expansion, the author refers to both expansions of business scale and scope. The third step of a successful ecosystem creation recipe is stability. For a business to thrive as an ecosystem, it must have the ability to grow, generate profit, and remain stable enough for customers and investors to trust. Said stability stems from, the author argues, having strong bargaining powers due to having control of "a critical component."[104] Like all of the successful ecosystems we are now witnessing, each possesses a robust bargaining power. One amongst many examples of such power can be Google. In recent years, Google have provided a wide range of services which are essential to its customers' daily life, including browsing and searching services, email, mobile operating systems, smart homes, maps, and more, all accessible through one account on almost any device. This has simplified the users' experience, making it easier to use the services and harder to give such services away. By having the customer depend on these services in our day to day needs, Google has possessed a strong bargaining power against its customers.

Another firm that possesses a strong bargaining power is Meta. Meta collects and maintains an exponential amount of data through its platforms like Facebook and WhatsApp. Such data allows the company a enjoy a stronger bargaining power against smaller businesses who seek Meta's platform to promote their business. Finally, according to the author, the final stage occurs when "mature business communities are threatened by rising new ecosystems and innovations."[105] Indeed, any company could be threatened by its rival regardless of how big or small it is, however, the author elaborates that ecosystems are created by the ability of the threatened company to respond to such threats. A company that enjoys a strong market power responds in multiple ways to protect and further grow its ecosystems using three main tactics.

[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

Such tactics include hurdling and slowing down its competition. One example is using barrier to entry strategies such as predatory pricing or exclusive dealing with customers. Another protection mechanism is incorporating new innovations to its existing business. One example can be found in Meta's response to Snapchat threats on Instagram. With the launch of Snapchat, teenage users shifted towards the app and started sharing less on Meta's family of apps and more on Snapchat which was prominently because of the feature of Snapchat Stories. Around four years after Snapchat's launch, Meta revealed a new feature on the Instagram platform which they called Instagram Stories, which has significantly slowed down the growth of Snapchat.[106] The final tactic, as James described is the ability of the business to" fundamentally restructure themselves to try coping with a new reality."[107] This of course can be witnessed in the rampant mergers and acquisitions undertaken by big tech firms, which they leverage in order to increase their market power, collect more data, and have further control over their competition.

C. Data as a competitive advantage

Data is a decided competitive advantage. Meglena Kuneva, the European Consumer Commissioner, expressed the importance of personal data in a Keynote Speech, Roundtable on Online Data Collection, Targeting and Profiling by stating that "Personal data is the new oil of the internet and the new currency of the digital world."[108] Big data is crucial for tech companies as it delivers useful consumer insights that firms use to improve their day-to-day operations. Analyzing and assessing historical and real-time data helps companies determine consumer behaviors and preferences, allowing firms to become more responsive to the changing demands and needs, and boost their customer engagement by refining their marketing, advertising, and promotions strategies. Although operating at free charge, "only the monetary price consumers pay is zero. Consumers pay in kind, by transferring their data."[109] Tech companies including but not limited to Meta, Alphabet, Amazon, Apple, and Microsoft generate revenue through the data they acquire from their customers directly and indirectly. The growing mass ownership of

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[106] Alex Kantrowitz, Snapchat was 'an existential threat' to Facebook — until an 18-year-old developer convinced Mark Zuckerberg to invest in Instagram Stories, Business Insider,(2020)
[107] *Supra note* 106.
[108] Meglena Kuneva, European Consumer Commissioner, Keynote Speech, Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009
[109] Stigler Committee on Digital Platforms, Final Report, September 2019, available at https://research.chicagobooth.edu/stigler/media/news/committee-on-digitalplatforms-final-report

consumer data has created a new form of economics where data has become the new currency. Given the importance of data to the tech market players, they have been on the hunt to accumulate data in order to develop their business, which has led to the concentration of data ownership to a small number of tech firms and the creation of a new form of monopoly over data.[110] This form of data monopoly has granted tech firms a considerable competitive advantage over smaller rivals.

D. Data and Market Power

This section will examine how the accumulation of data by tech companies can give them an edge over their competitors and create market power. Market power is the ability of a firm to influence the price, quantity, quality, or innovation of its products or services, and to affect the profitability or entry of other firms in the same market. Market power can have negative effects on consumer welfare, such as higher prices, lower quality, less choice, or reduced innovation. The chapter will discuss some of the factors that enable tech companies to acquire and maintain market power through data, such as network effects, and economies of scale and scope. We will also explore some of the practices that tech companies use to create barriers to entry for potential rivals, such as exclusive contracts, loyalty contracts, and predatory pricing.

1. Barriers to Entry

Data collection by tech companies can give them an unfair advantage over new entrants in the digital market, creating barriers to entry that harm competition and innovation. One of the consequences of the extended data collection by tech companies without oversight is the creation of barriers to new market entrants. Barriers to entry could be defined as "factors that could make a new entry on the market less likely or less rapid by affecting the expected sunk costs of entry and/or the expected profits for new entrants once they are in the market, or by establishing physical, geographic or legal obstacles to entry."[111] Some literature has argued that large

[110] Nathan Newman, Search, Antitrust, and the Economics of the Control of User Data, YALE JOURNAL ON REGULATION, https://www.yalejreg.com/print/search-antitrust-and-the-economics-of-the-control-of-user-data/ (last visited Oct 9, 2023).
[111] Propensity of Data Accumulation to Raise 'Barriers to Entry,' (2021), https://www.internetjustsociety.org/propensity-of-data-accumulation-to-raise-barriers-to-entry (last visited Oct 12, 2023).

acquisition of data cannot exhibit a barrier to entry because online market entry does not necessarily need big data to be present by the time of market entry. Instead, online service providers can easily establish their consumer base if their products are desirable to consumers.[112] However, digital platforms enjoy certain characteristics that could result in data monopolization and barriers to entry. These characteristics include: "i) strong network effects […]; ii) strong economies of scale and scope […]; iii) marginal costs close to zero […]; (iv) high and increasing returns to the use of data […]; and v) low distribution costs that allow for a global reach."[113] Factors contributing to the platform being more appealing to use due to its large existing customer base, and low cost of expanding in scope and scale can be attributed to the fact that tech firms retain an enormous amount of data.

Some actions taken by digital platforms can also inflict barriers to entry to smaller rivals. Digital platforms have achieved market power in the advertising market, accordingly, this power can lead to block entry of new competitors. For example, Facebook had a strict policy against cryptocurrency advertisements on its platforms, which prevented cryptocurrency firms from marketing their business. The platform did not reverse its policy and allowed crypto ads until 2021.[114] However, in 2019, Facebook announced its plan to create a universal cryptocurrency Libra.[115] Another means of barrier to entry is exclusive contracts and loyalty contracts.[116] long-term and exclusive commercial arrangements can limit and eliminate the chances of smaller rivals entering the relevant market. An example of this type of agreement can be found in a recent US case against Google. Google is accused of leveraging its dominant position in the online search market as a result of exclusivity contracts with device makers, mobile operators, and other companies, making Google the default search engine on cell phones and web

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[112] Darren S. Tucker & Hill Wellford, *Big Mistakes Regarding Big Data*, (2014), https://papers.ssrn.com/abstract=2549044 (last visited Oct 12, 2023).
[113] Stigler Committee on Digital Platforms.pdf, *Supra* note 109.
[114] Expanding Eligibility to Run Ads About Cryptocurrency, META FOR BUSINESS, https://www.facebook.com/business/news/expanding-eligibility-to-run-ads-about-cryptocurrency (last visited Oct 12, 2023).
[115] Julia Boorstin, *Facebook Launches a New Cryptocurrency Called Libra*, CNBC (2019), https://www.cnbc.com/2019/06/17/facebook-announces-libra-digital-currency-calibra-digital-wallet.html (last visited Oct 12, 2023).
[116] Stigler Committee on Digital Platforms.pdf, *Supra* note 113.

browsers.[117] Subsequently, smaller rivals such as Microsoft Binge and others, have suffered from the effects of exclusive contracts when trying to enter the search market.

