Evaluating the Case for Regulation of Digital Platforms

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INTRODUCTION: THE CRISIS OF ANTITRUST IN THE DIGITAL ECONOMY

Antitrust enforcement and competition policy in the digital economy is high on the agenda of authorities and policymakers. The flood of reports and policy papers recently released reflects the ongoing debate over the capability of current antitrust rules and tools to handle the emergence of large technology platforms (BigTechs) and to scrutinize their practices and business models.

The distinctive features of digital markets apparently require a rethinking of the antitrust regime. The presence of strong economies of scale, extreme indirect network effects, remarkable economies of scope due the role of data as a critical input, and conglomerate effects, along with consumers’ behavioural biases and single-homing tendencies, represent significant barriers to entry that make digital markets highly concentrated, prone to tipping, and not easily contestable. Therefore, large incumbent players appear not to be under threat and hard to dislodge. Moreover, digital platforms act as gatekeepers (either by controlling the access of third-party firms to their users or controlling the consumption of products and services by their users) and regulators (due to their rule-setting role within their ecosystem), and frequently play a dual role, being simultaneously operators for the marketplace and sellers of their own products and services in competition with rival sellers.

In light of this, mounting criticism against current competition policy allege that lax antitrust enforcement, flawed judicial rules that reflect unsound economic theories or unsupported empirical claims, and the limited effectiveness of the antitrust toolkit have

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contributed to a significant increase in concentration in digital markets.\(^1\) Furthermore, antitrust litigation and enforcement are deemed to be too protracted and expensive, causing ambiguity, draining resources, and privileging incumbents.\(^2\) Despite the Department of Justice’s Antitrust Division (DOJ) ongoing reviewing of whether and how certain online platforms have achieved market power and are engaging in anti-competitive practices\(^3\) and the Federal Trade Commission’s (FTC) launching of an *ex post* evaluation of BigTech acquisitions,\(^4\) there is strong scepticism and criticism surrounding the efficacy of antitrust investigations. Too little, too late.

By this view, the only cure to the antitrust crisis is to implement a wave of regulatory reforms. Despite concerns about the effective implementation of reform proposals aimed at providing greater control of BigTechs’ practices,\(^5\) and doubts about


\(^4\) *U.S. Federal Trade Commission, FTC to Examine Past Acquisitions by Large Technology Companies* (2020).

the nostalgia for past adventures, and even despite the common understanding reached by G7 competition authorities in June 2019—i.e. challenging issues raised by digital markets are not beyond the reach of antitrust law and many of the features of digital markets can be successfully addressed with existing toolkits since antitrust ensures a flexible framework and a fact-based, cross-sectoral and technology-neutral analysis—regulation is back on the table for policy discussions. Quite surprisingly, it is also on the minds of members of the mainstream antitrust communities.

Notably, some proposals envisage a public utilities-style regulation for the digital economy, advocating the creation of a digital authority able to impose measures against companies that have a strategic market status. Some proponents go even further by suggesting break-ups and bans on vertical integration altogether in order to address economic and social concerns arising from BigTechs. Other reform proposals point to

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7 G7 COMPETITION AUTHORITIES, COMMON UNDERSTANDING ON COMPETITION AND THE DIGITAL ECONOMY (2019).


9 STIGLER COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE (2019); UK COMPETITION AND MARKETS AUTHORITY, Online Platforms and Digital Advertising, in MARKET STUDY REPORT (2020); UK DIGITAL COMPETITION EXPERT PANEL, Unlocking digital competition, in REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (March 2019).

the need to integrate the antitrust toolkit with *ex ante* prohibitions to prevent anti-competitive practices by dominant platforms, since, according to this view, there is a risk that *ex post* enforcement would be too slow to successfully keep markets competitive and contestable in fast-moving markets characterized by a winner-takes-most dynamic.\(^\text{11}\)

Although the proposed solutions might diverge and reflect a heavy regulatory approach to antitrust law rather than the traditional paradigm of economics-based regulation,\(^\text{12}\) all the proposals question the role of antitrust in the digital economy and some suggest that online platforms should be treated as common carriers.\(^\text{13}\)

The aim of this chapter is to analyze recently released reports and policy papers to evaluate whether regulatory interventions reflect the distinctive features of digital markets and their leading players or whether the main thrust of these proposals for regulatory interventions is just to circumvent the burdens imposed by standard antitrust


\(^{13}\) The only exceptions to this are the proposals by the antitrust authorities of the Brazilian, Russian, Indian, and South African (BRICS) countries, which consider the respective antitrust tools and methods suitable to cope with the challenges of digital markets. See Brazilian, Russian, Indian, and South African Competition Authorities, *BRICS in the Digital Economy: Competition Policy in Practice 41* (2019). However, Russia maintains that its competition law requires ‘digital’ amendments to address some issues related to the classification of certain market players and pricing algorithms, and to strengthen merger control.
analysis. My findings suggest that the revival of regulation is likely motivated by an alleged antitrust enforcement failure as a result of an alleged gap in the current antitrust rules, rather than by an authentic market failure.

The chapter is structured as follows. Section 1 illustrates the key features of the main reform proposals advanced in the U.S. and the EU. Section 2 explains how the emergence of large online platforms may shift the current equilibrium between antitrust and regulation. Section 3 provides a critical analysis of the implications and the shortcomings of the suggested regulatory interventions. Section 4 concludes by suggesting drivers and goals of the competition policy in digital economy.

I. BRIEF OVERVIEW OF THE MAIN REGULATION PROPOSALS

This Section provides a descriptive analysis of the most prominent reports (namely, those released by the UK Digital Competition Expert Panel, the Stigler Center, the EU Commission Experts, the UK Competition and Markets Authority, and the Australian Competition and Consumer Commission) to highlight their main *ex ante* policy recommendations and give the reader the necessary background for the critical scrutiny that will be presented in the following sections.

The UK Digital Competition Expert Panel (or the “Furman report”) opened the floor to debate, being the first to suggest an *ex ante* regulation to sustain and promote effective competition in digital markets.\(^\text{14}\) Notably, the Furman report advocates the appointment of a sectoral regulator (a pro-competition digital markets unit) to impose measures against companies holding a strategic market status.\(^\text{15}\) As a new dominance category, companies with strategic market status are defined as those in a position to exercise market power over a gateway or bottleneck in a digital market, where they control others’ market access.


\(^\text{15}\) *Id.* at 55.
The Furman report recommends establishing a code of conduct for digital platforms with a strategic market status based on a set of core principles aimed at ensuring that business users: (i) are provided with access to designated platforms on a fair, consistent, and transparent basis; (ii) are provided with prominence, rankings, and reviews on designated platforms on a fair, consistent, and transparent basis; and (iii) are not unfairly restricted from utilising alternative platforms or routes to market. Accordingly, the code of conduct should prohibit or proscribe certain conduct by platforms with a strategic market status. As illustrative examples of the forms of behaviour considered unfair or unreasonable, the report mentions the following cases: an online marketplace excluding or suspending rival sellers from its platform to give its own product or service an advantage; a platform that contains a search function giving an unfair advantage to its own services over its rivals in downstream markets through the ranking or presentation of results; and an online platform penalizing a business user for providing a more attractive offering on another site.

Besides establishing a platform code of conduct, the digital regulator should also expand data openness where access to non-personal or anonymized data will tackle the key barrier to entry in a digital market and should promote personal data mobility and systems with open standards. In this regards, Open Banking is mentioned as an instructive example showing the potential for data mobility to provide new opportunities to compete and innovate.

A similar public utility regulation is endorsed by the Stigler Center report, which supports the establishment of a digital authority and a special regulation for firms with

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16 Id. at 61.
17 Id. at 61.
18 Id. at 68, 71, 74.
19 Id. at 69–70.
bottleneck power.\textsuperscript{20} Notably, the new regulator should be tasked with the goals of defining and addressing bottleneck power, designing data sharing rules to reduce single-homing, collecting data on market transactions, creating “light touch” rules (behavioral nudges) that can lead consumers to make better choices, ensuring data portability, creating open standards to promote competition, exercising additional power over merger review, and overseeing the creation of open interoperability standards.\textsuperscript{21}

A special regulation is advocated for digital firms that meet the definition of bottleneck power, i.e. a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.\textsuperscript{22} In these cases, the digital authority should be given merger review authority over all transactions and strategies aimed at discouraging multi-homing and discriminating against rivals should be prohibited.\textsuperscript{23}

 Nonetheless, the Stigler Center report also puts forth recommendations to enhance antitrust enforcement, in particular by relaxing the proof requirements or reversing the burden of proof in appropriate cases.\textsuperscript{24} This suggests adopting rules that presume anticompetitive harm on the basis of preliminary showings by antitrust plaintiffs and shifting the burden of exculpation to the defendant to ensure that plaintiffs would not be required to prove matters of which the defendants have greater knowledge and better access to relevant information. More generally, according to the report, because underenforcement is likely to be costlier than previously thought, it is time for antitrust law to recalibrate the balance it strikes between the risks of false positives and false

\textsuperscript{20} Stigler Committee for the Study of Digital Platforms, supra note 9, at 79, 83–85.
\textsuperscript{21} Id. at 79 and 85–92.
\textsuperscript{22} Id. at 79, 84.
\textsuperscript{23} Id. at 92–95.
\textsuperscript{24} Id. at 77.
The GAI Report on the Digital Economy

negatives. 25

The report released by the EU Commission Experts, however, does not envision a new type of public utility style regulation emerging for the digital economy, considering the risks associated with such a regime (rigidity, lack of flexibility, and risk of capture) too high. 26 Rather, by their view, the most promising road is a more vigorous competition policy regime achievable within the general antitrust framework. 27 Indeed, “competition law can and should, for the foreseeable future, continue to accompany and guide the evolution of the platform economy,” because its “case law method is particularly well suited for the current state of evolution of the platform economy: a still experimental stage, where the efficiencies of different forms of organization are not yet well understood and our knowledge and understanding still needs to evolve step by step.” 28

Nonetheless, a regulatory regime may be needed in the longer run, in particular in those areas that require an ongoing implementation and oversight to ensure, for instance, interoperability through a mandated sharing of data. 29

In their view, the main change of paradigm should reside in the balance of error costs and in the predominance of legal testing instead of the effects-based approach. 30 Under-enforcement in the digital era would be of particular concern because, when considering the stickiness of market power, the harm would presumably last longer than in traditional markets. Therefore, even if consumer harm cannot be precisely measured, strategies employed by dominant platforms to reduce the competitive pressure should

25 Id. at 74. For more on error cost analysis, see Geoff Manne, Error Costs in Digital Markets, in THE GAI REPORT ON THE DIGITAL ECONOMY (2020).
27 Id. at 14.
28 Id. at 70.
29 Id. at 70, 126.
30 Id. at 50–51.
be forbidden in the absence of clear consumer welfare gains.\textsuperscript{31} Such a shift would impact the burden of proof as well as the standard of proof itself. Specifically, when certain conditions are met, it would be the defendant’s burden to demonstrate the pro-competitiveness of the conduct.

Moreover, the EU Commission Experts’ report suggests introducing a special responsibility for digital platforms. Indeed, because of their gatekeeper status, digital platforms are unavoidable trading partners in a wide range of contexts\textsuperscript{32} and exercise an intermediation power even in apparently fragmented marketplaces.\textsuperscript{33} Further, platforms often perform a regulatory, setting up the rules and institutions through which their users interact, and play a dual role as umpires and players in their ecosystem.\textsuperscript{34} Hence, The EU Commission Experts Recommend that dominant platforms should have a responsibility to ensure that competition on their platforms is fair, unbiased, and pro-users.\textsuperscript{35}

Finally, interesting insights can be found in the inquiries conducted by the UK Competition and Markets Authority (CMA) and the Australian Competition and Consumer Commission (ACCC) into digital advertising markets.

