INSIGHT

Adapting Competition Law to the Digital Transition. Two Challenges

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Abstract: The European responses to the COVID-19 outbreak have triggered an ongoing review process of competition rules and enforcement procedure to support the Union's priorities. In this context, the European Commission published the Communication 'A Competition Policy Fit for New Challenges' with the aim of underlining the ability of competition law to facilitate the green and digital transitions, and to strengthen the resilience of the Single Market. This *Insight* reflects on the substantive and procedural challenges posed by the digital transition. Indeed, the complementary role of competition law to stimulate the achievement of the digital targets is characterised by two tensions, relating respectively to the interpretation and application of competition rules and to the degree of centralisation with regard to the enforcement mechanisms. In the author's view, EU competition law will offer dynamic substantive and procedural responses to the challenges of the digital transition.

Keywords: competition policy – digital transition – competition law – substantive challenges – procedural challenges – data.

I. A competition policy fit for the digital transition? The Commission's view

The European responses to the COVID-19 pandemic[1] have not only caused a reshaping of the policies of the European Union and its Member States; they have also created

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[1] As is well known, the European Union (EU) has reacted to the economic and social impact of the COVID-19 outbreak by adopting a vast array of measures, including the Next Generation EU Recovery Plan (NGEU), the 2021-2027 Multiannual Financial Framework (MFF) and the State aid Temporary Framework. An exhaustive analysis of the measures is given by F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic' (2022) JComMarSt 186; B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 635; J Echebarria Fernández, 'A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic' European Papers (European Forum Insight of 16 January 2021) europeanpapers.eu 1399.

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momentum for renewed competition policy tools and enforcement procedures to complement EU initiatives.[2] In this context, the European Commission published the Communication "A Competition Policy Fit for New Challenges" with the aim of underlining the ability of competition law to adapt to key developments and support Union priorities.[3]

Competition policy aims at keeping markets open and competitive, and ensuring a level playing field. Beyond that, the Commission, through the ongoing review of all competition instruments and their enforcement, aims to enable EU industries to lead the green and digital transitions, and strengthen the resilience of the Single Market, "while allowing consumers a fair share of the resulting benefits".[4]

This *Insight* will focus on the digital transition and specifically the need for cooperation and large-scale investments to support data sharing, data pool initiatives and the relevant infrastructure projects. Under the flagship programme of the Next Generation EU Recovery Plan (NGEU), namely the Recovery and Resilience Facility (RRF), at least 20 per cent of the funds allocated to Member States must benefit measures that contribute to the digital transition.[5] Data from the Digital Economy and Society Index (DESI) 2022 show that Member States are so far meeting this target.[6] Nevertheless, only a small fraction of enterprises use advanced digital technologies (i.e., big data, artificial intelligence and cloud computing). Importantly, even in several of the best performing countries, big data is only used by a small number of companies, as opposed to the 75 per cent target set out in art. 4 of the Commission Proposal for a Path to the Digital Decade.[7]

In the ongoing review process of competition law to achieve the digital targets, the Commission's view consists of an extended relaxation of competition rules and increased centralised coordination of enforcement procedures. More precisely, the Commission proposes a set of regulatory measures which will be complemented by more flexible competition rules and enforcement mechanisms. On the antitrust and merger control sides, the Communication underlines the necessity to facilitate pro-competitive

[2] To make a comparison with the process of reorganisation and growth of the EU administrative machinery within the single financial market and EMU triggered by the European responses to the financial and public debt crisis, see P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press 2021) 363-372; E Chiti, 'In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum' (2015) CYELS 311.

[3] Communication COM(2021) 713 final from the Commission on a competition policy fit for new challenges, 19.

[4] *Ibid.* 6-7. It is noteworthy that the Commission explicitly uses the same wording as art. 101(3) TFEU.

[5] Communication COM(2021) 118 final from the Commission on a 2030 Digital Compass: the European way for the Digital Decade, 2. The objectives and digital targets which the EU is expected to achieve by the end of 2030 are set out in arts 2 and 4 of Proposal COM(2021) 574 final from the Commission for a Decision of the European Parliament and of the Council establishing the 2030 Policy Programme "Path to the Digital Decade".

[6] Commission, *Digital Economy and Society Index (DESI) 2022* digital-strategy.ec.europa.eu.

[7] *Ibid.* Moreover, 90 per cent of the EU's data are processed by US-based companies and less than four per cent of the most popular online platforms, which collect a substantial amount of data, are European. See Communication COM(2021) 118 final cit., 3.

agreements and acquisitions, under which any potential harm to competition is outweighed by counterbalancing digital benefits. On the State aid front, the Commission indicates recent and ongoing revisions of State Aid Guidelines and General Block Exemption Regulations (GBERs), all of which channel public and private investments towards digital infrastructure. All of these substantive initiatives will be accompanied by an active role of the Commission, which stands ready to provide guidance to stakeholders and national authorities.