2.Self-preferencing

A common form of self-preferencing behavior is when a digital platform uses its dominant position in one market to leverage its presence in another market, where it may face more competition. The following paragraph will provide some examples of this practice by digital platforms. Self-preferencing behavior can be identified as "an undertaking treating itself, its services, or its subsidiaries favorably compared to its treatment of rival external competitors or costumers."[118] Self-favoritism is undertaking actions that lead to discrimination "in favour of its first-party services or products to the detriment of those of a third party, e.g., by making the latter less prominent, ranking them lower, degrading or delaying their access to the platform, or worsening their terms and conditions of access."[119] Multiple platforms have been involved in similar behavior. One example can also be Facebook cryptocurrency ads blockage as explained above. Another example is a famous case involving Google comparison shopping services, where Google "positioned and displayed its own comparison shopping service more favourably than competing comparison shopping services."[120]

3. Weaker data protection

One of the most debated consequences of controlling big data is concerns over data protection. As data is the most valuable asset to tech firms, big techs were too focused on gathering as much data as possible while paying little to no attention to how to properly retain and protect it. For example, it wasn't until 2019 during a security check that Facebook admitted

[117] David McCabe & Cecilia Kang, *Google Antitrust Trial: Google Viewed Exclusive Search Deals as a 'Weapon,' Justice Department Says*, THE NEW YORK TIMES, Sep. 12, 2023, https://www.nytimes.com/live/2023/09/12/business/google-antitrust-trial (last visited Oct 12, 2023).
[118] Alessandra Tonazzi & Gabriele Carovano, *DIGITAL PLATFORMS AND SELF-PREFERENCING*, COMPET. POLICY INT. (2020).
[119] Massimo Motta, *Supra* note 82.
[120] Case T-612/17 Google LLC, and Alphabet,. Inc. v. European Commission (2021).

to storing users' passwords in plain text files. These files were accessible internally to more than 20,000 employees.[121]

Although not all collected data are personal data, however, most of these data are directly related to the platforms' users in one way or another. The General Data Protection Regulation (GDPR) defines personal data in Article (4) as:

> […] any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;[122]

Tech firms are usually involved in what is referred to as data mining, a process in which firms gather a vast amount of data on consumers' daily online activity in order to provide targeted ads. The targeted ads occur upon sharing consumers' personal information with third parties without them knowing with whom it was shared or even consenting to share the information. There have been multiple incidents where tech firms have engaged in this behavior. For example, one of the biggest ever data breaches by digital platforms was the case of Facebook and Cambridge Analytica. In this incident, Cambridge Analytica harvested and used personal information from Facebook users without authorization in order to create targeted political advertisements and nudges used toward a certain voting choice.[123] Another example is Google's 2018 famous security breach when it failed to reveal a security breach incident in Google+ that left thousands of profiles exposed to external parties due to a software glitch.

4. Mergers and Acquisition

Tech giants have been on an acquisition spree for a little over a decade. They have shifted most of their focus to start-ups that succeeded in gaining control over customers' data and threatened

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[121] Alex Hern, *Facebook Stored Hundreds of Millions of Passwords Unprotected*, THE GUARDIAN, Mar. 21, 2019, https://www.theguardian.com/technology/2019/mar/21/facebook-admits-passwords-unprotected (last visited Oct 14, 2023).
[122] General Data Protection Regulation (EU GDPR) – The official PDF of the Regulation (EU) 2016/679.
[123] Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, THE GUARDIAN, Mar. 17, 2018, https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election (last visited Oct 14, 2023).

to potentially exercise competitive constraints over the tech giants.[124] The history of tech firms' series of rivals' acquisitions is proof that such acquisitions play a crucial role in the formation and maintenance of market dominance. For example, if we review the records of Meta – Facebook formerly, we will see that it has been involved in almost one hundred mergers and acquisitions since its launch in 2004.[125] Facebook started as Harvard University's exclusive student social network service and now has become one of the most ten valuable companies worldwide.[126] Meta has expanded gigantically in scope and in scale as a consequence of the vertical and horizontal mergers and acquisitions spree. What started as a social network platform is now a leader in the advertising market, messaging services, hardware and virtual reality industry, software, and recently blockchain.[127] Some of the most prominent horizontal acquisitions are Instagram and WhatsApp, which both have threatened Facebook's dominance in content sharing and chat markets. Both acquisitions were cleared by the Federal Trade Commission (FTC) and were not perceived as a violation of the Clayton Act.[128]

Other tech companies have also expanded in scope and scale through mergers and acquisitions. For example, Alphabet – Google's parent company which started in 1998 as an online search engine, has acquired more than two hundred and forty businesses.[129] Alphabet now owns over products and services around the world.[130] One of the most significant cases in Google's Double Click acquisition.[131] In 2007 the EU Commission conducted an investigation into Google's proposed acquisition of DoubleClick. In 2008, the commission issued a decision "declaring a concentration to be compatible with the common market and the functioning of the

[124] Mark Glick, Catherine Ruetschlin & Darren Bush, *Big Tech's Buying Spree and the Failed Ideology of Competition Law*, 72 UC LAW J. 465 (2021).
[125] Id.
[126] NASDAQ, Stock Screener, https://www.nasdaq.com/market-activity/stocks/screener (last visited Oct 14, 2023).
[127] Anders Henten & Iwona Windekilde, *Demand-Side Economies of Scope in Big Tech Business Modelling and Strategy*, 10 SYSTEMS 246 (2022).
[128] *See*, Closing Letters | Federal Trade Commission, https://www.ftc.gov/legal-library/browse/cases-proceedings/closing-letters?search=facebook&sort_by=search_api_relevance (last visited Oct 15, 2023). *Also See,* FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition, FEDERAL TRADE COMMISSION (2014).
[129] Henten and Windekilde, *supra* note 51.
[130] *Id.*
[131] Case No COMP/M.4731 – Google/ DoubleClick.

EEA Agreement."[132] The commission ruled that the merger would not have a negative impact on competition in the relative market.

The commission identified Google and DoubleClick as active members of the online advertising industry and did not take into consideration the personal data aspect in this merger as a form of market power from a competition standpoint, and established that personal data matters shall be addressed by data regulations, it concluded in its decision:

> This Decision refers exclusively to the appraisal of this operation with Community rules on competition,[…] In any event, this Decision is without prejudice to the obligations imposed onto the parties by Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data, in particular Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and Member States implementing legislation, which apply to the processing of personal data activities performed by the parties to the merger and by the entity resulting from the merger operation. Irrespective of the approval of the merger, the new entity is obliged in its day to day business to respect the fundamental rights recognised by all relevant instruments to its users, namely but not limited to privacy and data protection.[133]

In this case, the decision failed to address the privacy implication resulting from a merger of two entities that control an enormous amount of personal data and shall result in a high level of dominance, which would result in data breaches. Instead of addressing the competitive advantages of data which might lead to market dominance, and instead, the commission relied on the Data Protection Directive issued in 1995 to address the privacy concerns.

Therefore, this chapter demonstrates how the EU Commission's approach to data privacy in merger cases is inadequate and inconsistent, failing to account for the potential harms of data concentration and misuse. It argues that data privacy should be considered as an essential parameter of competition, especially in the digital markets where data is a key asset and source of market power. The next chapter will provide an overview of the legal framework for data

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[132] *Id.*

[133] Case No COMP/M.4731 – Google/ DoubleClick, REGULATION (EC) No 139/2004 MERGER PROCEDURE Article 8(1) (2008).

privacy in the EU, tracing its historical development and examining its current challenges and opportunities.

IV. Legal Framework for Data Privacy

One of the main challenges in the digital economy is how to balance the benefits of data-driven innovation with the protection of personal data and privacy. This chapter provides an overview of the legal framework for data privacy in the EU, tracing its historical development and exploring its implications for competition policy.This chapter explores the historical and legal foundations of data privacy regulations, focusing on the interplay between data protection and competition laws. Beginning with the evolution of the right to privacy, from professional practices to legal doctrines like Justice Louis Brandeis' "The Right to Privacy," the chapter sets the stage for understanding privacy rights. The chapter then delves into the EU's data privacy framework, starting with the European Convention on Human Rights and the Data Protection Directive of 1995. It highlights the significance of the General Data Protection Regulation (GDPR) introduced in 2018, emphasizing its impact on businesses and individuals. Examining the relationship between data protection and competition laws, the chapter discusses contrasting viewpoints, separatist and integrationist doctrines. It concludes with insights on how EU regulatory authorities are integrating privacy and competition laws, citing cases like Apple and Shazam acquisition and Facebook vs. FCO, showcasing the growing importance of privacy in competition analysis, especially in the digital economy.[134]

A. The Right to Privacy

It is believed that early data and privacy protection stemmed from professional practices rather than laws. For instance, lawyer-client confidentiality likely began as an informal agreement before being codified. Similarly, doctors have long kept medical records confidential, predating legal requirements. These practices show how professions protected personal information based on business interests, even before laws were in place.[135] Privacy as a legal right emerged prominently in "The Right to Privacy" article published in the 1890 Harvard Law Review.[136] Authored primarily by Justice Louis Brandeis, it stands as a cornerstone in American legal

[134] *See*, Facebook vs. FCO, *Supra* note 1.
[135] CALDER, ALAN. "A BRIEF HISTORY OF DATA PROTECTION." In EU GDPR - A Pocket Guide, Second Edition, 2nd ed., 10–15. IT Governance Publishing, 2018. https://doi.org/10.2307/j.ctv6cfnkk.5.
[136] Warren, S. D., & Brandeis, L. D. (1890). The Right to Privacy. Harvard Law Review, 4(5), 193–220. https://doi.org/10.2307/1321160

history, advocating for the notion of a right to privacy.

The article originated from the authors' observations of changes caused by technological advancements like cameras and newspapers and expressed concern about these technologies intruding into private and domestic life. The article argued that "instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life" and believed that such actions threaten people's fundamental rights to be left alone and become in complete charge of their personal affairs.[137] *The Right to Privacy* has made a strong case for protecting privacy rights, emphasizing the importance of individual dignity and autonomy and arguing that privacy is crucial to human liberty and personal security. Accordingly, per the authors' views, the law should recognize and protect individuals' rights to control the spread of information about themselves, especially with the emergence of technologies allowing the bypassing of others' personal space.