Notably, the CMA has welcomed the proposals advanced by the UK Digital Competition Expert Panel for the development of a pro-competitive \textit{ex ante} regulatory regime for advertising-supported platforms.\textsuperscript{36} Hence, it supports the appointment of a dedicated regulatory body to implement an enforceable code of conduct that would govern the behavior of platforms enjoying a strategic market status and to introduce a range of pro-competitive interventions aimed at tackling the sources of market power

\textsuperscript{31} Id. at 41–42.
\textsuperscript{32} Id. at 49.
\textsuperscript{33} Id. at 70.
\textsuperscript{34} Id. at 60.
\textsuperscript{35} Id. at 61.
\textsuperscript{36} UK COMMISSION AND MARKETS AUTHORITY, \textit{supra} note 9.
and promoting competition and innovation.\textsuperscript{37} With regards to the latter category of measures, the newly-established digital market unit should have powers not only to implement a range of data-related remedies, including data mobility, systems with open standards and open data, but also to introduce different forms of separation (from operational to full ownership separation).\textsuperscript{38}

The ACCC believes that the existing tools and goals of the competition law framework remain applicable for digital markets, but that there are conditions which limit the effectiveness of the broad prohibition on misuses of market power.\textsuperscript{39} Hence, the ACCC opts for the creation of a specialist digital platforms branch within the antitrust agency to supplement existing investigative tools with additional proactive investigatory, monitoring, and enforcement powers.\textsuperscript{40} The ACCC considers that it would be appropriate for the antitrust authority to carry out these functions, rather than a new regulator.

According to the Australian authority, there is international evidence that digital platforms have engaged in anti-competitive leveraging behavior in the past and have the ability and incentive to engage in this type of behavior in the future,\textsuperscript{41} and that the risk of leveraging behavior is indeed increasing as digital platforms expand into other markets. Existing investigation and enforcement mechanisms have proved flexible enough to address some competition and consumer issues in digital markets, but are not adequate to deal with all issues. Despite the focus of its investigation being on dominant players (Google and Facebook), the ACCC recommends that the new proactive investigation, monitoring and enforcement powers extend to all digital platforms.

\textsuperscript{37} Id. at 21–22.
\textsuperscript{38} Id. at 24.
\textsuperscript{39} \textsc{Australian Competition and Consumer Commission}, \textit{Digital Platforms Inquiry} 138 (2019).
\textsuperscript{40} Id. at 140–142.
\textsuperscript{41} Id. at 133.
Finally, the Australian inquiry revealed that Google and Facebook exert substantial bargaining power in their dealings with media businesses.\textsuperscript{42} Indeed, a significant number of media businesses rely on news referral services from Google and Facebook to such a degree that Google and Facebook are each unavoidable trading partners.\textsuperscript{43} In this regard, the ACCC suggests the adoption of a code of conduct to address the imbalance of bargaining power between digital platforms and media businesses.\textsuperscript{44}

II. THE REVIVAL OF ECONOMIC REGULATION

Because of their overlap in addressing market power, the interplay between antitrust and regulation has been long debated and the pendulum has often swung back and forth from rivalry to complementarity.

In application of a ‘plain repugnancy’ standard, U.S. antitrust laws have for long predominated over regulation.\textsuperscript{45} However, more recently the Supreme Court has shifted the balance, giving deference to federal regulation because of expertise and cost concerns.\textsuperscript{46} Where a regulatory structure designed to deter and remedy anti-competitive harm already exists, the additional benefit to competition provided by antitrust enforcement usually tends to be small. Furthermore, the risk and cost of false positive

\textsuperscript{42} Id. at 99–105.
\textsuperscript{43} Id. at 217–221.
\textsuperscript{44} Id. at 255–257.
\textsuperscript{46} See NYNEX Corp. v. Discon Inc., 525 U.S. 128 (1998); Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264 (2007); Pacific Bell Tel. Co. v. linkLine Communications, Inc., 555 U.S. 438 (2009). Further, according to the state action doctrine, since Parker v. Brown, 317 U.S. 341 (1943) the Supreme Court has exempted activities regulated under state law from the application of federal antitrust laws when the challenged activities are clearly articulated and affirmatively expressed as state policy and as long as the state actively supervises the implementation of its policy. See Frank H. Easterbrook, \textit{Antitrust and the Economics of Federalism}, 26 J. L. & Econ. 23 (1983). However, in North Carolina State Board of Dental Examiners v. Federal Trade Commission, 574 U.S. 494 (2015), the Court has recently limited the state-action immunity doctrine arguing that, if a state wants to rely on active market participants as regulators, it must provide active supervision.
antitrust violations are considered especially significant, because they may stifle the very conduct that antitrust law is designed to protect. Moreover, there may also be anti-competitive violations that are beyond the practical enforcement ability of an antitrust court and may require day-to-day supervision of a highly detailed degree. Therefore, where antitrust law and a regulation addressing a conduct would produce conflicting guidance, requirements, duties, privileges, or standards, such conduct is considered immune from antitrust liability and supervised by the regulatory authority.47

This implied antitrust immunity has been harshly criticized.48 The limitations of blind faith in regulatory oversight have been well explained, not solely in light of the risks of regulatory capture, as framed by private-interest and public choice theories.49 Even the most competition-conscious regulatory structure cannot preclude abuses of that structure, since the very structure that exists to promote competition can also create opportunities for rivals to achieve anti-competitive goals. As noted by Stacey Dogan and Mark Lemley, the risk of a strategic implementation of the regulatory framework (regulatory gaming) undermines both the regulatory system and the longstanding complementary relationship between regulation and antitrust, and provides the need for


49 For more on public choice theory, see Thom Lambert, Rent Seeking and Public Choice in Digital Markets, in THE GAI REPORT ON THE DIGITAL ECONOMY (2020).
ongoing antitrust oversight of regulated industries.\textsuperscript{50} Moreover, the cost of false positives cannot be overstated. Rather, quite ironically, the concerns raised by recent reports on digital markets have been focused on antitrust under-enforcement, since the harm to competition is expected to be longer term than in traditional markets because of the stickiness of market power.

On the other side of the Atlantic, the European Court of Justice (CJEU) has expressed greater support for the application of antitrust rules in regulated industries. Notably, regarding the margin squeeze of competitors, the CJEU has ruled that the approval by a national sectoral regulator of a dominant undertaking’s pricing practices cannot, as such, absolve that undertaking from responsibility under antitrust rules.\textsuperscript{51} It is only if anti-competitive behaviour is required by national legislation, or if such legislation creates a legal framework that eliminates any possibility of competitive activity, that a dominant player may escape liability (the so-called ‘State action defence’).\textsuperscript{52}

However, the regulatory framework is not considered irrelevant to the antitrust analysis. In the highly-regulated pharmaceutical industry, the CJEU intervened against the risks of regulatory gaming, stating that on the one hand, a dominant undertaking cannot use regulatory procedures in such a way as to prevent or impede the entry of competitors in the market,\textsuperscript{53} and on the other hand, that the assessment of whether potential competition must be carried out in consideration of the regulation constrains the industry’s valuable characteristics.\textsuperscript{54} In this regard, the European antitrust authorities

\textsuperscript{50} Dogan & Lemley, \textit{supra} note 48.

\textsuperscript{51} CJEU, 14 October 2010, Case C-280/08 P, Deutsche Telekom v. European Commission, paras. 80-85; CJEU, 10 July 2014, Case C-295/12 P, Telefónica SA and Telefónica de España SAU v European Commission. \textit{See also} EU General Court, 13 December 2018, Case T-851/14, Slovak Telekom v. European Commission.

\textsuperscript{52} CJEU, 9 September 2003, Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato, para. 53.


\textsuperscript{54} CJEU, 30 January 2020, Case C-307/18, Generics UK Ltd and others v. Competition and Markets Authority, para. 40.
and courts have embraced the same approach of their U.S. colleagues, by strongly challenging the tool-box of instruments (including product hopping\textsuperscript{55} and reverse payment settlements\textsuperscript{56}) implemented by branded drug companies to manipulate the patent and drug approval system with the aim of limiting or impeding competition from generics.

To sum up, the choice between antitrust and regulation greatly depends on the trade-offs in each specific case. Notably, it requires assessment of whether ex ante regulatory intervention in the market furnishes significant incremental benefits with respect to existing ex post antitrust policies of general applicability. This approach has, for instance, recently fuelled the debate on net neutrality regulation in the U.S.\textsuperscript{57}

The push towards a regulatory approach as the most viable policy option to address antitrust concerns in digital markets is essentially driven by two arguments. First, long-lasting antitrust investigations appear ill-suited to effectively address the fast-moving dynamics of digital markets since there is a risk that ex post enforcement will come too late to keep markets competitive and contestable. Second, BigTechs enjoy a brand-new type of market power which implies greater responsibilities and justifies specific responses. Indeed, large digital platforms manage to combine a gatekeeping or bottleneck position in the digital ecosystem with a parallel role of rule-setting or regulation within the established digital environment. Online platforms develop ranking algorithms, determine the conditions under which a business can enter the network, and fix the criteria governing the suspension, delisting, dimming, or termination of their accounts and of the associated goods/services sold via the platform. Such actions are

\textsuperscript{55} See, e.g., Reckitt Benckiser Group PLC, Case No: 1:19CV00028 (preliminary) (2019).

\textsuperscript{56} FTC v. Actavis, 570 U.S. 136 (2013).

perceived as particularly threatening when a BigTech performs a dual role, acting as both an intermediary and a trader operating on the platform, because it may have the incentive to discriminate to its own benefit.58

A. Breakup and Public Utilities-Style Regulation

From the reports and policy papers released so far, two different policy options emerge to address the regulation of digital platforms.

According to the first approach, a public utilities-style regulation for the digital economy should be established. As stated by the Stigler Center report, it is important that antitrust law not have different rules aimed at different sectors that would differentiate industries and undermine general political support for antitrust law.59 For this reason, the Stigler Center, the UK Furman, and the UK CMA reports advocate the appointment of a sectoral regulator (digital authority) to impose measures against companies holding a strategic market status.60 The ACCC prefers the creation of a digital platforms branch within the antitrust agency to supplement existing investigative tools with additional proactive investigation, monitoring, and enforcement powers.61

58 According to the baseball analogy used by US Senator Warren, “you get to be the umpire or you get to have a team in the game—but you don’t get to do both at the same time” Warren Democrats, Tweet (Oct. 15, 2019), https://twitter.com/TeamWarren/status/11842958562599424. See also Margrethe Vestager, Statement before the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law 2 (July 30, 2020), https://www.euractiv.com/wp-content/uploads/sites/2/2020/07/Statement-EVP-Vestager-House-SubCommittee-30-July.pdf, adopting another sporting analogy to underline the relevance of the dual role and stating that the platform is both a player on the downstream market against rivals, and at the same time is the referee which determines the conditions of that competition on the upstream platform.

59 STIGLER COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, supra note 9, at 73.

60 Id. at 78–79, 83–92; UK COMPETITION AND MARKETS AUTHORITY, supra note 9, at 22; UK DIGITAL COMPETITION EXPERT PANEL, supra note 9, at 5.

61 AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, supra note 21, at 138–42 and 255–57. See also AUSTRALIAN GOVERNMENT, Regulating in the Digital Age, in GOVERNMENT RESPONSE AND IMPLEMENTATION ROADMAP FOR THE DIGITAL PLATFORMS INQUIRY (2019) (committing $27 million over four years for a Digital Platforms Branch within the ACCC).
Within this line of reasoning, a different (and harder) solution is proposed by the supporters of the “breakup and regulate” approach. Notably, former U.S. Democratic Party presidential candidate Elizabeth Warren has proposed restoring competition in the technology sector by designating BigTechs as ‘platform utilities’ that should be prevented from competing on their own platforms.\textsuperscript{62} According to the forthcoming “Anti-Monopoly and Competition Restoration Act,” that was reportedly drafted by Senator Warren, a firm that serves as both a platform and a merchant that competes with third-party merchants would presumptively be considered abusing its market power.\textsuperscript{63} Further, in October 2019 the “Keep Big Tech out of Finance Act” was introduced before the House of Representatives (H.R. 4813).\textsuperscript{64} If enacted, the bill would prohibit technology companies (“large platform utilities” predominately engaged in the business of offering to the public an online marketplace, an exchange, or a platform for connecting third parties) that have an annual global revenue of over twenty-five billion dollars from either acting as a financial institution or being affiliated with a financial institution.

In a similar vein, Lina Khan, the Open Markets Institute, and the American Economic Liberties Project invite the recovery of the common carriage regime and the use of structural remedies to ensure that new bottleneck facilities do not distort competition.\textsuperscript{65} By this view, the best way to preserve competition and other essential values of a democratic society (such as privacy, free speech, and non-discrimination) is to ban any vertical integration. Releasing the findings of its investigation, the U.S. House Judiciary Committee’s Antitrust Subcommittee has shared these concerns and recommended the consideration of legislative reforms drawing on both structural

\textsuperscript{62} Warren, supra note 10. See also Tim Wu, The Master Switch: The Rise and Fall of Information Empires (2011).