The following sections argue that the ongoing review of competition law provides an opportunity to complement *ex ante* regulations and facilitate the achievements of the digital targets, especially in the form of cooperation agreements and Multi-Country Projects.[8] However, as will be stressed, the complementary role of competition law is characterised by two substantive and procedural tensions which require balanced solutions. The two tensions relate to the interpretation and application of competition rules, discussed in section II of this *Insight*, and to the degree of centralisation which is sought regarding the new mechanisms for public enforcement, discussed in section III. In the author's view, EU competition law will offer dynamic substantive and procedural responses to the challenges of the digital transition. Section IV will present some final considerations.

II. The complementary role of competition law: a dynamic balance between rules and exceptions

In the Annex to the Communication "A competition policy fit for new challenges", the Commission grouped the regulatory and competition initiatives to foster the digital transition into three main groups: new horizontal tools, the review of antitrust and merger rules, and the amendments to state aid frameworks.[9] The approach proposed by the Commission implies a substantive dynamic balance of rules and exceptions in order to interpret and apply competition rules in a way that drives the digital transition.

As for the new horizontal tools, they will be complemented by competition enforcement in achieving the digital targets and keeping markets well-functioning.[10] Some of the main regulatory initiatives, which are based on art. 114 TFEU, are the Digital Markets Act (DMA),[11] the Data Governance Act (DGA)[12] and the latest Data Act.[13] These regulatory

[8] See recital 3, recital 30, art. 3(2) and art. 12 of Communication COM(2021) 118 final cit.

[9] Annex to the Communication COM(2021) 713 final/2 cit.

[10] *Ibid.* 1.

[11] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[12] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

[13] Proposal COM(2022) 68 final from the Commission for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act).

actions promote data sharing and data pool initiatives by *ex ante* rules, recognising data as an essential resource in securing the digital transition.[14] Currently, data and the corresponding value are concentrated in the hands of a few large companies, necessitating actions to make data more easily accessible.[15]

It is correctly recognised by the aforementioned regulatory tools that in the business-to-business context (B2B), the central obstacles to data sharing are the lack of technical standards,[16] refusals to grant access not linked to competition concerns[17] and abuses of contractual imbalance.[18] In business-to-government data sharing (B2G), on the other hand, the main challenges are legal uncertainty and barriers, commercial disincentives and a lack of adequate infrastructure.[19] Therefore, the regulatory measures provide harmonised rules to establish an *ex ante* framework for making data available to private users and to public sector bodies.[20] However, they are without prejudice to the application of competition law,[21] which has been selected as the complementary tool to favour the digital targets owing to its flexible rules and case-by-case approach.[22]

[14] *Ibid.* 1; recital 2 Regulation 2022/868 cit.; recital 3 Regulation 2022/1925 cit.

[15] With the aim of tackling digital 'gatekeepers' power. See arts 3, 5, 6 and 14 Regulation 2022/1925 cit., as well as recital 36, art. 5(2) and art. 6(2) of the Proposal COM(2022) 68 final cit.

[16] For an accurate reflection on the need to adopt open and standardised Application Programming Interfaces (APIs) by private and public undertakings, see O Borgogno and G Colangelo, 'Data Sharing and Interoperability: Fostering Innovation and Competition through APIs' (2019) Computer Law & Security Review 105314. To facilitate the interoperability of data processing services, see e.g. recitals 59 and 60 Regulation 2022/1925 cit. and chapter VIII of the Proposal COM(2022) 68 final cit.

[17] See recital 27 Regulation 2022/868 cit., which assigns to data intermediation service providers a facilitating role in the establishment of relations between data holders and data users in a transaction of data assets. In addition, recital 45 Regulation 2022/868 cit. describes support to scientific research for technological development as a purpose of general interest which could contribute to the emergence of data pools on the basis of data altruism.

[18] Some national legal systems consider abuses of contractual imbalance concerning data sharing unfair practices whereas others acknowledge their anti-competitive essence. As a result of this legal uncertainty, different sanctions and problems of administrative power arise. See K Wiedemann, 'A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings Bundeskartellamt v. Facebook (Case KVR 69/19)' (2020) International Review of Intellectual Property and Competition Law 1168; E Fazio, 'Il problema delle competenze settoriali e l'adozione di un approccio olistico alla data-driven economy' (2020) Il diritto dell'economia 653.

[19] Proposal COM(2022) 68 final cit., 11.

[20] See e.g. art. 1 Proposal COM(2022) 68 final cit. Art. 15(b) of the Data Act will provide an opportunity to make data available to public sector bodies to assist the recovery from a public emergency.