The article has sparked the debate about privacy rights in the United States and challenged traditional legal doctrines that prioritized property rights over personal privacy. Although the article did not immediately lead to legislative changes or significant legal reforms, its influence extended beyond academia and shaped early legal discussions, and influenced judicial opinions on privacy rights. One of the most influential cases in shaping privacy rights in the United States is Katz v. United States (1967).[138] In this case, the Supreme Court ruled that the Fourth Amendment protects individuals from unreasonable searches and seizures, even in places where they have no reasonable expectation of privacy. The decision expanded the scope of privacy protections to include electronic communications, laying the groundwork for future rulings on digital privacy. Thus, the Right to Privacy article was a seminal work that initiated the legal recognition of privacy rights in the United States and inspired further developments in this field.

B. EU framework

The European Union has developed a comprehensive legal framework for data protection, which aims to safeguard individuals' privacy, starting with the European Convention on Human Rights

[137] *Id*.
[138] Katz v. United States, 389 U.S. 347 (1967).

which granted the right to privacy against governmental intrusion, up until the General Data Protection Regulation, which allowed data subjects to control and trace there data.

1. European Convention on Human Rights

The European Convention on Human Rights, signed in 1950 has played a fundamental role in advancing privacy rights across Europe.[139] Article 8 of the Convention guarantees the right to respect for private and family life, home, and correspondence, providing a legal framework for protecting individuals' privacy against governmental intrusion.[140] The European Court of Human Rights was established to oversee compliance with the convention and played a crucial role in interpreting and enforcing Article 8. Over the years, the Court has issued numerous rulings that have expanded the scope of privacy protections and set important precedents for member states. One example is Kruslin v. France, where the court ruled that state interference with an individual's private and family life must be necessary in a democratic society.[141] This decision underscored the principle that privacy rights are not absolute and can be subject to limitations, but such limitations must be proportionate and justified.

2. The Data Protection Directive

In October 1995, another milestone was taken on the European Union level. The Data Protection Directive was enacted by the Union to regulate the processing of personal data amongst its member states. Data protection was developed to provide legal protection to individuals against the inappropriate use of information technology for processing their information.[142] The directive was not created solely due to technological advancement, but it was also a response to the need for legal safeguards in the context of evolving information technology and data processing practices, as well as the unification of data protection regulations amongst member states.[143] The Data Protection Directive was built on the seven principles of the Organization for Economic Cooperation and Development (OECD), which included notice, purpose, consent,

[139] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950).
[140] Id. Art8.
[141] Kruslin v. France, European Court of Human Rights, (April 1990).
[142] Hustinx, Peter, 'EU Data Protection Law: The Review of Directive 95/46/EC and the General Data Protection Regulation', in Marise Cremona (ed.), New Technologies and EU Law (2017), https://doi.org/10.1093/acprof:oso/9780198807216.003.0005
[143] *Id.*

security, disclosure, access, and accountability. These principles were designed to address the challenges posed by the increasing use of information technology and the growing volume of personal data being processed, it provided that:

> that personal data must be 'collected for specific, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.' This purpose limitation principle isnecessary in order to ensure trust, predictability, legal certainty and transparent use of personal databy data controllers. Further processing for a secondary purpose is not forbidden, but the secondarypurpose must not be 'incompatible' with the purposes for which the data have been collected. Distinguishing between compatible and incompatible processing of personal data is often acomplex and delicate exercise in data protection law.[144]

3. General Data Protection Regulation

Technology has significantly impacted and changed our lives over the past decades. Even in the most basic use of the internet, personal data is required from the users in exchange for benefiting from it. As a result, digital service providers and organizations regularly gather and analyze vast amounts of data. Users frequently have no control over what businesses will do withthe digital footprints they reveal about themselves, which creates a serious privacy paradox. The fundamental motivation behind the GDPR's creation was to give people greater control over theirpersonal data by addressing concerns about how all those data should be gathered, stored, and processed wholly or partially by automated means.[145] The data subject matter of the law is data that reveals "racial or ethnic origin, political opinions, religion or philosophical beliefs, trade unionmembership, and the processing of genetic data, data concerning health or data concerning sex lifeor criminal convictions and offences or related security measures."[146] Article 5 of the regulations, the GDPR has listed seven core principles to be followed when processing data:

> 1. Personal data shall be:
> (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
> (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with

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[144] Data Protection Directive, (DPD) 95/46/EC.
[145] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GeneralData Protection Regulation), Article 2.
[146] *Id.*

Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article89(1) subject to implementation of the appropriate technical and organisational measures requiredby this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Therefore, the GDPR sets out a comprehensive framework for the processing of personal data in the EU, which aims to protect the rights and interests of data subjects and ensure a high level of data protection. However, the GDPR does not address the specific challenges posed by the increasing concentration and market power of digital platforms that rely on personal data as a key input and output. These challenges include the potential effects of data-driven mergers, the abuse of dominant positions through data practices, and the coordination or collusion among data-rich firms. In order to tackle these issues, some scholars and policymakers have suggested that competition law and data protection law should be harmonized and integrated, while others have argued that they should remain separate and distinct. In the next section, we will examine the main arguments and perspectives of these two doctrines.

C. The Interplay Between Data Protection Laws and Competition Laws

Competition law rules apply to undertakings involved in economic activities. Such undertakings are restricted from colluding to limit competition and from participating in mergers that significantly affect competition. Accordingly, competition law governs all economic activities. On the other hand, the scope of data protection law is distinct in two ways: firstly, it prominently focuses on the processing of personal data, excluding other economic activities, while secondly, it applies regardless of whether the personal data processing is economic or non-economic in nature.

Furthermore, the goals behind the two laws differ. Competition law aims to prevent economic harm like price increases, reduced quality, and limited choices, whereas data protection law also aims to safeguard fundamental rights such as privacy and non-discrimination. However, while there may be some overlap, not all competition law issues involve data protection, and vice versa. For example, a company's data processing practices might comply with competition law but violate privacy rights. Similarly, not all competition issues involve data protection, as personal data processing isn't relevant in all markets. Accordingly, the question of whether the gap in competition law can be filled by data protection law is a matter of a major debate. The two opposing views are the separatist and integrationist doctrines.

1. The Separatist

One of the main controversies in the intersection of competition law and data protection law is whether the two areas of law should be kept separate or integrated. The separatist theory constitutes a radical view of the separation between two different areas of law: antitrust laws and data protection laws. The theory views each of these areas of law aims to protect us from two distinct harms. Literature and case law have supported the separatist view in many incidences. There are some views that data privacy should be part of the quality consideration for consumers, i.e., by increasing data collection, the quality of data protection can be compromised. However, the separatist approach opposed this analogy as even if one were to compare increased personal data collection to pricing or product quality, there is nothing in antitrust laws to prevent a company from unilaterally engaging in this behavior. Antitrust law's historical opposition to price regulation means that a legal monopoly can set prices as it sees fit.[147]

Another reason to refute the analogy between privacy and quality is the fact that unlike lowering a product’s quality, collecting data requires big investment from undertakings. For example, when a firm compromises its quality to boost profits, it saves money by employing cheaper materials, which leads to higher profits. However, if a digital platform collects more

[147] James C. Cooper, Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity, George Mason Law Review, Vol. 16th Annual Antitrust Symposium (2013)

consumer data, it's not the same as cutting quality, as collecting and analyzing requires a bigger financial commitment by the undertaking,

One more disadvantage of the privacy and quality comparison is that collecting more information about consumers could actually lead to better quality. Consumer quality is challenging to identify, even by consumers themselves.[148] Each consumer has his own unique taste for quality, and what defines quality for one consumer does not necessarily define quality for another. Furthermore, quality is essential not only for products but also for services. When a platform collects extensive information about consumers, they benefit from the data it reveals, providing them with a personalized and unique experience, i.e., receiving better quality.[149]

A second reason to support the separatist perspective is that including privacy considerations in competition, evaluation would introduce a significant amount of subjectivity into the competition regulator's analysis. Determining the competitive standard against which privacy would be assessed and measuring a decline in privacy competition could leave such analysis subjective and complicated and less focused on legal competition standards.[150] Regardless of the argument the separatist has proposed, the outcome is the same. Competition law should only intervene in market behavior that harms market competition, regardless of the implications it has on consumer privacy.

The separatist approach was supported by regulators in a number of cases. One of the most significant cases were, the Google/Double Click acquisition, in which the EU Commission highlighted the distinct nature of the two companies and their lack of direct competition in relevant markets.[151] In 2007, the EU Commission conducted an investigation into Google's proposed acquisition of DoubleClick. In 2008, the Commission found that the transaction was unlikely to have harmful effects on consumers in ad-serving or online advertising markets, indicating that the merger would not significantly impede effective competition and declared the

[148] *See*, Takeuchi, H., & Quelch, J. (1983). Quality Is More than Making a Good Product. Harvard Business Review, 61(4), 139-145, discussing how identifying quality could be challenging after conducting research where they ask consumers what quality means for them.
[149] Hagel, et al, The Coming Battle for Customer Information, Harvard Business Review, (1997). https://hbr.org/1997/01/the-coming-battle-for-customer-information
[150] *Supra* note 14.
[151] Case No COMP/M.4731 – Google/ DoubleClick, REGULATION (EC) No 139/2004 MERGER PROCEDURE Article 8(1), (2008).