\textsuperscript{65} Khan, supra note 10; Open Markets Institute, supra note 10; Stoller, Miller, & Teachout, supra note 10.
separation and line of business restrictions in order to reduce the conflicts of interest faced by dominant platforms functioning as critical intermediaries.66

Conversely, the Stigler Center and the Furman reports consider the option of the structural separation very disruptive, while other tools offer a more targeted, more pro-business, and pro-consumer solution to foster competition in digital markets.67 Namely, the Furman report and the CMA point to the implementation of an enforceable code of conduct for platforms with strategic market status.68 However, the CMA is also open to exploring the separation of Google and Facebook as a remedy to address concerns around transparency, conflicts, and market power in the advertising intermediation, i.e., the so-called “ad tech stack.”69 In contrast, the ACCC reaches a different outcome. The ACCC does not recommend that either Google or Facebook divest their subsidiary businesses, but rather relies exclusively on the adoption of a code of conduct to address the imbalance of bargaining power between digital platforms and media businesses.70

66 U.S. HOUSE OF REPRESENTATIVES, supra note 1, at 380.
67 STIGLER COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, supra note 9, at 80; UK DIGITAL COMPETITION EXPERT PANEL, supra note 9, at 77. See also AMERICAN ANTITRUST INSTITUTE, supra note 1, at 37, noting that the rare historical breakup remedies fashioned through antitrust law were applied in sectors that are very different from the digital ecosystems; Herbert Hovenkamp, House Judiciary Inquiry into Competition in Digital Markets: Statement of Herbert Hovenkamp 6 (Univ. Pa. Inst. L. & Econ. Research Paper No. 20-38, 2020), seeing “little merit in various proposals to break up large digital platforms such as Amazon or Facebook. These proposals appear to see size itself as the wrong to be proscribed and offer little assurance that price or output will improve. The opposite is more likely. The United States does not have a good track record with enforced breakups for monopolistic practices. . . . Also highly problematic is one popular “quasi” breakup proposal, which is that Amazon be required to establish separate platforms for sales of its own products and the numerous sales it makes as a broker for other merchants. The principal victims will be consumers, and the principal beneficiaries will be other large businesses whose products Amazon currently sells”; Tirole, supra note 6, raising several reservations about divestitures in the tech industry, because of the difficulty to identify a stable essential facility, the risk of destroying the benefits of network externalities, and the possibility that dominant firms may strategically intertwine different services to make it difficult for authorities to “unscramble the eggs.”
68 UK DIGITAL COMPETITION EXPERT PANEL, supra note 9, at 57, 61; UK COMPETITION AND MARKETS AUTHORITY, supra note 9, at 22–23.
69 UK COMPETITION AND MARKETS AUTHORITY, supra note 9, at 24.
70 See AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, supra note 21, at 116–17, mentioning three
B. The More Regulatory Approach: Blacklisted Practices and Legal Presumptions

A second approach to the regulation of digital platforms is embraced by several European antitrust authorities. We may define it as the “more regulatory” approach to antitrust law because, instead of endorsing the explicit adoption of a public utilities-style regulation for the digital economy and the appointment of a digital agency as sectoral regulator, proponents of the “more regulatory” approach aim at integrating the antitrust toolkit with *ex ante* prohibitions to prevent anti-competitive practices by dominant platforms.\(^71\)

By this view, since digital markets prompt rapid concentrations of power, timely intervention is crucial. Because the traditional *ex post* enforcement may cause delays in investigations, the best approach is to apply simple *ex ante* rules of conduct. From this perspective, the seven year European Google Shopping investigation provides a good example of how complex and burdensome the competitive assessment can be when it comes to some practices performed by vertically integrated platforms.\(^72\) The reform proposals belonging to the “more regulatory” approach make antitrust assessment faster and simpler by introducing a blend of corrective tools such as *ex ante* prohibitions, market investigations, non-punitive remedies, *per se* rules, legal presumptions, and shifting the burden of proof.

In particular, the German Commission’s “Competition Law 4.0” has taken a position against the creation of a Digital Agency.\(^73\) Instead of imposing standards, the

\(^71\) Cappai & Colangelo, *supra* note 12.

\(^72\) European Commission, Case AT.39740 (2017), Google Search (shopping).

\(^73\) GERMAN COMMISSION, *supra* note 11, at 25, 77–81.
German Commission proposes a set of clear rules of conduct (“clear-cut prohibitions”) for dominant online platforms, with potential exceptions.\(^{74}\) On the same grounds, the French Competition Authority considers it useful to draw up a list of practices that raise concerns specific to “structuring digital platforms.”\(^{75}\) Furthermore, the German Commission proposed accelerating the development of these new rules of conduct for dominant digital platforms through an EU Platform Regulation that would both flesh out and supplement competition law.\(^{76}\)

In a joint memorandum the Benelux (Belgium, the Netherlands, and Luxembourg) competition agencies call for the introduction of an \textit{ex ante} intervention mechanism to prevent anti-competitive conduct by digital gatekeepers.\(^{77}\) Notably, competition authorities should have the power to intervene on dominant platforms, without establishing the infringement, by imposing proportionate remedies that are behavioural and non-punitive in nature. Rebuttable presumptions on the proportionality of certain


\(^{75}\) French Competition Authority, \textit{supra} note 11, at 7–8, indicating that a non-exhaustive list could cover practices that consist in: disfavoring competing products or services using their services, hindering access to markets in which they are not dominant or structuring; using data in a dominated market to make access to that market more difficult; making interoperability of products or services more difficult; making data portability more difficult; hindering the use of multihoming. The French Authority defines structuring digital platforms in three stages as: 1) a company that provides online intermediation services for exchanging, buying or selling goods, content or services; and 2) who holds structuring market power a) because of its size, financial capacity, user community and/or the data that it holds, b) enabling it to control access to or significantly affect the functioning of the market(s) in which it operates; 3) with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity. \textit{See also} Peter Alexiadis & Alexandre De Streel, \textit{Designing an EU Intervention Standard for Digital Platforms} (EUI Working Papers RSCAS No. 14, 2020), https://fsr.eui.eu/working-paper-designing-an-eu-intervention-standard-for-digital-platforms/, proposing a (cumulative) three criteria test to determine the targeted digital platforms, namely (i) the existence of market structures which are highly concentrated and non-contestable, (ii) the presence of digital gatekeepers which act as unavoidable trading partners, (iii) and the lack of effectiveness of competition rules to address the identified problems in the market.

\(^{76}\) \textit{GERMAN COMMISSION, supra} note 11, at 49. \textit{See also} \textit{MONOPOLKOMMISSION, supra} note 74.

\(^{77}\) Joint Memorandum from Belgian Competition Authority, Dutch Authority for Consumers & Markets, and Luxembourg Conseil de la Concurrence, \textit{supra} note 11, at 5–6.
remedies, including those punitive in nature, are considered appropriate for companies which do not abide by the imposed remedies. Similarly, with regard to banking and financial markets, the Expert Group on Regulatory Obstacles to Financial Innovation has recommended that the European Commission introduce *ex ante* rules to prevent large, vertically integrated platforms from discriminating against product and service provision by third parties.\(^78\)

At a first glance, the report previously prepared for the Commission by the EU Competition Experts seems to suggest a different approach that advocates just a more vigorous competition policy regime.\(^79\) Although the Commission’s expert panel acknowledges the need for a substantial rethinking of the tools of analysis and enforcement, regulatory interventions are only invoked to ensure access to data in sector-specific situations, particularly where access would open secondary markets for complementary services.\(^80\)

According to the report, a review of the error cost framework and a consequent relaxation or reversal of the burden of proof is needed.\(^81\) In particular, a finding that specific practices adopted by dominant platforms “restrict the ability of other firms to compete either on the platform or for the market in a way which is not clearly competition on the merits should trigger a rebuttable presumption of anti-competitiveness. It should

\(^78\) **EXPERT GROUP ON REGULATORY OBSTACLES TO FINANCIAL INNOVATION, Thirty Recommendations on Regulation, Innovation and Finance, in Final Report to the European Commission 79–80 (2019).**

\(^79\) Crémer, de Montjoye, & Schweitzer, *supra* note 26, at 14. See also Marc Bourreau & Alexandre de Streel, *Digital Conglomerates and EU Competition Policy*, (CERRE Discussion Paper, 2019), suggesting to adapt the antitrust theories of harms to firms’ incentives in the digital economy by extending anti-competitive bundling theories and adjusting the essential facility doctrine to the features of data.

\(^80\) Crémer, de Montjoye, & Schweitzer, *supra* note 26, at 82. In a similar vein, Alexiadis & De Streel, *supra* note 75, suggest both the re-assessment of antitrust enforcement principles and theories of harms (including the shift of the burden of proof in some circumstances, e.g. self-preferencing) and the introduction of a complementary regulation to ensure contestability between digital platform alternatives, mainly by promoting interoperability through a mandated sharing of data.

\(^81\) Crémer, de Montjoye, & Schweitzer, *supra* note 26, at 50-51. See also **AUSTRIAN COMPETITION AUTHORITY, Digitalisation and Competition Law, in POSITION PAPER 10 (2020).**
be the dominant platform’s responsibility to show that the practice at stake brings sufficient compensatory efficiency gains.”

In the U.S., the Stigler Center report also endorses the relaxation of proof requirements or the reversal of the burden of proof “in appropriate cases.” On a similar note, Senator Klobuchar has introduced the “Anticompetitive Exclusionary Conduct Prevention Act,” which aims at deterring exclusionary practices by dominant firms. The Act introduces a rebuttable presumption of an appreciable risk of anticompetitive harm when the firm has a market share of greater than 50 percent or significant market power in the relevant market. Finally, a group of antitrust experts for the Washington Center for Equitable Growth has recently argued that antitrust rules constructed by the courts reflect a systematically skewed error cost balance: “they are too concerned to avoid both chilling procompetitive conduct and the high costs of litigation, and too dismissive of the costs of failing to deter harmful conduct.” Therefore, the signatories of the statement have called on the U.S. Congress to update current antitrust law to align it with modern economic theory and to fix harmful judicial rules by: incorporating presumptions that better reflect the likelihood that certain practices harm competition; recognizing that certain conduct that creates a risk of substantial harm should be unlawful even if the harm cannot be shown to be more likely than not; and altering substantive legal standards and the allocation of pleading, production, and burdens of proof to reduce

82 Crémer, de Montjoye, & Schweitzer, supra note 26, at 71.
83 STIGLER COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, supra note 9, at 77.
barriers of demonstrating meritorious cases.\textsuperscript{86}

These proposals to reverse the burden of proof by introducing presumptions suggests that both the European Commission’s expert panel and the aforementioned U.S. antitrust experts are actually sharing the same theoretical approach. According to the EU Competition Experts, the operators of dominant platforms have a responsibility to ensure that competition on their platforms is fair, unbiased, and pro-users.\textsuperscript{87} Indeed, because of their gatekeeper status, digital platforms are unavoidable trading partners and exercise an intermediation power even in apparently fragmented marketplaces, i.e. those where the market share is significantly below 40%.\textsuperscript{88} Moreover, platforms perform a rule-setting function and play a dual role in their ecosystem.\textsuperscript{89}

C. EU Commission’s Proposals: Ex Ante Regulatory Framework and New Competition Tool

These arguments are gaining momentum and the European Commission seems ready to embrace a new regulatory approach. Indeed, in unveiling a new digital strategy, the Commission has recently remarked that competition rules are under revision so they are better suited to the digital economy.\textsuperscript{90} The Commission highlights the systemic role of certain online platforms which act as “private gatekeepers” to markets, customers, and information, and emphasises the need to ensure that their market power will not jeopardise the fairness and openness of markets.\textsuperscript{91} Further, since “competition policy alone cannot address all the systemic problems that may arise in the platform economy,”

\begin{itemize}
\item \textsuperscript{86} Id. at 1–2.
\item \textsuperscript{87} Crémer, de Montjoye, & Schweitzer, supra note 26, at 61.
\item \textsuperscript{88} Crémer, de Montjoye, & Schweitzer, supra note 26, at 49, 70. See also U.S. HOUSE OF REPRESENTATIVES REPORT, supra note 1, at 39, arguing that their role as gatekeepers also gives the dominant platforms outsized power to control the fates of other businesses.
\item \textsuperscript{89} Id. at 60.
\item \textsuperscript{90} European Commission, Communication Shaping Europe’s Digital Future COM(2020) 67 final, 8 (February 19, 2020).
\item \textsuperscript{91} Id. at 8.
\end{itemize}
additional rules may be needed to ensure contestability, fairness, innovation, and the possibility of market entry.\textsuperscript{92} To this end, the Commission announced the launch of a sector inquiry to evaluate the effectiveness of the current competition rules and stated that it would explore whether \textit{ex ante} regulatory responses may be needed to ensure market contestability against gatekeeping platforms with significant network effects.\textsuperscript{93} Notably, the Commission is working on a proposal for an \textit{ex ante} regulation as part of the Digital Services Act package set to be presented by the end of 2020.