[21] See e.g. recitals 9-11 Regulation 2022/1925 cit.; recitals 13, 15, 25, 37 and 60 Regulation 2022/868 cit.; recital 88 Proposal COM(2022) 68 final cit.

[22] The boundaries between competition law and regulation have long been debated. A shared conclusion in Europe is that competition rules have a complementary role to *ex ante* regulations. For the evolution of the complementary role of competition law, see J Drexl, F Di Porto, *Competition Law as Regulation* (Edward Elgar 2015) 153-162. Even though the complementary role of competition law is acknowledged in the regulatory initiatives, the relationship between the DMA and competition law rules is highly debated owing to overlapping objectives and legal interests. See e.g. P Akman, 'Regulating Competition in Digital Platform

To achieve their complementary objectives, competition rules have so far been applied to horizontal and sector-specific regulations simultaneously.[23] However, to benefit the digital transition, competition rules must be set aside where certain conditions and justifications for exemption are fulfilled. Indeed, the ongoing initiatives to revise antitrust and merger rules, and amend the State aid frameworks represent a relaxation of the related rules.[24]

Starting from the analysis of the revision of antitrust and merger rules, the EU objective is to facilitate agreements and joint actions among undertakings to provide solutions contributing to the digital targets.[25] Thus, the Commission has published a draft of new Guidelines which set out principles for the assessment of horizontal cooperation agreements, decisions and concerted practices between undertakings ('agreements'[26]) under art. 101 TFEU.[27] Horizontal agreements between competitors are more likely to restrict competition than vertical agreements between companies operating at different levels of the supply chain.[28] Nevertheless, the Commission has adopted a similar review approach for the Guidelines for restrictive vertical cooperation agreements.[29]

The assessment of agreements under art. 101 TFEU consists of two steps. The first one is to assess whether an agreement between undertakings, which may affect trade between Member States, has an anti-competitive object or actual or potential anti-competitive effects under art. 101(1) TFEU. The second one is to verify the type of benefits resulting from that agreement, if any, and to assess whether those benefits outweigh the restrictions on competition according to art. 101(3) TFEU. If the agreement satisfies the conditions and justifications provided by art. 101(3) TFEU, it will be exempted from the prohibition in the first paragraph.

According to the Commission, cooperation agreements that bring together different research capabilities, complementary skills and data assets are likely to prompt efficiency-

Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) ELR 85; G Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022) SSRN www.papers.ssrn.com; P Larouche and A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) Journal of European Competition Law and Practice 542.

[23] See J Drexl and F Di Porto, *Competition Law as Regulation* cit. 153-162.

[24] See Communication COM(2021) 713 final/2 cit., 1-6.

[25] Communication COM(2021) 713 final cit., 15.

[26] The term 'agreement' in this *Insight* includes 'concerted practices' and 'decisions of associations of undertakings'.

[27] Communication C(2022) 1159 final from the Commission – Approval of the content of a draft for a Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

[28] R Whish and D Bailey, *Competition Law* (Oxford University Press 2018) 4.

[29] Communication C(2021) 5026 final from the Commission – Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

enhancing effects that benefit consumers.[30] For instance, if information exchanges or data sharing between competitors do not exceed what is necessary for the legitimate cooperation, then the agreement is likely to fulfil the conditions of art. 101(3) TFEU, even if the sharing has anti-competitive effects under art. 101(1) TFEU.[31]

It is true that, under art. 2 of Regulation 1/2003, the relevant authority must provide proof of an infringement of art. 101(1) TFEU, while the undertaking has the burden of proving that the agreement produces the benefits to meet the criteria of art. 101(3) TFEU. However, the interpretation of the prohibition by the authority is subject to an assessment of the concrete economic function of the agreement. Consequently, the prohibition in art. 101 TFEU should be applied *ope legis*[32] and on the basis of unitary reasoning, despite the burden of proof being distributed.[33] As a consequence of this *ope legis* application, in the author's opinion, authorities may follow a narrower interpretation of art. 101(1) TFEU with a view to favouring the digital targets.

Similarly, lenient outcomes may also stem from the interpretation and application of competition rules in theories of harm evaluations and merger cases, although the Communication did not stress these aspects. For instance, data sharing and data accumulation practices may be exempted from art. 102 TFEU[34] and from Merger Regulation[35] on the basis of digital transition considerations that counterbalance the restrictive effects on competition. Indeed, even in such cases the assessment presupposes a comprehensive analysis of the undertaking's behaviour and its possible benefits to the market and consumer interests — which is essentially the same type of evaluation that underlies the alternative rule/exception within art. 101 TFEU.