"concentration to be compatible with the common market and the functioning of the EEA Agreement."[152] The commission ruled that the acquisition would not have a negative impact on competition in the relative market.[153]

In this case, the commission identified both Google and DoubleClick as active members of the online advertising industry and did not take into consideration the personal data aspect in this merger as a form of market power from a competition standpoint, and established that personal data matters shall be addressed by data regulations, it concluded in its decision:

> This Decision refers exclusively to the appraisal of this operation with Community rules on competition,[…] In any event, this Decision is without prejudice to the obligations imposed onto the parties by Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data, in particular Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and Member States implementing legislation, which apply to the processing of personal data activities performed by the parties to the merger and by the entity resulting from the merger operation. Irrespective of the approval of the merger, the new entity is obliged in its day to day business to respect the fundamental rights recognised by all relevant instruments to its users, namely but not limited to privacy and data protection.[154]

The stance of maintaining separate regulatory bodies persisted in a number of cases amongst EU and US regulators. For example, in the EU Commission's decision on Facebook's acquisition of WhatsApp, the commission limited its analysis to "potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof."[155] The Commission also clearly addresses that if the data concentration resulting from the acquisition leads to privacy concerns, such concerns shall "not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules."[156] The commission also shared the same opinion in its decision on the Microsoft and LinkedIn case.

[152] *Id*. Also *See*, EEA Agreement is an agreement that provides equal rights and obligations for individuals and economic operators between the members of the agreement in the EU Internal Market.
[153] *Id*.
[154] *Id*.
[155] European Commission, Case COMP/M.7217 (2014)
[156] *Id.*

The commission did share a remark on the merged data, however, it stated that it should be handled in accordance with the relevant data protection rules.[157]

2. The integrationist

One of the perspectives that advocates for a harmonious relationship between data protection and competition law is the integrationist approach, which views privacy as a dimension of quality and market integration as a common goal. The integrationist approach stems from the widely accepted idea that competition benefits consumers by considering factors beyond price, such as quality. Accordingly, the concept of quality is then expanded to include competition based on privacy. It is argued that both data protection and competition law aim to enhance market integration. On one hand, The data protection laws were designed to support market integration, ensure more consistent rules, and establish a new EU agency for enforcing data protection laws uniformly.[158] On the other hand, competition law also fosters market integration by preventing private entities from creating obstacles to trade between EU Member States.[159] Accordingly, while data protection law promotes integration in a positive manner, competition law mainly operates by removing barriers to integration.

Another middle ground where integrationist enthusiasts argue that competition regulation and data privacy collide is consumer welfare. While competition law focuses on consumers' benefits by offering them better goods and services, data protection law benefits individuals, including consumers, by giving them control over their personal data. Furthermore, While data protection law prioritizes individual control over personal data, it aligns with competition law's aim of enabling consumers to express their preferences. Therefore, both data protection and competition law support the idea that good data protection practices enable individual control over personal data and foster meaningful competition among businesses based on these practices.

Legal scholars have also proposed a number of theories of harm that encourages the combination of data protection and competition laws. One theory suggests that in digital markets, network effects and other unique features make digital platforms more powerful. This reduces

[157] Case COMP/M.8124, European Commission (2016)
[158] Francisco and Lynskey, Family ties: the intersection between data protection and competition in EU Law.Common Market Law Review, 54 (1). pp. 11-50. ISSN 0165-0750, (2017)
[159] *Id.*

their motivation to compete by offering strong privacy protection or products that respect privacy.[160] Another theory of harm expresses that in the cases of mergers between digital platforms, the merged entities would have more ways to profile people and invade their privacy by combining their data.[161] A third theory of harm can be established if we were to consider data privacy as a form of quality. If regulators consider data privacy as part of the quality delivered to consumers, then any compromise in privacy-based quality could lead to a decrease in consumer welfare standards. As a result, competition regulators should consider privacy considerations in their assessments of the undertakings' behavior.[162]

Privacy-related theories of harm were not only adopted by legal scholars and lawyers but were also endorsed by competition regulatory authorities in Europe. In a joint publication by the Autorité de la Concurrence and the Federal Cartel Office, the authorities have voiced their concerns about using data as a competitive advantage and the need to address data in competition analysis; they expressed:

> [w]hen data confer significant competitive advantages to their owners, firms will need to acquire more data and/or analyse and exploit it better in order to remain competitive and/or to get a competitive edge over market rivals. The conducts implemented to acquire these data can be examined from a competition law perspective. In parallel, undertakings can use their data-based market power to gain a competitive edge on adjacent markets. Concerns are also often voiced as regards data-related price discrimination. Finally, the possible interplay between competition law and privacy rules is touched upon.[163]

Regulatory authorities have embraced the integrationist approach through their decisions in multiple precedents. One clear example is the EU Commission's Apple and Shazam acquisition decision.[164] In March 2018, the EU Commission was notified of the proposed acquisition of Apple and Shazam and approved the merging process in September 2018.[165] In its decision, the commission expanded its investigation to include an assessment of the data as a competitive advantage and a ground for a breach of fair competition. The commission assessed the parties' compliance with the GDPR and assessed whether the merger of personal data could lead to a

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[160] Giuseppe Colangelo & Mariateresa Maggiolino, Data Protection in Attention Markets: Protecting Privacy Through Competition? (2017).
[161] *Id*.
[162] *Id*.
[163] Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (2016).
[164] EUROPEAN COMMISSION. DG Competition. CASE M.8788 – APPLE / SHAZAM, Sep 6, 2018.
[165] The European Commission, Mergers: Commission clears Apple's acquisition of Shazam, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662

breach of GDPR and negative consequences on the competition. The commission reached out to assess the privacy policies of the app users and whether the said policy provides consumers with the accurate purposes for which the user's data would be processed. The Commission stated that:

> Pursuant to Article 5(1)(b) of the GDPR, personal data which has been collected for specified, explicit and legitimate purposes may not be further processed in a manner that is incompatible with those purposes. Data which qualifies as personal data under the GDPR can be processed by a third party only to the extent that there exists a contractual legal basis for the transmission to the third party and a legal basis for the processing by that third party.[166]

The effect of the Apple and Shazam case on the integrationist approach reinforces the idea that privacy and competition law can work together to enhance consumer welfare and maintain fair competition. The case highlights the importance of considering privacy concerns in competition analysis, especially in the digital economy where personal data holds significant value.

Another significant case where regulatory authorities supported the integrationist approach is Facebook vs. FCO.[167] In 2019, the German Federal Cartel Office found that Meta, formerly Facebook, had collected and combined user data from its platform with data gathered from other Meta services and third-party websites without sufficient user consent. This meant that users could only use the social platform Facebook under the condition that Facebook collects their data from other websites and apps and link it to their Facebook account. This includes data from Facebook, WhatsApp, and Instagram.[168] The FCO considered such action an abuse of dominance under competition law as the users could not use Facebook's services without having their data collected and combined across services. In its decision, the authority indicated that the social network cannot make users agree to let Facebook collect their personal data from other websites and apps, including those owned by Facebook, and link this data to their accounts. The FCO further based its decision on the fact that Meta's data processing practices did not align with GDPR standards. Accordingly, the FCO prohibited Meta from undertaking those data practices as they are considered an abuse of dominance and harmful to competition.

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[166] EUROPEAN COMMISSION. DG Competition. CASE M.8788 – APPLE / SHAZAM, Sep 6, 2018, Para. (229).
[167] *Supra* note 1.
[168] Press Release, Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources, (Feb, 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html

Following the FCO decision, Meta challenged it in the Higher Regional Court of Düsseldorf. They appealed the FCO's findings on GDPR violations, arguing that GDPR enforcement should be limited to data protection authorities. The Düsseldorf Court sought a preliminary ruling from the ECJ on these issues, which raised questions about interpreting the GDPR and how data protection and antitrust laws interact.[169] The Düsseldorf Court proposed two main questions to the ECJ, regarding whether a competition authority in a Member State, not a data protection authority and not in the Member State where a company is based, can find GDPR violations while investigating competition law abuses, and whether valid consent can be given to a dominant company like Meta for data processing.[170] Furthermore, the Düsseldorf Court also inquired whether Meta collecting data from third-party websites about sensitive topics like health or religion and adding it to a user's profile counts as processing special categories of data under GDPR, whether processing this data can be justified if the user made it publicly available, and whether Meta can justify collecting and processing data outside of Facebook based on contract performance or legitimate interests.[171]

Accordingly, the ECJ ruled that Member State competition authorities can review GDPR compliance if needed to establish abuse of market dominance under the condition that they collaborate with relevant data protection authorities.[172] In its decision the court stated the following:

> In exercising its powers, a competition authority must assess, inter alia, whether the conduct in question entails resorting to methods other than those prevailing under merit-based competition, taking into account the legal and economic context in which that conduct takes place. In that respect, the compliance or non-compliance of that conduct with the provisions of the GDPR, not taken in isolation but considering all the circumstances of the case, may be a vital clue as to whether that conduct entails resorting to methods prevailing under merit-based competition, it being stated that the lawful or unlawful nature of conduct under Article 102 TFEU is not apparent from its compliance or lack of compliance with the GDPR or other legal rules.[173]

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[169] Brook, Magali Eben, "Another Missed Opportunity? Case C-252/21 Meta Platforms V. Bundeskartellamt and the Relationship between EU Competition Law and National Laws," Journal of European Competition Law & Practice (2023), lpad047, https://doi.org/10.1093/jeclap/lpad047.
[170] *Supra* note 167.
[171] *Id*.
[172] Brook, Magali Eben, "Another Missed Opportunity? Case C-252/21 Meta Platforms V. Bundeskartellamt and the Relationship between EU Competition Law and National Laws," Journal of European Competition Law & Practice (2023).
[173] *Supra note*. Para.23.