According to the inception impact assessment, the adoption of an \textit{ex ante} regulatory framework for large online platforms acting as gatekeepers would include two sub-options.\textsuperscript{94} The first sub-option would introduce a prohibition or restriction of certain unfair trading practices (blacklisted practices), such as certain forms of self-preferencing and the acceptance of supplementary commercial conditions that by their nature have no connection with the underlying contractual relationship.\textsuperscript{95} Besides establishing obligations and prohibiting certain unfair trading practices, the second sub-option of a new \textit{ex ante} regulatory framework would include an ability to impose tailor-made remedies targeting specific issues and individual large online platform companies, to be applied on a flexible, case-by-case basis. These remedies would be adopted and enforced by a competent regulatory body and could include platform-specific non-personal data access obligations, specific requirements regarding personal data portability, or

\textsuperscript{92} \textit{Id.} at 9.

\textsuperscript{93} \textit{Id.} at 10.

\textsuperscript{94} European Commission, supra note 11, at 4.

\textsuperscript{95} See also Vestager, supra note 58, at 6, referring to a clear list of dos and don’ts that the platforms concerned would be required to comply with (i.e. a specifically defined set of obligations and prohibitions that would be of general applicability to the platforms concerned), which might include “rules to stop platforms misusing their position as both player and referee . . . One possible rule could be one that prohibits platforms from displaying their own downstream services more prominently than those of rivals. Another possible rule in relation to data might be a so-called “data silo” rule, where a conglomerate platform is prohibited from using specific data sets for certain business purposes in order to prevent it leveraging from one market to another.”
interoperability requirements.

Moreover, the European Commission has published an open public consultation on the need for a possible new competition tool that would allow addressing structural competition problems in a timely and effective manner.\textsuperscript{96} The proposal aims at providing the Commission with powers akin to those exercised by the UK CMA when it carries out market investigations.\textsuperscript{97} In particular, after establishing a structural competition problem through a market investigation, the new tool would allow the Commission to impose behavioural and, where appropriate, structural remedies, without requiring a proceeding under the antitrust provisions.

According to the inception impact assessment, four policy options are considered.\textsuperscript{98} The first two would address unilateral conduct by dominant companies either across all sectors or just in specific sectors, such as digital markets, by enabling the Commission to impose behavioural and structural remedies. The other two policy options would include a market structure-based (rather than dominance-based) tool, thereby not limiting itself to dominant companies, and thus allowing the Commission to intervene when a structural risk for competition or a structural lack of competition prevents the market from functioning properly. Structural risks for competition refer to tipping markets, i.e. scenarios where certain market characteristics (e.g. network and scale effects, lack of multi-homing, and lock-in effects) and the conduct of the companies with an entrenched market and/or gatekeeper position create a threat for competition.\textsuperscript{99}

\textsuperscript{96} European Commission Press Release IP/20/977, Commission Consults Stakeholders on a Possible New Competition Tool (June 2, 2020).

\textsuperscript{97} See Amelia Fletcher, Market Investigations for Digital Platforms: Panacea or Complement?, (CCP Working Paper No. 6, 2020), http://competitionpolicy.ac.uk/publications/working-papers/working-paper-20-06, considering the pros and cons of the new competition tool by comparing it with the with the UK market investigation powers granted to the CMA.


\textsuperscript{99} Id. at 2.
Structural lack of competition refers instead to a structural market failure, i.e. scenarios where markets display systemic failures due to certain structural features (e.g. high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation) and oligopolistic market structures with an increased risk for tacit collusion.

Finally, *ex ante* regulation will also be considered to address systemic issues related to data, namely market imbalances in relation to access to and use of data. According to the Commission, the contestability of markets is affected by the ‘data advantage’ achieved by a small number of online platforms which may exploit it to set the rules on the platform, unilaterally impose conditions for access and use of data, and leverage such advantage when developing new services and expanding into new markets. Thus, the accumulation of vast amounts of data by BigTech companies, the role of data in creating or reinforcing imbalances in bargaining power, and the methods by which these companies use and share the data across sectors will be analysed in order to evaluate whether additional sector-specific *ex ante* regulatory interventions are needed.

### III. TAMING DIGITAL GATEKEEPERS: A CASE OF REGULATORY HUBRIS?

Despite different applications and policy options, i.e. breakups, digital authorities, *ex ante* prohibitions, new competition tools, and reversals of the burden of proof, the two approaches to the regulation of digital platforms described in the previous paragraph share the same underlying principles. Namely, they argue that antitrust law is unable to keep up with fast-moving markets and that BigTechs are not traditional dominant players. BigTechs are both gatekeepers exerting a bottleneck power and private regulators setting rules for businesses using their platforms. Further, they play a dual role

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as umpires and players in their ecosystem, simultaneously operating the marketplace and selling their own products and services in competition with other sellers. As a result of these factors, digital platforms deserve special treatment to ensure fairness and contestability on the platform and on neighbouring markets. In other words, online platforms should be treated like common carriers and should implement a nondiscrimination/neutrality regime.

Against this background, the regulatory approaches recently advanced do not seem to reflect the distinctive features of digital markets, but rather the need to design enforcement short-cuts to cope with growing concerns that antitrust law is unable to address potential anticompetitive practices by large online platforms. Hence, in most of the mentioned reports, the revival of regulation seems supported more by an alleged antitrust enforcement failure rather than true a market failure. The goal is indeed to fill alleged enforcement gaps in the current antitrust rules by introducing tools aimed at lowering legal standards and evidentiary burdens in order to address anti-competitive practices that standard antitrust analysis would struggle to tackle.102

A. Self- Preferencing and the Vertical Integration Anathema

From this point of view, the case of self-preferencing appears paradigmatic. On the one hand, it represents the main concern related to the dual mode intermediation performed by some digital platforms. Acting simultaneously as regulators and

102 AUSTRIAN COMPETITION AUTHORITY, supra note 81, at 10, made it very clear: “It seems justified to use the device of the reversal of the burden of proof . . . in particular where there appears to be an abusive or unfair pattern of behaviour, it is difficult for an applicant to reconstruct what has been going on within an undertaking, or official investigations rapidly come up against natural or technical limits.” See also the EUROPEAN COMMISSION, supra note 98, stating that the aim of the proposal for a new competition tool is to fill enforcement gaps in the current antitrust rules by expanding the toolkit in order to address anti-competitive behaviours that standard antitrust analysis would strive to tackle; and the U.S. HOUSE OF REPRESENTATIVES REPORT, supra note 1, at 392, acknowledging that some of the anticompetitive business practices uncovered by its investigation could be difficult to challenge under current antitrust law, therefore specific legislative reforms would help renew and rehabilitate the antitrust laws in the context of digital markets.
participants in the market, BigTechs may leverage their power by giving preferential treatment to their own products and services. As a result, it comes as no surprise that restricting self-preferencing is the paramount *ex ante* prohibition in almost all the mentioned reports and inquiries.\(^{103}\)

On the other hand, despite the European Commission’s decision in *Google Shopping*,\(^{104}\) it is contentious whether a dominant undertaking is required to treat a rival’s product in the same way as it treats its own under antitrust rules.\(^{105}\) Differentiated treatment is not inherently problematic under competition law because dominant players are not subject to a duty to keep their rivals in the market. Therefore, antitrust provisions do not impose a general prohibition on self-favoring by dominant firms, so that such conduct is not unlawful *per se*.

Notably, after a seven year investigation, the European Commission found that discriminatory treatment of rivals by a vertically integrated search engine may amount

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\(^{103}\) *Australian Competition and Consumer Commission*, supra note 21, at 134–36; *Expert Group on Regulatory Obstacles to Financial Innovation*, supra note 78, at 79–80; *French Competition Authority*, supra note 11, 7–8; *German Commission*, supra note 11, at 50–51; *UK Competition and Markets Authority*, supra note 9, at 358; *UK Digital Competition Expert Panel*, supra note 9, at 62. See also *U.S. House of Representatives Report*, supra note 1, at 382–84, recommending that Congress consider establishing rules to prevent discrimination, favoritism, and self-preferencing. More in general, about differentiated treatment see Inge Graef, *Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 Y.B. EURO. L. 448 (2019), distinguishing among ‘pure’ self-favouring (whereby a vertically integrated platform treats its own services more favourably than those of others), ‘pure’ secondary line differentiation (whereby a non-vertically integrated platform differentiates between non-affiliated services in a market in which it is not active itself), and ‘hybrid’ cases where a platform differentiates among non-affiliated services in an effort to favour its own business.


\(^{105}\) See, e.g., Submission to the House Subcommittee of Antitrust, Hal Singer Answers Questions from House Subcommittee on Antitrust 2 (March 30 2020), https://www.econone.com/news-article/hal-singer-answers-questions-from-house-subcommittee-on-antitrust/, arguing that antitrust is not a perfect solution for dealing with the problem of self-preferencing and that, even if the antitrust laws could be stretched to accommodate this type of exclusion, the pace of litigation is too slow to address the potential harms that flow from self-preferencing, namely, an innovation loss at the edges of the platforms. See also Shapiro, supra note 1, at 83, considering it very difficult to pursue a digital platform under the U.S. Supreme Court antitrust precedent for discriminating in favor of its own products and services.
to an abuse of dominance if the search engine gives an illegal advantage to its own comparison shopping service by systematically ensuring prominent placement for it and demoting rival comparison shopping services in its search results. According to the Commission, by artificially diverting traffic from their rival’s services, Google’s self-preferencing aims to leverage its market power on the search engine.

Similarly, by exploiting its dual role as marketplace operator and seller, Amazon is suspected to have adjusted its product-search system to favor its own products. Notably, the European Commission is investigating whether Amazon is using sensitive data about marketplace sellers, their products, and their transactions to affect competition. The Commission will look into the role of data in the selection of the winners of the “Buy Box” and the impact of Amazon’s potential use of competitively sensitive marketplace seller information on that selection. Further, The Wall Street Journal has recently reported that Amazon used data about independent sellers on the company’s platform to develop competing products. The Canadian Competition Bureau is also investigating Amazon’s trade practices, in particular looking at: i) any

106 European Commission Press Release IP/19/4291, The Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon, (July 17, 2019). Furthermore, several European national antitrust authorities (Austria, Germany, Italy, Luxembourg) weighed in opening proceedings against Amazon on similar grounds.

107 Dana Mattioli, Amazon Scooped Up Data from its Own Sellers to Launch Competing Products, THE WALL STREET JOURNAL, April 23 (2020). See Randal C. Picker, Statement before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law 20–25, May 11 (2020), addressing antitrust concerns and remedies about Amazon’s dual role. According to Picker, “the behavior of third-party sellers suggests that Amazon is providing valuable services to those sellers in using its internal skill set in wholesale transactions on the Amazon platform. Requiring Amazon to exit one business or the other would reduce competition and would risk destroying these valuable arrangements. If the central concern is that Amazon is exploiting individual third-party seller information, there are much more direct interventions possible. In some sectors, we silo data and we could do that here. That said, do note, as the Rain Design example suggests, the real possible costs to consumers from limiting entry by Amazon into new product markets. And if there is a belief that product cloning is too easy, the natural place to fix that problem is in intellectual property law. On the buy box, the central allegation seems to be that Amazon uses the buy box to make money for Amazon. That of course is the business that Amazon is in and U.S. antitrust law doesn’t create some sort of general nondiscrimination and access regime for third-party sellers.”
policies which may impact third-party sellers’ willingness to offer their products for sale at a lower price on other retail channels, such as their own websites or other online marketplaces; ii) the ability of third-party sellers to succeed on Amazon’s marketplace without advertising on its website or using its fulfilment service; and iii) any efforts or strategies by Amazon that may influence consumers to purchase products it offers for sale over those offered by competing sellers.108

Finally, the European Commission is evaluating the antitrust complaint filed by Spotify against Apple. Spotify alleges that Apple has unfairly limited competitors in their access to the Apple Music streaming service and, by imposing a 30% fee on subscriptions, has been using its App Store to impede Spotify’s competitive potential to the advantage of Apple Music. Notably, the European Commission has opened antitrust investigations concerning the mandatory use of Apple’s own proprietary in-app purchase system (“IAP”) for the distribution of paid digital content (for which Apple generally charges app developers a 30% commission on all subscription fees) and restrictions on the ability of developers to inform users of alternative purchasing possibilities outside of apps.109