The ECJ has also emphasized that access to personal data is a significant factor in competition and can be considered when determining if an undertaking's conduct is abusive, however, the ECJ clarified that finding GDPR noncompliance does not automatically mean an abuse of dominance has occurred.[174]

This chapter has explored how the interplay between competition law and data privacy can be addressed by the courts and the regulators, with a focus on the European context. The chapter examined some key cases that illustrate the challenges and opportunities of applying the existing legal frameworks to the digital economy, where data is a crucial asset and a source of market power. Furthermore, the chapter discussed how the European Commission and other authorities have proposed new regulations and initiatives to ensure fair and transparent competition in the digital markets, while protecting the fundamental rights of consumers and citizens. In the next chapter, the attention will turn to a novel regulatory tool in the digital economy: the Digital Markets Act. The chapter will analyze the objectives and scope of the DMA, its impact on the digital economy and effects on data privacy law and competition law application.

[174] *Id.*

VI. Regulatory Responses to Bridge the Gap Between Competition Law and Data Privacy

As we have seen in previous chapters, policymakers have been deliberating on interventions in the digital markets. Numerous competition policy queries have been conducted, leading to ongoing discussions about the need for additional legislation. Multiple jurisdictions have taken a stance toward legislating laws that govern the competition law and data privacy dichotomy. One leading example is the European Union which has implemented the Digital Markets Act. The Act aims to enforce stricter requirements on big platforms. This Chapter will provide an overview of the regulatory responses to bridge the gap between competition law and data privacy, with a focus on the EU's DMA. We will examine the objectives and scope of the DMA, as well as its main provisions and implications for digital platforms and consumers. Finally, we will discuss the challenges and opportunities for implementing and enforcing the DMA and its potential impact on the future of digital markets and innovation.

A. Objectives and Scope of the DMA

When looking at competition law applications, regulators and legislators have adopted an all-or-nothing approach. This has transferred into a rigid application of competition law on big technology firms while neglecting intermediary and flexible options when dealing with such firms. This can be found in multiple examples which were shared above when adopting the separatist approach.[175] Currently, regulatory authorities seem to be drifting towards an integrationist approach in competition and data privacy regulations. In previous years, regulators have been in a race to adopt new regulations to govern the competition/data interplay, and the leader of the race has been the EU. The EU has issued a set of legal regulations "which aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses."[176] This set of rules is the Digital Services Act package and includes the Digital Services Act (DSA) and the Digital Markets Act (DMA).

[175] *See*, Adrian Kuenzler, What competition law can do for data privacy (and vice versa), computer law & security review 47 (2022), discussing the consequences of the rigid approach of competition law application when assessing cases in the digital economy and focusing on the advertising market.
[176] European Commission, The Digital Services Act package, (last visited 31 March 24, 2024), https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package

The European Commission introduced the Digital Markets Act in December 2020, which was promptly approved by both the European Parliament and the Council by March 2022. As a trial to remedy the shortcomings of competition law in the digital market, the act was established to tackle concerns surrounding the dominance and behaviors of major online platforms. The Act focuses on "core platform services provided or offered by gatekeepers […] irrespective of the place of [the platform's] establishment" and sets specific criteria for their identification.[177] Hence, the DMA is a novel and ambitious regulatory framework that aims to address the challenges posed by the digital economy and ensure fair competition in the online sector.

One of the main goals of the DMA is to regulate the conduct of large online platforms that act as gatekeepers in the digital sector. The EU's objective with the DMA was to oversee these gatekeepers, preventing the misuse of their market control and promoting fair competition, innovation, quality, and consumer choice, in its preamble, it was stated that "the purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular."[178] Therefore, the DMA seeks to enable business users to access the fundamental platform services of major digital gatekeepers, empowering them to innovate and expand.

The focus of the Act applies to unfair behaviors exhibited by very large online platforms, which the Act referred to as gatekeepers. Only firms with an annual revenue of €7.5 billion within the EU or a global market capitalization of €75 billion will be subject to the DMA.[179] Additionally, these gatekeepers must have a minimum of 45 million individual monthly users and 100,000 business users.[180] Furthermore, these entities must oversee at least one core platform service, such as marketplaces, app stores, search engines, social networks, cloud services, advertising services, voice assistants, and web browsers.

In order to identify and regulate the potential gatekeepers in the digital sector, the DMA establishes a set of criteria and obligations that apply to these entities. Generally, the term

[177] The European Parliament, Regulation (EU) 2022/1925, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (14 September 2022)
[178] *Id*, Article (1)
[179] *Id*, Article (3)
[180] *Id*.

gatekeeper means “a person whose job is to open and close a gate and to prevent people entering without permission.”[181]However, according to the DMA, a company is designated as a gatekeeper if it satisfies three main characteristics which are:

> (a)it has a significant impact on the internal market;(b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.[182]

The characteristics of gatekeepers enable such entities to undertake a number of breaching actions against smaller businesses, including barriers to entry due to the monopoly they have over data and preferential treatment of their business over the smaller competitors. Accordingly, the DMA aims to prevent gatekeepers from unfairly leveraging data advantages against business users, self-preferencing their own services, limiting interoperability with third parties, and engaging in behaviors that stifle competition. By ensuring that gatekeepers do not abuse their position, the DMA seeks to provide a “a level playing field for all digital companies, regardless of their size.”[183]

In September 2023, the Commission designated six gatekeepers in the digital market. The gatekeepers incorporated Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft. After the designation, the six gatekeepers were granted six months to “ensure full compliance with the DMA obligations for each of their designated core platform services.”[184] Amongst the obligations placed on the designated platforms is promoting their services to end users at no cost, facilitating subscription and un-subscription processes, and enabling easy deletion of pre-installed applications.[185] The act also restricted them from prioritizing their own products and services over competitors using the gatekeepers’ platform to undertake their business.[186] Hence,

[181] Cambridge University Press & Assessment, Cambridge Dictionary, (Last visited March, 20, 2024), https://dictionary.cambridge.org/us/dictionary/english/gatekeeper
[182] *Id.*
[183] European Commission, EU Digital Markets Act and Digital Services Act explained, (Last visited March 20, 2024), https://www.europarl.europa.eu/topics/en/article/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained
[184] European Comission, Press release, Digital Markets Act: Commission designates six gatekeepers, (Last visited March 24, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328
[185] Supra note 180, Article (5)
[186] *Id.*

the DMA comprises a set of guidelines for actions to take and avoid, applied proactively in advance.

Although the DMA was long awaited to fill a gap that competition law failed to address, the DMA is not considered part of competition law. An underlying premise of the DMA is that digital markets can be separated from non-digital markets for purposes of applying regulatory requirements. Meaning that, it aims to separate traditional competition law to address traditional market faliurs while dealing exclusively with digital problems. The legislator has separated between the DMA and competition law and assured to make this line clear in the text of DMA, it stated:

> "[t]his Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application."[187]

In essence, the act seeks to safeguard the contestability and fairness of markets where gatekeepers operate, distinct from the traditional competition-law focus, ensuring the protection of a separate legal interest while coexisting with existing regulatory frameworks.

Furthermore, the DMA aims to not only address the shortcomings of competition law due to the presence of data consideration gap. The Act also acts as an expedited tool to address digital market infringement. In traditional competition law, the prohibition of anti-competitive practices was on *ex-post* Basis.[188] This means that if the undertakings carry out the anti-competitive practice, the commission would then investigate and decide whether such action was in breach of competition law or not. This was often considered a slow process as the harm was already done in the market, and in the fast-paced digital market, it was too late. The DMA has proposed an *ex-ante* approach. In other words, the Act provided a list of dos and don'ts, and in case a firm decides not to follow the guidelines of the Act, it will be in breach.

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[187] *Id.*

[188] The Latin word *ex-post* translates to after the event. In a regulatory context, it means that actions are taken in response to market failures or distortions that have already occurred and address issues based on available information after the fact.

One of the main questions raised by the DMA is how it interacts with the existing competition law framework. Although the DMA applies exclusively to the digital market, it does not eliminate competition law application. The DMA has established that Articles 101 and 102 of the TFEU apply to gatekeepers. However, the act limited the application of the articles to cases of market dominance and anti-competitive behavior. Also, the ex-post feature remains part of the articles' application while undertaking case investigations. Additionally, current Union law may not effectively tackle the issues arising from gatekeepers' actions that do not meet traditional criteria for dominance in competition law.[189] Therefore, the DMA and the TFEU are not mutually exclusive, but rather complementary instruments that aim to achieve different objectives and protect different legal interests in the digital market. However, their coexistence also raises some challenges and uncertainties regarding the consistency, coherence, and legality of their enforcement.