Moreover, the European Commission has also opened an antitrust investigation concerning Apple’s terms, conditions, and other measures for integrating Apple Pay in merchant apps and websites on iPhones and iPads, Apple’s limitation of access to the near-field communication (NFC) functionality (“tap and go”) on iPhones for payments in stores, and alleged refusals of access to Apple Pay for specific products of rivals on iOS and iPadOS smart mobile devices.110


While commenting on the opening of these investigations, executive Vice-President Margrethe Vestager made explicit reference to the gatekeeper role obtained by Apple with regards to the distribution of apps and content to users of Apple’s popular devices. 111

These investigations are premised on either the assumption that BigTechs must ensure rivals a level playing field or a sort of platform neutrality regime which represents a version of the essential facility doctrine. 112 However, while awaiting the European General Court judgement in Google Shopping, 113 a lively debate has taken place on the possibility to assess such conduct under one of the established categories of abuse, as the types of abuse closest to the challenged practice, i.e. essential facilities doctrine, discrimination, and tying, do not appear suitable to address cases of self-preferencing. 114

111 Id.

112 Geoffrey A. Manne, Correcting Common Misperceptions About the State of Antitrust Law and Enforcement, Invited Statement on House Judiciary Investigation into Competition in Digital Markets 8, (April 17 2020), https://laweconcenter.org/wp-content/uploads/2020/04/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf. See also Niamh Dunne, Public Interest and EU Competition Law ANTITRUST BULL. (forthcoming), arguing that the notion that dominant platforms have a positive duty to ensure “fair” outcomes for rivals has inescapable parallels to more traditional forms of utilities regulation. On the risks arising from putting the government in the business of regulating these common carriage deals, see Picker, supra note 105, at 31: “Would Apple have an obligation to carry—here meaning pre-install—any app requesting that? I hope that merely to state the idea is to make clear why that would be an outcome that would be physically impossible and would create a terrible consumer experience. . . . Would a nondiscrimination regime require Apple to pre-install all competing music apps? Would we instead make the browser choice screen universal for any app category where Apple sought to pre-install all apps? Could Apple auction off the sole right to be pre-installed? And could Apple bid in that auction against outsiders? That might sound strange—Apple bidding to pay itself—but that is exactly how some versions of the Google Shopping remedy have operated.”

113 GC, Case T-612/17, Google and Alphabet v. Commission.

114 See Niamh Dunne, Dispensing with Indispensability, 16 J. COMPETITION L. & ECON. 74 (2020); Graef, supra note 103; Pablo Ibáñez Colomo, Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping, 10 J. EURO. COMPETITION L. & PRAC. 532 (2019); Pinar Akman, The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law, 2 UNIV. ILL. J. L., TECH. & POL’Y 301 (2017); Bo Vesterdorf, Theories of Self-Preferencing and Duty to Deal – two sides of the same coin?, 1 COMPETITION L. & POL’Y DEBATE 4 (2015); Nicolas Petit, Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf, 1 COMPETITION L. & POL’Y DEBATE (2015). See also Pablo Ibáñez Colomo, Self-Preferencing: Yet Another Epithet in Need of Limiting Principles, 43 WORLD COMPETITION (Forthcoming 2020) https://ssrn.com/abstract=3654083, suggesting that self-preferencing, as a legal category, may be misleading.
This debate provides useful insights for US policy circles as well, since the U.S. House Judiciary Committee’s Antitrust Subcommittee has suggested emulating the European model imposing a special responsibility on dominant firms by introducing the notion of the abuse of dominant position and overriding several Supreme Court’ decisions in order to clarify prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying, and self-preferencing. Moreover, the recent lawsuits filed by Epic Games against Apple and Google resemble the European investigations. On August 2020, Epic added a discount direct payment option for the successful videogame Fortnite alongside the iOS App Store and Google Play payment options, in violation of those stores’ policies and bypassing their 30 percent fee. As a result, Fortnite was removed from both platforms and Epic filed lawsuits complaining that Apple and Google stand as unavoidable middlemen for app developers and in every in-app transaction, and alleging anti-competitive restraints in the app distribution market and in the in-app payment processing market.

In light of the debate around the Google Shopping decision, it seems that importing the European concept of abuse of dominance and the related types of abusive behaviors is not sufficient to tackle BigTechs’ strategies. Thus, many European antitrust

because the various manifestations of the phenomenon are far from identical, ranging from hypotheses that raise issues similar to those at stake in traditional tying cases to others that raise issues similar to those considered as a refusal to deal.

115 U.S. HOUSE OF REPRESENTATIVES REPORT, supra note 1, at 391–99, stating that, through adopting a narrow construction of consumer welfare as the sole goal of the antitrust laws, the U.S. Supreme Court has limited the analysis of competitive harm to focus primarily on price and output rather than the competitive process, hence contravening legislative history and legislative intent. See also Weber Waller, supra note 1; Eleanor M. Fox, Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide, 98 NEB. L. REV. 297 (2019); Lina M. Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, 11 HARV. L. & POL’Y REV. 235 (2017).

116 See also Picker, supra note 107, at 30, “There is this idea that antitrust enforcement has shifted from Washington DC to Brussels and that that reflects a better competition law in Europe and more aggressive competition regulators in Brussels. I am skeptical that an objective observer would describe the European record as one of success.”
authorities have been eager to impose new clear-cut *ex ante* prohibitions against dominant digital platforms, and they are placing a ban on self-preferencing at the top of the list.

However, it is questionable that such a prohibition would benefit consumers and achieve the expected pro-competitive goals. Digital intermediaries employ different business models and business models matter when policy makers are evaluating the dual role of platforms. As correctly argued, because the different strategies for monetizing the surplus created by their platforms influence their incentives, any regulatory framework needs to account for these differences, thereby avoiding the assumption that platforms adopting different business models inevitably have the same incentives to engage in self-preferencing.

The target placed on self-preferencing seems to reflect the rhetoric of bigness that embraces the ongoing crusade against vertical integration of platforms due to their dual role. Notably, competitive risks do not appear significantly different from those

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117 See James C. Cooper, Joshua D. Wright, & John M. Yun, Testimony on the State of Competition in the Digital Marketplace before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law 12–13 (George Mason University Law & Economics Research Paper Series No. 20-13, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584629, arguing that a monopolization theory based on self-preferencing is a theory that tends to create liability for competition itself and noting that observing a dominant platform taking actions that disadvantage a rival does not answer the core question in any antitrust inquiry, that is, whether self-preferencing harms consumers rather than just rivals.”

118 See NORDIC COMPETITION AUTHORITIES, DIGITAL PLATFORMS AND THE POTENTIAL CHANGES TO COMPETITION LAW AT THE EUROPEAN LEVEL 17 (2020), arguing that the complexity and variety of business models adopted by digital platforms, together with the high pace of innovation that characterizes this dynamic sector, make the establishment of clear-cut *ex ante* criteria a challenging task. See also Cristina Caffarra, Federico Etro, Oliver Latham, & Fiona Scott Morton, Designing Regulation for Digital Platforms: Why Economists Need to Work on Business Models, VOXEU (June 04, 2020), https://voxeu.org/article/designing-regulation-digital-platforms; and Alexandre de Cornière & Greg Taylor, A Model of Biased Intermediation, 50 RAND J. ECON. 854 (2019), distinguishing among environments exhibiting conflict (i.e. where higher revenues are obtained by extracting more surplus at consumers’ expense) and those exhibiting congruence (i.e. when strategies that increase firms’ per-consumer revenues also increase consumers’ utility); and Andrei Hagiu & Julian Wright, Marketplace or Reseller?, 61 MGMT. SCI. 184 (2015), analyzing different trade-offs faced by intermediaries when choosing whether to function more as a marketplace or more as a reseller.

common in any scenario of vertical integration. Vertical integration, however, whether by merger or by contract, may provide substantial procompetitive effects and tends to increase consumer welfare. Specifically, vertical integration may decrease transaction costs, eliminate double marginalisation, reduce contracting frictions, enable better coordination in terms of product design, and increase organisation of the production process and the way in which the products are sold.

about Senator Warren’s proposal that large internet sellers such as Amazon should be prevented from selling both their own products and those of other sellers on the same platform: “I suspect, her advisors were so fixated on the rhetoric of bigness that they never sat down to figure out who was getting harmed or benefitted by this proposal.” See also Andrei Hagiu, Tat-How Teh, and Julian Wright, Should Platforms be Allowed to Sell on Their Own Marketplaces?, (June 15, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606055, http://andreihagiu.com/wp-content/uploads/2020/05/Hagiu_Teh_Wright_May2020.pdf, showing that an outright ban of the dual mode intermediation tends to benefit third-party sellers at the expense of consumer surplus or welfare.

120 See U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, VERTICAL MERGERS GUIDELINES 4–6, 11–12 (2020), evaluating whether the potential benefits of the elimination of double marginalization offset incentives to lessen competition by foreclosing rivals or raising their costs; European Commission, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, (2008) OJ C 265/6, para. 13; and European Commission, Guidelines for the Assessment of Vertical Restraints, OJ C 130/1, para. 213, about the efficiencies of category management agreements. See also Margaret Slade & Francine Lafontaine, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LITERATURE 629 (2007), providing empirical evidence about the significant efficiencies that can be found in vertical mergers; Thomas W. Hazlett, U.S. Antitrust Policy in the Age of Amazon, Google, Microsoft, Apple, Netflix and Facebook 15–22 (2020) Invited paper for the U.S. House of Representatives, Judiciary Committee, Bipartisan Investigation into Competition in Digital Markets, https://ssrn.com/abstract=3594934, illustrating how emerging digital platforms have benefited from vertical integration; Roger D. Blair, Christine S. Wilson, D. Daniel Sokol, Keith Klovers, and Jeremy A. Sandford, Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies, 27 GEO. MASON L. REV. (forthcoming), noting that the economic literature finds that a vertical merger’s aggregate procompetitive benefits are likely to exceed its anticompetitive effects across a wide range of possible scenarios and that the economic evidence has indicated that vertical integration, whether by merger or otherwise, is typically procompetitive. However, see Dissenting Statement of Commissioner Rohit Chopra, Regarding the Publication of Vertical Merger Guidelines, FTC File No. P810034 (June 30, 2020) https://www.ftc.gov/public-statements/2020/06/dissenting-statement-commissioner-rohit-chopra-regarding-publication) and Dissenting Statement of Commissioner Rebecca Kelly Slaughter, Regarding the Publication of Vertical Merger Guidelines, FTC File No. p810034 (June 30, 2020), https://www.ftc.gov/public-statements/2020/06/dissenting-statement-commissioner-rebecca-kelly-slaughter-re-ftc-doj) questioning the over-emphasis on the benefits of vertical mergers and disapproving the newly released Vertical Merger Guidelines for supporting the belief that vertical mergers are presumptively benign.
B. Data Advantage and the Paradox of Data Sharing

Additional regulatory interventions have also been proposed to tackle BigTechs’ data advantage.

Data is a precious source in digital markets allowing firms to design new goods, new processes, and new business strategies by guessing consumers’ preferences and rivals’ strategies, and testing the resulting conjectures in real time. Hence, the competitiveness of firms increasingly depends on timely access to relevant data. However, market imbalances are reportedly based on access to and use of data.\(^{121}\) Although a lot of data are publicly and commercially available, having accumulated large amounts of data over a long period of time often provides an incumbent a competitive advantage. Because data is accumulated as a by-product of the normal functioning of a platform, dominant online players have access to much more recent data than their rivals, thereby increasing their competitive advantage.\(^ {122}\) Thus, as recently stated by the European Commission, the accumulation of vast amounts of data by BigTech companies, the role of data in creating or reinforcing imbalances in bargaining power, and the methods by which these companies use and share the data across sectors need to be analysed in order to evaluate whether sector-specific ex ante regulatory interventions are required.\(^ {123}\)

Supporters of a new sectoral regulator propose assigning it the task of ensuring data portability and increasing data mobility in general, designing data sharing rules in

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\(^{121}\) European Commission, supra note 100, at 8 and 14. See also Maurice E. Stucke, Here Are All the Reasons It’s a Bad Idea to Let a Few Tech Companies Monopolize Our Data, Harvard Business Review (March 27, 2018) https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data, describing BigTech companies as “data-opolies” and considering them more dangerous than traditional monopolies because they can also affect privacy, autonomy, democracy, and well-being.

\(^{122}\) Crémer, de Montjoye, & Schweitzer, supra note 26, at 24, 29.

\(^{123}\) European Commission, supra note 100, at 8, 14.
order to promote multi-homing, and creating open standards.\textsuperscript{124} Despite the
disagreement about the appointment of a new authority, the “antitrust-based” proposals
also point to an \textit{ad hoc} regulatory regime for large online platforms. Notably, while the
German Commission endorses the idea of a “platform regulation” which supplements
competition law by targeting dominant online platforms and imposing a requirement
that they enable the portability of user and usage data in real time in an interoperable
data format,\textsuperscript{125} the French Competition Authority prefers to define a list of practices that
raise competition concerns specific to “structuring digital platforms,” which consist of
using data in a dominated market to make access to that market, data portability, and
interoperability more difficult, and hindering the use of multi-homing.\textsuperscript{126}

These proposals reflect the idea that the antitrust enforcement toolbox is
inadequate to effectively tackle the need to ensure access to data, since it can be imposed
only pursuant to the essential facilities doctrine if the resource at issue is considered
essential according to the requirements set by the case law.\textsuperscript{127} The proposals aim to
empower consumers with greater control over their data and to encourage switching and
multi-homing by fostering interoperability and data portability. The rise of digital
platforms provides opportunities to better engaging consumers, and as a result
policymakers are increasingly turning to demand-side interventions to enhance
competition.\textsuperscript{128}

\textsuperscript{124} \textsc{Stigler Committee for the Study of Digital Platforms, supra note 9, at 32; UK Competition and
Markets Authority, supra note 9, at 34; UK Digital Competition Expert Panel, supra note 9, at 9. See also
U.S. House of Representatives Report, supra note 1, at 384–88, recommending that Congress consider
data interoperability and portability to encourage competition by lowering entry barriers for competitors
and switching costs by consumers.}

\textsuperscript{125} \textsc{German Commission, supra note 11, at 50–52.}

\textsuperscript{126} \textsc{French Competition Authority, supra note 11, at 7–8.}

\textsuperscript{127} Giuseppe Colangelo & Mariateresa Maggiolino, \textit{Big Data as Misleading Facilities}, 13 \textsc{Euro. Competition
J.} 249 (2017).

\textsuperscript{128} Amelia Fletcher, \textit{Disclosure As a Tool for Enhancing Consumer Engagement and Competition}, \textsc{Behav. Pub.
Pol’y} (forthcoming); Executive Summary, OECD Session: Consumer-Facing Remedies (June 5, 2018),
Data portability has also become a key concern for major market players. In July 2018 four tech giants (Microsoft, Google, Twitter, and Facebook) announced the launch of a joint open-source initiative called the Data Transfer Project. Acknowledging that data portability and interoperability are central to innovation, its objective is to ease user data transfers among the platforms.  

Relying on the same goals and premises of the abovementioned proposals, in recent years European institutions have tackled some important data-related issues by enacting regulatory interventions to grant users a right to personal data portability, to promote the free flow of non-personal data in the commercial arena and the re-use of public sector information, and to empower individuals by introducing contractual rights when digital services are supplied to consumers who provide access to their data. Moreover, sector-specific legislation on data access has been adopted to address identified market failures, such as payment service providers and smart metering information. Finally, the Commission recently announced a Data Act on issues that affect relations between actors in the data-agile economy to provide incentives for horizontal data sharing across sectors.


130 Commission Regulation 2016/679 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, art. 20 2016 O.J. (L 119/1).


136 European Commission, supra note 98, at 13.
A general and broad data portability right is also the subject of the recent Australian Government’s Consumer Data Right. As part of the commitment to giving consumers greater control over their data, all customers (both individuals and businesses): will be entitled to exercise the general portability right in relation to the classes of data covered by the right, will have greater access to their own data in a usable form, and will be able to securely transfer data to trusted third parties.\(^{137}\) The Australian Consumer Data Right will be applied sector-by-sector, following an analysis of the merits of applying the right to different classes of data and data holders. Since data may vary between sectors, an industry data-specification process will enable the relevant industry to determine the types of data that will be covered, as well as mechanisms for transfer and security protocols. In particular, the Consumer Data Right will commence in the banking sector, followed by the energy and telecommunication sectors.

On a similar note, U.S. Senators Mark Warner, Richard Blumenthal, and Josh Hawley have recently cosponsored a bill (“Augmenting Compatibility and Competition by Enabling Service Switching Act”) promoting the portability of data generated on large platforms as well as the interoperability among them.\(^{138}\) Notably, the bill would require a large communications platform provider to maintain a set of transparent, third-party-accessible interfaces (including APIs) when transferring user data to a user or to a competing communications provider acting at the direction of a user, in a structured and readable format.

Alongside the access to account (XS2A) rule introduced by the EU Payment Service Directive (PSD2)\(^{139}\) and the Australian Consumer Data Right\(^{140}\), it is worth mentioning the

\(^{139}\) Supra note 134.
\(^{140}\) Australian Competition & Consumer Commission, Consumer Data Right Rules 2020 (2020)
UK Open Banking remedy, which is the result of the CMA’s market investigation in the British retail banking sector.\textsuperscript{141} Following this market investigation, the CMA enacted a comprehensive remedy package complementary to the PSD2 framework and explicitly designed it to accelerate the implementation of the XS2A. This mandates the nine major British banks to jointly develop a single, open standardized set of application programming interfaces (APIs) freely available for the whole industry.\textsuperscript{142}

All these digital regulatory interventions share a similar pro-competitive rationale—to encourage competition by promoting access to data and facilitating data sharing and portability. These provisions have a clear policy implication. Namely, they are undermining the narrative that tech giants do not deserve their dominant positions, because they have acquired them by leveraging their data against rivals and exploiting consumers’ fragilities. By affirming individuals’ control over their personal data and promoting the sharing of non-personal data in business activities, the European and Australian regulations are expected to avoid the lock-in of data, to re-balance the relationship between digital consumers and digital platforms, and to encourage competition between companies. Thanks to provisions which ensure data portability, data sharing, and access to bank accounts, tech-giants will no longer be able to use the competitive advantages deriving from data to defend and entrench their market positions. As a consequence, if consumers continue to prefer BigTechs, there would be no doubt that they are the most efficient and innovative players in the market.

Nonetheless, several studies are questioning the effectiveness of data portability in fostering market competition. Some commentators warn against the unintended

\textsuperscript{141} UK COMPETITION AND MARKETS AUTHORITY, Retail Banking Markets Investigation, in Final Report 3, 6 (2016).

\textsuperscript{142} See Oscar Borgogno & Giuseppe Colangelo, Data sharing and interoperability: Fostering Innovation and Competition Through APIs, 35 COMPUTER L. & SEC. REV. (2019).
competitive effects of the European General Data Protection Regulation (GDPR), claiming that it has entrenched the market power of incumbents. Similar concerns have been raised about the entry of BigTechs into retail banking as a result of the access to account rule introduced by the revised EU Payment Service Directive (PSD2). By harnessing massive quantities of data generated by their networks and having access to payment account information allowed by the PSD2, large technology companies may disrupt retail banking markets. Therefore, some voices warn against the risk of a regulatory backfire invoking further regulatory measures such as introducing ad hoc provisions to prevent anti-competitive practices by BigTech platforms instead of relying on antitrust law to oversee the digital transition of financial markets boosted by data sharing regulations.

In particular, a self-explanatory bill, “Keep Big Tech Out of Finance Act,” was introduced before the House of Representatives in October 2019. If passed, the bill

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would prohibit large technology companies from either acting as a financial institution or being affiliated with any financial institution. In the European landscape, the Expert Group on Regulatory Obstacles to Financial Innovation recommended that the European Commission introduce *ex ante* rules to prevent large, vertically integrated platforms from discriminating against products and services provided by third parties.\(^{146}\) The fear is that BigTechs could quickly monopolize the market for financial services by combining different types of financial and non-financial services, and giving preferential treatment to their own products and services compared to those provided by incumbents and start-ups.\(^{147}\)

From this perspective, the growing use of technology to provide financial services (FinTech) and the emergence of platform business models in finance (Open Banking) represent a perfect case study to assess opportunities, limits, and risks of regulating emerging technologies and digital players. As I will illustrate in the following section, crafting an *ex ante* asymmetric regulation tailored to the size of online companies could be at odds with the pro-competitive aim of data sharing provisions and illustrate that policymakers may be intervening simply because they dislike certain market outcomes.

1. Open Banking and BigTechs in Finance

The European XS2A rule, the UK Open Banking remedy, and the Australian Consumer Data Right are meant to spur innovation and competition in retail payment and banking industries. The retail banking sector has traditionally been affected by low elasticity of demand, consumer adherence, and lock-in problems allowing banks to enjoy economic rents. Namely, an established customer base (so-called “back-book customers”) gives an unfair competitive advantage to incumbents, and less favourable conditions are offered when compared to front-book customers who are more prone to switching in

\(^{146}\) EXPERT GROUP ON REGULATORY OBSTACLES TO FINANCIAL INNOVATION, *supra* note 78, at 79–80.

\(^{147}\) Crémer, de Montjoye, & Schweitzer, *supra* note 26, at 33.
search of a better deal. Consequently, the more established banking firms have not only been able to retain stable and broad market shares, but they have also been substantially free to engage in bundling and tying practices to the detriment of competition and, ultimately, of consumer welfare.

Technology-enabled solutions might alter the bargaining power between customers and financial providers, thereby transforming how providers will compete and how customers will interact with financial providers.\textsuperscript{148} Indeed, FinTech retains the potential to trigger a process of adding banking into its core activities. FinTech can perform domestic and cross-border payment services (through digital wallets or pre-funded e-money), customer relationship (by providing price comparison, switching services, and robot-advisory services), retail and commercial banking (by offering innovative lending and borrowing platforms), wholesale banking and markets, wholesale payment, clearing, and settlement infrastructure.

However, in order to promote innovation and competition in the banking and financial landscape and pave the way for FinTech, \textit{policymakers need to address a data bottleneck problem}.\textsuperscript{149} Information is a key input to compete in financial services, since the entire sector builds on information and information management. Therefore, the type of information that financial institutions have and the way they use it is pivotal for the potential impact of FinTech. As keepers of customers’ finances, banks play a gateway role that is crucial to the viability of many FinTech business models. While newcomers seek to gain access to this essential information in order to steer customers towards their services, incumbents will be unwilling to share their data booty. In this respect, customers’ account data can be regarded as a barrier to entry for newcomers.

Against this background, the European PSD2, the UK Open Banking remedy, and

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\item Borgogno & Colangelo, \textit{supra} note 142.
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The Australian Consumer Data Right give customers the ability to control their accounts by allowing third party providers to initiate payment orders or to use their transaction data, thus paving the way towards open banking. Open Banking is flourishing around the world, and it represents a natural consequence of consumer data portability.\textsuperscript{150} Within an Open Banking environment, customers can easily perform banking activities with different providers, relying on a single online app to collect all the data necessary to manage their finances. This brings together payment accounts and other products like mortgages, pensions, and investments.

Although these regulatory interventions may create new opportunities for FinTech, data portability and interoperability may also favor the entry of BigTechs. In fact, the competitive impact of BigTech companies may be greater than that of FinTech. The latter face competitive disadvantages vis-à-vis incumbent banks in terms of compliance costs, limited access to soft information about potential customers, brand recognition, lack of reputation, and a relatively high cost of capital. As a result, the relationship between banks and FinTech is likely to be cooperative and complementary.

\textsuperscript{150} See, e.g., \textit{Ley de Instituciones de Tecnología Financiera} (FinTech Institutions Law), Diario Oficial De La Federación El Diez de Marzo, the new Mexican law regulating FinTech Institutions that came into force on 10 March 2018 and requires financial entities and FinTech institutions to establish APIs to allow, with the prior consent of users, connectivity and access to interfaces developed or managed by other financial entities and FinTech players. In the same vein, the Canadian Competition Bureau has invited policymakers to take significant steps to welcome FinTech by enacting broader open access regimes to financial data through APIs. See Conference Transcript, \textit{Technology-Led Innovation and Emerging Services}, (Nov. 20, 2017) https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04315.html. As a result, the Canadian Minister of Finance appointed an Advisory Committee to guide the Government’s review into the merits of open banking. See Press Release, \textit{Consumer-Directed Finance: the Future of Financial Services}, (2019) https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking/report.html. Moreover, in 2017 Japan amended its Banking Act to promote open innovation, enabling FinTechs to access financial institution systems via API connection. In the same vein, the Hong Kong Monetary Authority launched the Open API Framework in 2018, providing specific guidance to enable collaboration between banks and third-party service providers, and the Monetary Authority of Singapore published an API Playbook and set up an API register to encourage banks to open up their systems. Finally, also Brazil is following suit with an Open Banking regulation that should be effective by the end of 2020.
in nature.\textsuperscript{151} Similarly, banks show a willingness to interact with FinTech as service providers, avoiding expensive integration efforts.\textsuperscript{152}

Unlike FinTech, BigTech firms already enjoy reputation, established networks, large installed customer bases, considerable earnings, powerful brands, and unfettered access to capital markets. Furthermore, they can leverage proprietary data silos derived from their non-financial-service operations to provide consumers with tailored offers, and they have the analytical skills and the most advanced technologies with which to process transaction and consumer data so as to get the most out of their resources. Because of these factors, BigTech firms could scale-up in financial markets very quickly, thereby posing a significant competitive, and potentially disruptive, threat to traditional banking.