B. Concerns over the DMA application

The DMA represents a significant regulatory framework aimed at fostering fair competition, protecting consumer interests, and promoting innovation in the digital economy. However, the application of the DMA has raised several concerns among stakeholders, prompting discussions on its potential impact and effectiveness. This essay delves into the key concerns surrounding the application of the DMA and explores potential strategies to address these challenges.

1. Impact on Innovation and Market Dynamics

One of the main objectives of the DMA is to foster innovation and fair competition in the digital sector, by imposing a set of obligations and prohibitions on the so-called gatekeepers. However, some critics argue that the DMA could have the opposite effect on innovation and market dynamics, Eventually, the doubt that comes with being a possible or actual gatekeeper and the challenges of whether some behavior is covered by the regulation would probably discourage innovation and growth. The platforms' business users might also suffer negative consequences.[190]

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[189] *Supra* note 187.
[190] Miguel de la Mano, *et al*, Compass Lexecon, THE DIGITAL MARKETS ACT BACK TO THE "FORM-BASED" FUTURE?, (2021)

Innovation is a key driver of market economics and market competition, as it enables firms to create new products and services, improve their quality and efficiency, and differentiate themselves from their rivals.[191] Innovation also benefits consumers, who can enjoy more choices, lower prices, and better experiences. By fostering innovation, the DMA aims to prevent the gatekeepers from abusing their dominant positions and stifling the potential of new entrants and challengers.[192] The DMA also seeks to ensure that the gatekeepers' business users can access and use the platforms' data and functionalities in a fair and transparent manner, thus enhancing their own innovation capabilities. Therefore, the DMA can be seen as a pro-innovation regulation that aims to level the playing field and promote dynamic competition in the digital sector.[193]

The DMA is a controversial regulation that aims to foster innovation and fair competition in the digital sector by imposing obligations and prohibitions on the gatekeepers. However, the effect of DMA on innovation has faced opposing views. Stakeholders have feared that DMA obligation might be potentially very disruptive, to the point that legal uncertainty may have a chilling effect on innovation.[194] They have argued that starting with less ambitious proposals and providing more legal certainty to gatekeepers, with the possibility of widening the list when further experience has been gained, perhabs a more effective approach.[195] . This argument suggests that the DMA should be more flexible and adaptive to the changing realities of the digital market, rather than imposing a rigid and one-size-fits-all framework that could harm both the gatekeepers and their business users.

Another potential drawback of the DMA is that it could undermine the incentives for data-driven innovation among both large and small platforms. Regulating data sharing through DMA has also raised concerns about affecting large platforms' eagerness to innovate. In other words, if both big and small companies had to share their data, they would lose motivation to

[191] Matthew Johnson, Oxera, The impact of the Digital Markets Act on innovation Helping or hindering innovation and growth in the EU?, (2020), https://www.oxera.com/insights/reports/the-impact-of-the-digital-markets-act-on-innovation/
[192] *Id.*
[193] *Id.*
[194] Cabral L. Haucap, et al, The EU Digital Markets Act, Publications Office of the European Union, (2021).
[195] *Id.*

collect and process data in ways that benefit society.[196] Small firms that could now benefit from big firms' efforts without paying anything would have little to no reason to invest in their own data collection, while bigger undertakings would have less motivation to improve their existing data collection because they could not keep the value of that data for themselves. Accordingly, the DMA could have unintended consequences on the data economy and reduce the overall welfare of consumers and producers.

2. Exclusion of economic factors

The DMA is a novel regulatory instrument that seeks to address the market power of digital platforms without relying on economic analysis. Unlike traditional competition law and regulatory frameworks, the DMA does not factor in economic considerations in its enforcement. As much as the complex situation with the digital arena needed a fast and decisive ex-ante tool, it is argued that removing the economic factors from a law aiming at regulating market competition could result in some recoils. The DMA's strict limitations might result in negatively impacting consumers' benefits and may fail to capture behaviors that have the same results as the ones restricted by the law. To overcome the gap in traditional competition law, which depends on assessing economical price facts to set market definition, assess market dominance, and other considerations, the DMA has excluded all economic factors used in the traditional framework. Although the absence of said economic factors could help the DMA achieve its goals, however, its argued that such absence could lead to achieving unwanted results through under and overenforcement of the act.[197] Therefore, the DMA should aim to balance between being effective and flexible, and allow for some economic considerations to be taken into account in its implementation and enforcement.

One of the main criticisms of the DMA is that it ignores the economic implications of its enforcement and relies solely on quantitative criteria. It is argued that removing economic factors from the DMA could lead to conduct activities that are not covered by the list of prohibitions;

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[196] Meredith Broadbent, Center for Strategic Internationa Studies, The Digital Services Act, the Digital Markets Act, and the New Competition Tool European Initiatives to Hobble U.S. Tech Companies, (2020), https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool

[197] Neil Gallagher & Paulo R. Abecasis, Copenhagen Economics, THE DIGITAL MARKETS ACT AND THE ROLE OF ECONOMICS, (2022)

however, such activities could lead to the same results as those covered by the list.[198] By establishing a limited set of regulations for gatekeepers to follow, the DMA could potentially make it easier for gatekeepers to find ways to bypass these limitations. On the other hand, overenforcement may happen when certain practices that could benefit consumers are prohibited by the DMA. In other words, the regulatory authorities could be too focused on the compliance of the undertaking with the DMA, while giving little to no attention to consumer benefits.[199] Therefore, the DMA should incorporate some economic analysis in its design and application, and balance between ensuring fair competition and promoting innovation in the digital market.

Moreover, The quantitative thresholds that are used to identify gatekeepers are not based on economic principles and are only based on quantitative estimates of the size of a platform.[200] In other words, the DMA has limited its enforcement on firms that have a large number of users and large enough turnover. However, it did not account for the relative importance of a core platform service in its specific relevant market. Accordingly, commentators have argued that this method does not evaluate how each relevant market is affected by the undertaking's market power. Also, such criteria are arbitrarily high. Accordingly, it is likely to address a small number of firms.[201]

Accordingly, it can be established tha the DMA's attempt to regulate the digital sector by distinguishing between digital and non-digital markets is problematic and questionable. The boundaries between these markets are not clear-cut, and the criteria for defining them are vague and inconsistent. By applying a rigid and one-size-fits-all approach, the DMA could miss the variability and complexities of different digital services and their interactions with other markets. Furthermore, the DMA could create an unfair advantage for some platforms over others, depending on how they are classified and targeted by the regulation. Therefore, the DMA should adopt a more flexible and dynamic framework that takes into account the specificities of each digital market and service, and the potential benefits and harms for consumers and competitors.

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[198] *Id.*
[199] *Id.*
[200] *Supra* note 190.
[201] *Id.*

This would ensure that the DMA achieves its objectives of fostering fair competition and innovation in the digital sector, while avoiding unintended consequences and legal challenges.

3. Inconsistent definition of Digital Markets

One of the main challenges of the DMA is to define and identify its scope of application. The DMA aims to regulate the behavior of very large online platforms that act as gatekeepers in the digital sector, but it does not provide a clear and consistent criterion for what constitutes a digital market or a digital service. This creates a risk of legal uncertainty, arbitrariness, and discrimination for both the regulated platforms and their competitors. In this subchapter, we will examine the difficulties of drawing a line between digital and non-digital markets, and the implications for the effectiveness and legitimacy of the DMA.

As stated in the recitals of the DMA, the acts strictly apply to a pre-selected giant firm operating the digital market.[202] Accordingly, the DMA operates on the assumption that digital markets can be distinct from non-digital markets. This presumption has raised a lot of concern regarding the accurate application of the regulation, can DMA really differentiate between digital and non-digital markets? Most importantly, can digital and non-digital markets be differentiated?

Digital advancements are reshaping various industries beyond internet platforms. In the traditional markets, undertakings compete across different channels to engage users and consumers, and this includes digital channels. Moreover, businesses are increasingly integrating digital tools for planning, production, data utilization, market expansion, sales, and strategy enhancement. A digital channel is just one of the multiple means through which the undertakings reach their consumers. Consequently, if everything is digitally influenced, the rationale and effectiveness of regulating the digital domain separately come into question.

To differentiate between digital and non-digital enterprises, it is important to understand that digital primarily represents a business model and a means of distribution rather than a distinct market.[203] Competition, on the other hand, occurs within the product market and not within specific distribution channels. With the continuous advancement of technology, the digital

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[202] *Supra* note 189, (recitals)
[203] AURELIEN PORTUESE, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, the Digital Markets Act:

realm now extends across various sectors, such as banking, entertainment, real estate, and more. The draft DMA proposal does not clearly specify the threshold of physical versus digital sales required for a company to be classified as a digital entity.[204] This leads to the challenge of defining and distinguishing between digital and non-digital markets, which are increasingly intertwined and interdependent. For example, is Airbnb a digital or a non-digital market? It operates online, but it also affects the supply and demand of physical accommodation. Similarly, is Amazon a digital or a non-digital market? It sells both digital and physical goods, and it competes with both online and offline retailers. In fact, there is no such thing as a digital market per se, but rather a digital distribution channel that can be used for various kinds of products and services.

4. Unclear language and ambiguous duties

The Act seeks to regulate large online platforms which act as gatekeepers in order to promote fair and open competition within the digital markets and ensure competitiveness and innovation. A number of concerns have been raised about the drafting of the DMA obligation as some of the stakeholders have regarded its obligation as vague, and the language used is outdated and does not properly address a digital need. However, the DMA has been criticized for its lack of clarity and precision in several aspects, such as the definition of core platform services, the criteria for identifying gatekeepers, the scope and content of the obligations and prohibitions, and the role and powers of the Commission.

Some stakeholders have argued that the DMA is too vague and broad, leaving too much discretion to the Commission, and creating legal uncertainty for the platforms and their users.[205] Others have pointed out that the DMA is too rigid and prescriptive, imposing a one-size-fits-all approach that does not account for the diversity and dynamism of the digital sector. Accordingly, enforcers should not impose one single solution to a specific problem on all companies that provide the same kind of service, as although they might have similar services, but each platform

[204] *Id.*
[205] Matthias Bauer, et al, The European Center for International Political Economy, The EU Digital Markets Act: Assessing the Quality of Regulation, (2022)

has its unique operating system.[206] Consequently, it was suggested that the Commission should avoid imposing uniform solutions for compliance on gatekeepers, as this could harm the performance of their service, and might result in a lower quality of user experience and discourage companies from innovating or creating new products and services.[207]

Furthermore, the DMA's attempt to single out the digital sector as a separate and homogeneous object of regulation is problematic and questionable. The digital sector is not a well-defined and coherent market, but its multifaceted and interacts and overlaps with many other sectors and channels.[208] The DMA's criteria for identifying gatekeepers and core platform services are vague and arbitrary, and they do not reflect the complexity and diversity of the digital economy.[209] The DMA risks creating artificial distinctions and unfair advantages for some players over others, and undermining the level playing field and consumer welfare in the internal market. The DMA needs to adopt a more nuanced and flexible approach that recognizes the heterogeneity and interdependency of digital and non-digital markets, and that applies the same rules and principles to all actors that compete in the same relevant market, regardless of their distribution channel or business model.

Moreover, some have raised concerns that the DMA language could create regulatory overlaps and inconsistencies with other EU laws and policies, such as the General Data Protection Regulation, and the competition law framework. Article 6 provides that:

> gatekeeper shall allow business users and alternative providers of services provided together with […] core platform services, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same operating system, hardware or software features, regardless of whether those features are part of the operating system, as are available to, or used by, that gatekeeper when providing such services.[210]

The Article does not include any language that would protect trade secrets and data and is vague about how gatekeepers should allow access and interoperability to business users using the same

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[206]ALEKSANDRA ZUCHOWSKA, Digital Markets Act: Mastering the Art of Proper DMA Enforcement, (2024), https://www.project-disco.org/european-union/digital-markets-act-mastering-the-art-of-proper-dma-enforcement/

[207] *Id.*

[208] Miguel de la Mano, *et al*, Compass Lexecon, THE DIGITAL MARKETS ACT BACK TO THE "FORM-BASED" FUTURE?, (2021).

[209] *Id.*

[210] Supra not 202, (Article 6)

features as the gatekeeper's own services. This also raises concerns about how much gatekeepers have to reveal or change their technology to benefit their rivals and reduce their competitive edge in the market.

5. The implication of an ex-ante approach

The DMA introduces an ex-ante regulatory framework for digital gatekeepers, which are large online platforms that act as intermediaries between consumers and businesses. The aim of this framework is to prevent gatekeepers from abusing their market power and to impose a set of obligations and prohibitions on their conduct. However, the ex-ante approach is easier said than done. Although the DMA is distinct from traditional competition law, it still needs to be compatible with competition law. It has been argued that the ex-ante nature of the DMA could do more harm than good due to the fact that it works in opposite manner than competition law.

As the digital world is constantly developing, having a preset ex-ante regulation could be limiting. It is argued that pre-se regulation would make it hard to measure whether a specific practice affects consumer welfare negatively or positively.[211] Commentators have argued that "much remains to be learned about the dynamics of competition in platform markets where a small number of firms continues to co-exist and compete for users […] a case-by-case assessment will therefore be needed.[212] In other words, we can acknowledge that a case-by-case assessment will be crucial as the conduct prohibited by the act might not always be harmful to both businesses and consumers.

The application of ex-ante laws laws amongst various satkeholders. In a report by the Chairman of the OECD Competition Committee, he expressed his concern regarding the backlash that might result from ex-ante rules:

> Of course, the realization that the business models of competitors on a market can be heterogenous and evolutive and that the specific features of business models need to be taken into consideration both to identify potential competition issues and to propose remedies implies that

[211] Montjoye, Y., et al, European Commission, Directorate-General for Competition, Competition policy for the digital era, Publications Office, 2019, https://data.europa.eu/doi/10.2763/407537

[212] Schweitzer, Heike, The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal (April 30, 2021). Forthcoming, ZEuP 2021, Issue 3, Available at SSRN: https://ssrn.com/abstract=3837341

> attempts to complement competition law enforcement with across the board ex ante regulations may be problematic as some practices (such as, for example, data portability or interoperability) may be pro-competitive or pro-efficiency in certain ecosystem environments and be potentially anti-competitive in other ecosystem environments.[213]

Thus, ex-ante regulation may not be able to capture the complexity and diversity of different platform markets and may have unintended consequences for competition and innovation.

C. The interplay between DMA and Competition law

The DMA aims to restrict unfair practices undertaken by gatekeepers in the digital market. Although the DMA grants more power of intervention to competition authorities against dominant firms, yet it is not considered a part of competition law. Indeed, creating an ex-ante tool that limits anti-competitive practices is a necessary step toward creating a fair playing field in the tech arena. However, this tool was faced with mixed feelings of support and concern over its implication on the ex-post regulatory framework of competition law and the fear of creating the risk of regulatory fragmentation.

Article 1 (5) of the DMA has aimed to draw the line between DMA and other laws, including competition law application, it expressed that:

> Member States shall not impose further obligations on gatekeepers by way of laws, regulations or administrative measures for the purpose of ensuring contestable and fair markets. Nothing in this Regulation precludes Member States from imposing obligations on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation […].[214]

While Article 1 (6) directly addressed Articles 101 and 102, TFEU, indicating that the DMA does not in any way affect their enforcement. The article stipulated that the Act shall apply without prejudice to:

> (a) national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions;
> (b) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers; and
> (c) Council Regulation (EC) No 139/2004(23)and national rules concerning merger control.[215]

In accordance with Article 1, the legislators have drawn a clear line between the Act and regulation on both national and EU levels.

[213] Jenny, Frederic, Competition Law and Digital Ecosystems: Learning To Walk Before We Run, (2021). Available at SSRN: https://ssrn.com/abstract=3776274 or http://dx.doi.org/10.2139/ssrn.3776274.
[214] *Supra* note 202.
[215] *Id*.

Nevertheless, the ambiguity of Article 1 has resulted in creating multiple interpretations, and each would result in a different shape for the DMA effect on competition policy application. It is argued that the interpretation can be summarized into three different scenarios.[216] These interpretations identify as narrow, broader, and broadest explanations of the legal rights safeguarded by the DMA.[217]

One way to understand the legal implications of Article 1 of the DMA is to consider three possible scenarios: narrow, broader, and broadest. The narrow scenario implies that the DMA aims for full harmonization and prevents Member states from imposing any additional obligations on gatekeepers beyond those specified in the DMA. The broader scenario allows Member states to enforce their national competition laws, including those related to unilateral conduct, as long as they do not conflict with the objectives of the DMA, such as ensuring fairness and contestability. The broadest scenario suggests that the DMA does not limit the scope of national competition laws, and that Member states can apply any rules or remedies to gatekeepers, regardless of the legal interests pursued.

When looking at Article 1(5) of the DMA, if we assessed the article from a narrow and merely textual scope, one might interpret it as promoting maximum harmonization, as it prohibits imposing additional obligations on gatekeepers through legislation, regulations, or administrative actions. Accordingly, Member states are especially restricted from imposing obligations related to ensuring fairness and competition amongst gatekeepers in the digital arena. Furthermore, Article 1 (6), when assessed from a narrow standpoint, indicates that the DMA should apply to gatekeepers regardless of legal interests pursued by national competition laws, which might accordingly lead to conflict between the DMA and competition rules applying to gatekeepers.

Moreover, from a broader standpoint, Article 1 (6) can seem to promote a minimum level of harmonization. This can be implied from the text as it allows Member states to enforce their national competition law and introduce new legislation when needed while dealing with gatekeepers. Furthermore, when looking at Article 1(5) from a broader scope, it can be interpreted that states are prohibited from applying any law where it concerns fairness and contestability; however, it can allow discretion for the EC and the Courts in deciding whether the implementation of national laws is conflicting with the application of the DMA.

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[216] Jasper van den Boom, European Competition Journal, What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws, (2023).
[217] *Id*.