The entry of large digital platforms into the financial sector magnifies both the benefits provided and the concerns raised by FinTech companies. Focusing just on antitrust implications, on the one hand, drawing on their leadership in big data analytics as well as on digital services and infrastructure, BigTechs may further increase competitive pressure on the incumbent side. In turn, this will likely stimulate responses from the incumbent side, ultimately improving consumer welfare and financial inclusion. On the other hand, the disruption evidenced by other industries because of BigTechs


entry might raise antitrust concerns. Digital platforms can make full use of data access mechanisms in order to strengthen their business potential even further by leveraging their data advantage in downstream or conglomerate markets, thereby attaining significant portfolio effects.\footnote{Bank for International Settlements, Big Tech in Finance: Opportunities and Risks, in BIS Annual Economic Report 67–68 (2019).} Therefore, nothing prevents them from engaging in self-preferencing, bundling new products with traditional services, or discriminating traditional incumbents when accessing to their platforms.

For these reasons, proposals have been specifically targeted to the role of BigTechs in finance. Banks run the risk of being enveloped by BigTech platforms, which may harness the network effects that previously protected the incumbent by assembling much of the information the customer’s bank or asset manager possesses, and supplementing it with their detailed knowledge of many other aspects of the customer’s choices and preferences.\footnote{See Thomas Eisenmann, Geoffrey Parker, & Marshall Van Alstyne, Platform Envelopment, 32 Strategic Mgmt J. 1270 (2011), describing the platform envelopment strategy by referring to the entry of a platform with market power in an origin market into another platform’s market (the target market): according to this strategy, by combining its own functionality with that of the target in a multi-platform bundle that leverages shared user relationships, the enveloper captures market share by foreclosing an incumbent’s access to users and harnesses the network effects that previously had protected the incumbent.}

In particular, a bill has been introduced before the U.S. House of Representatives which would prohibit technology companies that have an annual global revenue of over twenty-five billion dollars from either acting as a financial institution or being affiliated with a financial institution.\footnote{H.R. 4813, 116th Cong. §1 (2019).} The bill would ban BigTechs from establishing, maintaining, or operating a digital asset that is intended to be widely used as medium of exchange, unit of account, store of value, or any other similar function, thus effectively banning virtual currencies.

Furthermore, the European Expert Group on Regulatory Obstacles to Financial
Innovation has recommended the introduction of *ex ante* rules to prevent large, vertically integrated platforms from discriminating against products and services offered by third parties.\textsuperscript{156} Notably, the Expert Group list three main scenarios: a) large technology companies with access to significant social media, search history, and other data, leveraging their preferential data access to enter the market for financial services and benefiting from access to payment account information; b) providers of smartphone operating systems not providing access to the relevant devices’ interface for competing payment applications; and c) providers giving access to devices or software under conditions that can create inefficiencies, such as prohibiting the use of other consumer interfaces or demoting rivals’ financial products and services in search engine results.

Finally, incumbents and commentators have proposed to complement the data sharing rule with a reciprocity obligation between BigTechs and banks:\textsuperscript{157} if the beneficiary is a large digital company, the access to account rule should be integrated with a corresponding right for banks to access BigTech data that may be used to enhance digital payment services.

With data portability provisions in place to address concerns about the data power of incumbent banks over FinTechs, attention has shifted toward BigTechs’ data power over incumbent banks. The regulatory pendulum swings back and forth as more asymmetric regulation is introduced.

However, it is worth remembering that, in the banking sector, gatekeepers are represented by financial institutions, rather than BigTechs. Therefore, by adopting *ex ante*
prohibitions against digital players, policymakers run the risk of missing the forest for the trees.

Because regulation significantly affects innovation, competition, and consumer welfare, policymakers ought to be aware of the trade-offs embedded in different approaches. Specifically, policymakers should carefully consider whether it is premature to implement new regulations to protect big banks from BigTechs. As matters stand, it is not yet possible to predict if and how BigTechs are going to approach or disrupt retail banking markets. At present, we are still witnessing individual and cautious attempts by technology companies to provide specific services to their platform users. At the same time, it is becoming evident that FinTech start-ups are set to cooperate, rather than compete, with incumbent banking players. Whether this complementarity ends up in cooperation or full-fledged integration between large incumbent banks and FinTech start-ups, we are still halfway to achieving the pro-competitive goal underlying data access regulatory regimes. In fact, regulatory interventions such as the PSD2, the Open Banking remedy, and the Consumer Data Right, were designed to serve the purpose of creating a more competitive retail banking environment to deliver lower prices and better quality to consumers.

If new asymmetric regulations were introduced as a containment measure specifically aimed at shielding traditional banks from BigTechs’ competitive pressure, a twofold problem would arise. First, innovations and efficiencies that potentially could have emerged from platforms would be jeopardized, thereby preventing the creation of new products and services beneficial to consumers. Such a form of regulation would asymmetrically target specific entities, thereby subjecting them to a non-neutral regulatory burden based on a bigness biased assumption that they would behave unfairly.

\footnote{Oscar Borgogno & Giuseppe Colangelo, \textit{The Data Sharing Paradox: BigTechs in Finance}, EURO. COMPETITION J. (forthcoming 2020).}
once engaged in retail financial markets. Second, large incumbent banks would be in a privileged position because they would be protected from BigTechs’ potential competition but still free to harness FinTech-enabled solutions to drive out of the market small local banks unable to bear the cost of the Open Banking transition. Further, FinTech firms and established financial institutions may join forces to counter the entry of BigTechs.\(^{159}\) Hence, somewhat paradoxically, early regulatory measures specifically imposed on BigTechs could end up frustrating the pro-competitive aim of data portability regimes previously introduced. Finally, it should be borne in mind that the ordinary legal framework would still apply. Hence, antitrust enforcement would still be required to oversee and fight any anti-competitive conduct as it may arise.

C. Winners, Losers, and the Competition Policy

The debate around the unintended consequences of data sharing provisions, such as those introduced by the GDPR and the several Open Banking initiatives, highlights two main risks associated with the regulation of digital markets.

First, it shows the inherent limitations of regulation, which are heightened when dealing with emerging technologies. Predicting how these technologies will evolve is an unmanageable task even for the most illuminated policymaker. Thus, the final outcome may be remarkably different from the starting goal, especially where the technicalities are not adequately addressed. In this regard, the recent European experience is insightful. As already mentioned, during the last years the European Commission has decided to strengthen competition in data-driven markets with a broad array of different and heterogeneous regulatory initiatives which mandate or encourage data sharing. APIs surfaced as a technical tool capable of ensuring a smooth flow of data between undertakings. By allowing a firm to easily access the data gathered by another company,

\(^{159}\) Enriques & Ringe, \textit{supra} note 151, at 3.
APIs are set to boost interoperability among different players and facilitate the exchange of data streams or datasets between data holders. However, a clear view as to who should define APIs and how they should define them (i.e. how to standardize their creation) is still lacking.\textsuperscript{160} This is an extremely sensitive issue as the success of any data sharing regulation is mainly dependent on the way the industry will implement its technicalities.

Open Banking represents, instead, the leading application of interoperability requirements in a market.\textsuperscript{161} In order to facilitate data sharing interactions between banks and third-party service providers, this pro-competitive remedy mandates the creation of open standardised APIs which ensures that data are shared in an interoperable form. Thus, this promotes a new, platform-based business ecosystem characterised by the widespread use of data-enabled services to deliver innovative and competitive services to consumers. The economic rationale of Open Banking is to empower customers over their own transaction data so that they can benefit from a strengthened bargaining position against the banks. By departing from paternalistic and defensive consumer protection approaches which have proven to be somewhat ineffective, the Open Banking project gives the centre stage to consumers and puts them in charge of their digital data portfolio. Therefore, Open Banking should serve as a blueprint for data portability and interoperability legislation.

\textsuperscript{160} Borgogno & Colangelo, supra note 142.

However, the concerns about the possibility that BigTech companies may prevail hide the second major risk associated with top-down solutions. That is, the regulation of digital markets seems to revolve around outcomes rather than on principles.

Moreover, concerns arise with regard to definitions and thresholds for antitrust intervention. Indeed, the very definition of gatekeepers is vague. For instance, according to the EU Commission’s proposal for an *ex ante* regulatory framework, this subset of online platforms would be identified on the basis of criteria, such as significant network effects, the size of the user base, and the ability to leverage data across markets, whose relevance has yet to be decided.

Additional doubts emerge about the definition of “tipping” markets. Indeed, the new competition tool envisaged by the European Commission would justify an intervention not only in case of a structural market failure, but also in a scenario of structural risks for competition. According to the Commission, the latter case applies to tipping markets which require an early intervention to prevent the emergence of risks for competition that can arise through the creation of powerful market players with an entrenched market and/or gatekeeper position. These markets are apparently defined by just referring to certain characteristics (e.g. network and scale effects, lack of multi-homing, and lock-in effects) and the presence of companies with a gatekeeping position.

As recently noted by the UK CMA, whose investigating powers have inspired the European Commission, “identifying when a market might tip is very difficult. There are real risks and difficulties of intervening pre-emptively without significant investigation and strong information gathering powers to determine in which markets and what type of intervention may be warranted and effective. . . . even if one could accurately identify

\[162\] See Nordic Competition Authorities, *supra* note 118, at 17, stressing that such a regulatory intervention should rely on a clear and objective set of criteria. It needs to be clear which companies are considered digital gatekeepers, and companies must be able to foresee which type of regulation they will be subject to.

\[163\] European Commission, *supra* note 96.
when tipping may occur and could identify and act swiftly enough to implement a suitable remedy, there remain questions as to the benefits of intervening. Intervening where unwarranted would have significant negative consequences in the market in which intervention occurs but could also deter procompetitive innovation across all markets.\textsuperscript{164}

In sum, in preserving the intensity of competition among platforms, a sector-specific regulation could be a valuable complement to antitrust enforcement where data represent a real bottleneck that does not allow a level playing field, such as in the banking and financial industry. However, the regulatory proposals for digital markets by asymmetrically targeting specific entities (i.e. banning BigTechs from operating in financial markets or \textit{ex ante} preventing them from adopting certain practices) suggests that regulatory interventions in digital markets may be underpinned on a bigness bias. That is, the idea that competition is good only when it comes from some players, even when new big digital players are challenging actual (although non-digital) gatekeepers and making contestable markets that have been traditionally affected by low elasticity of demand and lock-in problems that allow incumbents to enjoy significant economic rents. Hence, digital policies are required to ensure an outcome, rather than safeguarding the process.

For these reasons, it is appropriate to embrace regulatory humility, acknowledging the limits of regulation and refraining from picking winners and losers in the marketplace and from preemptively intervening in absence of solid evidences of market failure and consumer harm.\textsuperscript{165}


\textsuperscript{165} Maureen K. Ohlhausen, Former FTC Comm’r, Remarks before American Enterprise Institute: Regulatory Humility in Practice (April 1, 2015). \textit{See also} Ajit Pai, Chairman, Fed. Commc’n Comm’n, Remarks Before
IV. CONCLUDING REMARKS: THE LAST DANCE OF ANTITRUST?

This is not the first time antitrust law and policy has faced a stress test to evaluate whether it is able to keep up with changing and challenging times. Technology and innovation fuel a longstanding and ongoing process of assessment and re-evaluation of rules, tools, and doctrines. A couple of decades ago, similar concerns were expressed that antitrust law was not well-equipped to address the new economy. The toolkit developed to deal with competition in the brick-and-mortar age was deemed ill-suited to face the dynamism of the new economy. However, as noted by Richard Posner, “antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy.”

By the same token, more recently Daniel Sokol has reminded us that “[i]n a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics.”

The state of competition in the digital marketplace is now questioned because of the emergence of large tech companies, commonly labeled as titans, giants, and gatekeepers. The success of these companies has attracted every kind of spotlight, enough to become a literary genre.