The final scope of interpretation is the broadest approach. It is argued that the broadest approach could lead to a lot of friction between the application of competition law and the DMA. It is where articles 1 (5) and 1 (6) DMA are understood not just literally but in line with the wider principles of EU law. This interpretation suggests that national competition law should not conflict with any legal interest that might be protected under the DMA, even when pursuing other legal interests than those governed by the DMA. Accordingly, the provides removing all possible friction between the laws. Accordingly, it can be deduced that the DMA relationship with competition law has no specific shape and can be interpreted in many ways, and each has its unique effect on regulating competition in the digital markets.

D. The interplay between DMA and Data Privacy

Prior to the DMA data privacy and competition regulations were considered separate. Indeed, there are multiple cases, as discussed in earlier chapters, where competition authorities adopted data privacy in their assessments and decisions. However, there has been no regulation that directly connected both areas of law, until the depute of the DMA. As much as a tool that combines both worlds was needed, it still raises some concerns regarding possible conflict between the DMA and the GDPR and the possibility of fragmentation across Member states.

The DMA has included obligations for gatekeepers on data portability and free access to data in Article 6 of the Act. Article 6 (9) has obliged gatekeepers to allow third parties and end users data transferability if such parties are authorized by end users, it stated:

> [t]he gatekeeper shall provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.[218]

Furthermore, the Article obliged the gatekeeper to grant further real time data, including personal data to business users and third parties, it indicated that:

> [t]he gatekeeper shall provide business users and third parties authorised by a business user, at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data […]. With regard to personal data, the gatekeeper shall provide for such access to, and

[218] *Supra* note 214.

> use of, personal data only where the data are directly connected with the use effectuated by the end users in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end users opt in to such sharing by giving their consent.[219]

Article 6 (9) grants natural persons and business users the right to data portability. With the exception of business users, the right for data portability to natural persons was granted by virtue of Article (20) of the GDPR.[220] Accordingly, this right would allow access and interaction with commercial data. Furthermore, Article 6 (10) has introduced two key rights, the first being free access to the data, while the second is to ensure access to all types of data, including provided and generated data, as well as aggregated and non-aggregated individual business user data.[221] Therefore, it appears that the DMA poses a challenge to the existing legal framework and requires careful balancing between its objectives and the rights and principles established by the GDPR and other relevant laws.

The requirement of data sharing in the DMA has raised concerns amongst stakeholders. It is argued that mandated data sharing could result in risks of conflict between the Act and the GDPR. The sharing obligation might affect the GDPR principles, such as limitations on data storage, data minimization, and confidentiality.[222] For example, the DMA was not specific on how long data can be stored and shared with competitors; accordingly, it might result in conflict with the data storage mandate in the GDPR. Another concern was raised regarding the processing of data by gatekeepers. Mandated data sharing would result in multiple processing purposes, which conflicts with the GDPR mandate that data controllers must have a lawful basis for processing personal data.[223] This might also affect the rights of opting in and out of the data subject which was one of the Key features of the GDPR. Therefore, the implementation of the DMA will require a careful balance between the objectives of fostering competition and innovation in the digital markets and the protection of personal data and privacy of individuals.

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[219] *Id*.
[220] *Supra* note 122.
[221] *Supra* 219.
[222] Meredith Broadbent, Center for Strategic Internationa Studies, The Digital Services Act, the Digital Markets Act, and the New Competition Tool European Initiatives to Hobble U.S. Tech Companies, (2020), https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool
[223] Article 5 of the GDPR. Also *See*, the Irish Council for Civil Liberties letter to the European Parliament on " Greater protection in Article 5 (a) of the Commission's proposal for a Digital Markets Act."

This chapter examined the main provisions and implications of the proposed Digital Markets Act, which aims to regulate the behavior of gatekeepers in the digital economy and promote fair and open competition. It discussed some of the challenges and opportunities that the DMA poses for both the gatekeepers and their competitors, as well as for the consumers and end users of digital services. Furthermore, it highlighted some of the potential conflicts and tensions between the DMA and other existing or emerging legal frameworks, such as the GDPR and competition law. Moreover, that chapter argued that the DMA is a novel and ambitious regulatory initiative that requires careful balancing and alignment of different objectives and interests, as well as close coordination and cooperation among different authorities and stakeholders at the national and EU level.

Conclusion

The digital economy has brought about significant changes to the way businesses operate, leading to new challenges in the areas of competition law, data privacy, and regulatory frameworks. This thesis has explored these challenges and provided insights into how they can be navigated. Firstly, the thesis examined the evolution of competition law to assess the role it plays within the economy and what could be its impact on the digital economy. Starting with the classical school, competition was considered a tool to organize conflicting self-interests in markets to achieve market balance. The classic school of thought has strongly deemed any intervention in market competition as unnecessary as the market is completely capable of regulating itself through the act of the invisible hand. Following the no-intervention school of thought there emerged a need for an intervention which was supported by multiple schools of thought such as the Brandesian school, Harvard School, and the Chicago School's school. Such schools have all addressed the need for intervention of competition law in regulating market competition through different mechanisms. Therefore, it can be concluded from this chapter that there has been a strong consensus on the need for regulatory intervention in market competition.

The thesis then examines the rise of a new market based on zero price. As was established in the previous chapter, there is a primary need for competition law intervention to regulate market competition. Competition law has fallen short of keeping up with the development of new types of markets. This shortcoming was rooted in the fact that competition law has based its assessment of a healthy market competition on price aspect, assuming that price is the main concern for consumers and the prominent pillar in determining consumer welfare. The thesis offered an overview of tools regulatory bodies use to assess an undertaking's market power, including the most commonly used test, the SSNIP test. The SSNIP test is based on assessing a specific product's price increase and its effect on other products to conclude whether the undertaking producing such product enjoys a monopoly over the relevant market. Accordingly, narrowing the scope of market power assessment methods, focusing only on price factors, has led to monopolies in plain sight in the digital market.

Furthermore, after determining the gap presented in the traditional methods of competition law in addressing market power which led to the creation of tech giants that compete by providing zero price services in exchange for data accumulation, the thesis delves into the impact of big data on the application of competition law. Giant tech firms have manifested not just to create ecosystems offering a vast range of services under one umbrella, aiming to simplify user experiences and retain customers within their ecosystem. Accordingly, this allowed firms to collect massive amounts of personal data, which resulted in the evolution of data as a competitive advantage. However, the concentration of data ownership in a few tech firms has raised concerns about monopolistic practices and barriers to entry for new market players, which include barriers to entry, self-preferencing behavior, weaker data protection, and the surge in mergers and acquisitions by tech giants to control data and maintain dominance.

After establishing that data have become a significant competitive advantage in Tech firms, the thesis then shifts to explore the legal framework governing data. The GDPR has established seven core principles for processing data, including lawfulness, fairness, transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity, and confidentiality. However, the GDPR's application has raised concerns about legal uncertainty and its potential impact on innovation and market competition. Accordingly, opinions on whether to apply the GDPR in the context of competition regulatory assessment were divided between a separatist approach where data privacy law and competition law should be regarded as separate laws addressing different matters, and an internationalist approach where data privacy is part of consumer welfare.

In the last chapter, the thesis examined the Digital Markets Act (DMA) and its role in fostering fair competition, protecting consumer interests, and promoting innovation in the digital economy. While the DMA represents a significant regulatory framework, its application has raised concerns about legal uncertainty, potential harm to innovation, and the impact on data-driven innovation among both large and small platforms.

In conclusion, it can be argued that the dichotomy around whether privacy should be considered in competition law analysis remains unclear. From a data privacy viewpoint, regulators, and digital platforms face conflicting legal demands on handling personal data. On the one hand, data collection has prompted innovation, resulting in new products, services, and business models; thus, boosting consumer welfare. On the other hand, data protection is a fundamental right that should be protected under data protection laws. Data is a valuable asset in the market, giving an advantage to those who have and use it. This creates a stronger incentive to gather and analyze more data, and leads to improved profiling and understanding of consumer choices, but lowers online privacy. These conflicts can spark innovation fueled by data rivalry. More rivalry should be good for consumers, but there are still many uncertainties about how much rivalry should be traded for data privacy.

As established in this research, the dominant view is that there needs to be a balance between competition law and data privacy. Although these two areas have different concerns and effects, privacy can be recognized as a part of consumer welfare since privacy standards are considered of quality nature. The harmonization between competition law and data privacy could result in a consistent legal system seeking its own enforcement objectives. Factors other than data might drive competition in specific markets. However, when competition law and privacy interplay in cases involving big tech firms, data aspects should be taken into account by competition.

Furthermore, it should be agreed that competition law intervention should be limited to cases where data privacy that are directly related to market failure, and not privacy rights in general. One of the primary objectives of competition law is to protect consumers. As we deduced from the current European approach, as highlighted in cases like Facebook vs. FOC, regulators integrate privacy considerations into competition decisions when privacy results in market failure. Nevertheless, the mere violation of data protection rules should not be treated as a competition issue. While privacy standards are relevant to competition analysis as a qualitative factor, it is crucial to maintain a distinction between competition law and data protection law. Expanding competition law to cover areas like data protection is inappropriate because competition law is designed to address market failures and remedy competitive harm. Therefore, competition law should continue to evaluate decisions involving personal data to preserve competitive balance in the digital markets.