The current debate about the alleged crisis of antitrust in the digital economy is driven by two main arguments. First, digital markets move too fast to be supervised ex

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168 See Dirk Auer & Nicolas Petit, Two Systems of Belief about Monopoly: The Press vs. Antitrust, 39 Cato J. 99 (2019), noting that much of the press coverage describes these large corporate organizations in derogatory terms and makes extensive use of the word “monopoly” in a pejorative way conveying the vision of monopoly as malum in se.
169 As noted by NICOLAS PETIT, BIG TECH AND THE DIGITAL ECONOMY: THE OLIGOPOLY SCENARIO 92 (2020) (“[b]ooks on the tech giants have become a genre of their own. There is one for every taste, and in every airport.”).
post, hence antitrust enforcers would often intervene after the tipping point. Second, the emergence of platform-based companies enjoying a brand-new type of market power implies greater responsibilities and justifies specific responses. By acting as gatekeepers and private regulators, large digital platforms perform a systemic role in markets, increasing the risk of tipping and an uneven playing field within their digital ecosystems.\textsuperscript{170} These concerns are heightened by their dual role and the associated conflict between playing both the role of traditional retailers and third-party sales platforms simultaneously. For these reasons, it is argued that BigTechs deserve to be treated like common carriers and subjected to a neutrality regime aimed at ensuring fairness and contestability on the platform and on neighbouring markets.

The need for timely intervention in fast-moving markets by introducing a blend of corrective tools such as \textit{ex ante} prohibitions, market investigations, break-ups and bans on vertical integration, legal presumptions, and shifts of the burden of proof supports a regulatory approach aimed at making antitrust assessment faster and simpler. As maintained by prominent antitrust scholars, “antitrust laws, as interpreted and enforced today, are inadequate to confront and deter growing market power . . . current antitrust doctrines are too limited to protect competition adequately, making it needlessly difficult to stop anticompetitive conduct in digital markets.”\textsuperscript{171} As further argued by the American Antitrust Institute, “[s]uch solutions should be unnecessary if antitrust law were better enforced.”\textsuperscript{172}

By advocating an overhaul of the antitrust toolkit with the introduction of \textit{ex ante} prohibitions against gatekeeping platforms, the reform proposals blur the line between

\textsuperscript{170} Tech platforms also serve as private courthouses for disputes about speech, lodging, commerce, elections, and reputation in the information age. See Rory Van Loo, \textit{Federal Rules of Platform Procedure}, Univ. Chi. L. Rev. (forthcoming 2020), analyzing the processes that tech platforms use to resolve disputes.

\textsuperscript{171} \textsc{Washington Center for Equitable Growth}, \textit{supra} note 1, at 1.

\textsuperscript{172} \textsc{American Antitrust Institute}, \textit{supra} note 1, at 3.
regulation and antitrust and mix their respective features and goals. For this reason, it seems appropriate to label it as the “more regulatory” approach to antitrust law in order to describe a shift of antitrust enforcement from the law enforcement model toward the regulatory model, as Douglas Melamed anticipated some years ago.\textsuperscript{173}

Indeed, the solutions offered do not reflect the traditional paradigm of economic regulation, because they are aimed at curing an enforcement failure rather than a market failure. Further, they are cross-sectoral, general in scope, and applicable to any business performed via a digital platform. Since the data-driven economy is pushing a platformization process in many industries, we can argue that, in the near future, this special set of regulatory provisions will represent the ordinary state of the economy. At the same time, the interventions proposed do not reflect the standard antitrust analysis, either. They call for an assessment that is neither flexible nor technology-neutral or facts-based. Moreover, the \textit{ex ante} regime for platforms revolves around outcomes rather than principles, hence competition enforcers would be required to intervene in order to ensure a particular market result, rather than safeguarding the competitive process.

Herbert Hovenkamp has recently noted that the history of digital platform monopolies is not distinctive from that of other industries\textsuperscript{174}: “[T]here does not seem to be any evidence that durability of a dominant position is a more prominent feature of digital platform markets than for markets generally. Even among digital markets, entry and exit continuously occur, shares change, and dominance comes and goes.” Further, there is little empirical support for the proposition that digital platforms as a group are winner-take-all markets, rather the landscape for digital markets resembles the landscape for markets in general:\textsuperscript{175} “Some of them are more conducive to single firm dominance


\textsuperscript{175} \textit{Id.} at 15.
than others, and few are true natural monopolies. Some resemble markets with a dominant firm plus a competitive fringe. Others enjoy competition among more evenly sized rivals.”

In sum, the real focus of the ongoing debate is not whether, in the digital economy, ex ante regulation may be favoured to antitrust enforcement; rather, it is whether well-established economic standards of antitrust analysis should leave room for a tailored set of ex ante provisions which, under closer scrutiny, reveal the attempt to move from an effects-based approach to a system centred on legal presumptions and legal testing. Identifying ex ante the types of conduct that are anticompetitive and reversing the burden of proof would save time and alleviate risks of underenforcement. Rather than reflecting the distinctive structural features of digital markets, the invoked regulatory approach seems to be merely an enforcement short-cut and is an attempt to address alleged anti-competitive practices by online platforms while avoiding the hurdles and burdens of the standard antitrust analysis.176 Thus, against this background, the circumstance that some reports proposed the establishment of a digital authority appears of little significance.

However, the features of platform economics contribute crucially to the analysis of the effects of conduct. As acknowledged in the special advisers’ report for the European Commission, the efficiencies of certain practices in the platform economy are “not yet well understood and our knowledge and understanding still needs to evolve

Because of network externalities, the circumstances in which the conduct within a multisided platform can determine a restriction of the market are exactly the same as those which can generate procompetitive effects. Hence, intervening by picking and choosing conduct that harms competition irrespective of their effect would not be appropriate and could irreversibly compromise the platform’s very existence. In order to consider a practice, by its very nature, harmful to competition, without an analysis of its effects, there must be “sufficiently reliable and robust experience.”

Similarly, by attaching a special responsibility to digital platforms due to their rule-setting role, the reform proposals are challenging their business models and their multi-sided nature, or in other words, their status. Quite simply, their fault is essentially that they are successful, and thus subject to scrutiny regardless of whether they have achieved their leading positions through competing on the merits.

Despite the lack of a universally-adopted definition of two/multi-sided markets, their roots are mainly grounded in the theory of network externalities and in the Coasian analysis of private bargaining as a means of addressing transaction cost problems. A two/multi-sided market is generically characterized by the following distinctive traits:

177 Crémer, de Montjoye, & Schweitzer, supra note 26, at 70.
179 See Geoffrey A. Manne, Against the Vertical Discrimination Presumption, 2 CONCURRENCES 1 (2020), underlining the relevance of optimizing openness in order to preserve the effective operation of the platform and its own incentives for innovation, since, while constraints on complementors’ access and use may look restrictive compared to an imaginary world without any restrictions, in such a world the platform would not be built in the first place.
180 CJEU, 2 April 2020, Case C-228/18, Gazdasági Versenyhivatal v. Budapest Bank Nyrt, para. 76.
181 From this perspective, as argued by Picker, supra note 107, at 2, 35, whether the question is about how to support the role that newspapers and media play in democracies or how to establish fair competition on the platform, it would be better to look outside of antitrust for solutions because these questions belong to regulation: “How these companies have behaved once they achieved their leading positions is something very much within traditional antitrust analysis, but their success in achieving those positions initially is something that the United States should celebrate and is outside traditional antitrust analysis. This is market success, not fault. And, based on the enforcement record so far, I am doubtful that a more encompassing European Union-style competition law would be effective either.”
the presence of indirect network externalities that cannot be internalized through a bilateral exchange (usage and membership externalities); the necessity for an intermediary to intervene to resolve a transaction cost issue, thereby generating value for at least one of the interested sides; the interdependence needed between the groups that interact through the platform to bring “both sides on board” as the platform has to gather a sufficient number of economic agents on every side of the market in order to reach a critical mass to foster indirect network effects; the non-neutrality of price structuring by the platform which, in order to bring both sides on board, needs to impose asymmetrical prices on the different groups operating on the platform (skewed pricing), so that these prices, although not reflecting the effective cost of the service offered to a given group of users, can incorporate demand elasticity.182

In addition to being useful in understanding a possible theory of harm, these characteristics of two/multi-sided markets have an impact on the antitrust evaluation of conduct and price strategies.183 If the agents on each side are interdependent and their welfare depends on the combination of the effects on the different sides of the platform, businesses compete to attract two demands so that the coordinating role played by platforms is required by the essential feature of the competition in digital markets. By setting rules, platforms attempt to bring and keep both sides on board because they address externalities among users and balance different interests.184 Thus, by developing

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182 For more on platforms and two-sided markets, see John M. Yun, Overview of Network Effects & Platforms, in THE GAI REPORT ON THE DIGITAL ECONOMY (2020).


184 See, e.g., David S. Evans, Governing Bad Behaviour by Users of Multi-Sided Platforms, 27 BERKELEY TECH. L. J. 1201 (2012). See also Kevin Boudreau & Andrei Hagiu, Platform Rules: Multi-Sided Platforms as Regulators, in PLATFORMS, MARKETS AND INNOVATION (Annabelle Gawer, ed., 2009) (providing a conceptual framework for interpreting various non-price instruments used by them in order to solve what would otherwise be
governance mechanisms, platforms protect the value of the ecosystem. Since competition in the digital economy is essentially a competition between ecosystems,\textsuperscript{185} setting rules within their ecosystem platforms would not be equivalent to private regulation; they would merely compete in the way they are expected to.\textsuperscript{186}

Moreover, digital platforms employ different business models and this choice inevitably affects their incentives, determining how they react to the evolution of the ecosystem and how strategies for interacting with third party complementors affect consumers.\textsuperscript{187} Hence, business models matter even more when policy makers are evaluating the dual role of platforms and it is problematic to design a single regulatory framework which encompasses heterogeneous players on the only premise that they exert gatekeeper power. Finally, the very definition of gatekeepers is vague.

This does not mean that platforms have a license to engage in any conduct simply because it is in line with their business model. But, it is necessary to foresee the degree to which a regulatory intervention can affect competition by considering the specificity of the business models involved.

The emergence of platform business models does not require a shift in the current equilibrium between antitrust and regulation.\textsuperscript{188} Competition law is fit to preserve the

\textsuperscript{185} See Crémer, de Montjoye, & Schweitzer, supra note 26, at 33–34; Petit, supra note 169, referring to BigTechs as “moligopolies,” meaning conglomerates which play a dynamic oligopoly game competing across industries, rather than competing within itemized relevant markets where they are monopolists.


\textsuperscript{187} Caffarra, Etro, Latham, & Scott Morton, supra note 118.

\textsuperscript{188} See Hovenkamp, supra note 174, at 8, arguing that, beyond platform mergers, there are several things that courts could do better without new legislation or significant change in judicial enforcement. See also Hazlett, supra note 120, at 33, noting that business model competition shapes markets en route to the discovery of varied and surprising forms of competitive superiority, hence where anti-competitive outcomes result, it will be the exception rather than the rule.
contestability of markets. Because the incumbency advantage in digital markets significantly depends on whether customers multi-home, competition policy should be focused on reducing barriers to entry, lowering switching costs, and encouraging interoperability and consumer engagement189 rather than targeting corporate bigness regardless of whether they affect the competitive process.190

At the same time, in preserving the intensity of competition among platforms, regulation may undoubtedly play a relevant role that is limited to structural problems. Notably, in specific markets such as the banking and financial industry where data represent a real bottleneck that does not allow a level playing field, data portability provisions envisaged in the European PSD2, the UK Open Banking remedy, and the Australian Consumer Data Right unlock competition and innovation by ensuring adequate levels of interoperability so that consumers are able to share their data with different providers in a secure and standardized format. In cases like this, a sector-specific regulation is a valuable complement to antitrust enforcement.

As pointed out by Dennis Carlton and Randy Picker, “in the century-long seesaw battle over how to design competition policy, [antitrust law] has turned out to be more enduring than regulation. . . . The history shows that at least for the United States, the increased use of the Sherman Act instead of regulation to control competition, and when necessary, the complementary use of the two, has brought benefits to consumers.”191

189 Pinar Akman, An Agenda for Competition Law and Policy in the Digital Economy, 10 JEURO. COMPETITION L. & PRACTICE 589, 590 (2019). See also Tirole, supra note 6, stressing the competitive benefits of multihoming.
Competition is the best regulator, even in the platform economy. Looking forward to the challenges ahead.