Finally, the ongoing review of state aid rules proposed by the Commission has a key role in enabling breakthrough innovations needed to deliver on the digital transition, such as digital infrastructure, which requires large-scale investments by public and private entities.[36] Similarly to the previously mentioned initiatives on antitrust and merger rules, the revision of State aid frameworks favours an extended application of the exemptions from the prohibitions.[37] According to the provisions contained in art. 107(2) and (3) TFEU, it is possible to derogate from the prohibition of State aid provided by art. 107(1) TFEU when the benefits to society outweigh the restrictions on competition that the aid

[30] Communication C(2022) 1159 final cit., 15-16.

[31] *Ibid.* 93.

[32] Art. 1 Regulation (EC) 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[33] See the thorough analysis of M Libertini, *Diritto della concorrenza dell'Unione Europea* (Giuffrè 2014) 145-154.

[34] *Ibid*. 270-274 and 307; P Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge 2018) 29-32.

[35] See recital 29 and art. 2(1) Regulation (EU) 139/2004 of the Council of 20 January 2004 on the control of concentrations between undertakings; P Ibáñez Colomo, *The Shaping of EU Competition Law* cit. 29-32.

[36] Communication COM(2021) 713 final/2 cit., 17.

[37] *Ibid*. 3-6.

may cause to the Single Market.[38] In particular, Member States, as well as other public or private entities, in close cooperation with the Commission turn to art. 107(3)(b) TFEU on promoting the execution of Important Projects of Common European Interest (IPCEIs) in the form of Multi-Country Projects.[39] As a result of this comprehensive interpretation and application of art. 107 TFEU, public and private resources may be combined to fund multi-purpose pan-European digital infrastructures to support the digitalisation of European industry as well as public administrations.[40]

It should be clear now that the competition approach requested by the Commission implies a substantive dynamic balance of rules and exceptions with a view to favouring the digital transition benefits. This substantive dynamic balance risks fragmenting competition law and increasing uncertainty due to the expanded use of exceptions.[41] Therefore, it is necessary to establish appropriate safeguards which minimise the restriction of competition and ensure that countervailing benefits are shared without discrimination across the Union. Rather than rigid and inflexible rules infringing on the dynamic balancing between rules and exceptions, these safeguards should form part of an effective public enforcement procedure.

III. The degree of (de)centralisation of public enforcement to ensure the dynamic balance

Considering the risk of fragmented and uncertain application of competition rules stemming from the substantive dynamic balancing required by the Commission, there is a need to establish appropriate procedural safeguards. To secure uniformity and legal certainty to the substantive challenges of the digital transition, a tension concerning the degree of centralisation of the new mechanisms for the public enforcement must therefore be clarified.

Firstly, it is necessary to consider the different implementation and enforcement models adopted in the *ex ante* regulatory initiatives. On the one hand, the DGA[42] and the Data Act[43] maintain decentralised systems, whereas on the other hand the DMA opts for

[38] See e.g. Communication C(2021) 8442 final from the Commission - Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication on the application of Articles 107 and 108 TFEU to short-term export-credit insurance; Regulation (EU) 2021/1237 of the Commission of 23 July 2021 amending Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

[39] Art. 13(4)(e) Communication COM(2021) 574 final cit.

[40] Compare with the partial list of Multi-Country Projects provided by Communication COM(2021) 118 final cit., 16.

[41] A similar perspective is adopted to describe the responses to the COVID-19 outbreak and related consistency risk at the Italian national level in S Cassese, *La nuova costituzione economica* (Laterza 2021) 203-207.

[42] Recital 55, arts 26 and 34 Regulation 2022/868 cit.

[43] Art. 31 Proposal COM(2022) 68 final cit.

a centralised model to limit gatekeepers' power.[44] Gatekeepers operate cross-border and normally with the same business model. Consequently, action at the EU level reduces costs of compliance, while augmenting the predictability and effectiveness of the rules.[45] Nonetheless, the DMA, the DGA and the Data Act acknowledge the complementary application of decentralised EU competition law and corresponding national rules.[46] Despite all the new regulatory tools recognising the parallel action by national competition authorities (NCAs), only the DMA provides for cooperation and coordination mechanisms through the European Competition Network (ECN).[47] Therefore, it is the author's opinion that the risk of fragmentation and legal uncertainty posed by digital transition considerations will persist in the forthcoming data-regulatory framework.

To reduce this risk, procedural safeguards must be found in the enforcement of competition rules. Following the entry into force of Regulation 1/2003, the EU antitrust rules have been enforced by the Commission and the national competition authorities in a multi-level enforcement system. In particular, Regulation 1/2003 abolished the Commission's exclusive right to grant 'individual exemption' to anti-competitive agreements[48] and decentralised the enforcement of arts 101 and 102 TFEU to NCAs.[49] This means that undertakings must now self-assess whether their agreements and conduct infringe antitrust rules or provide counterbalancing benefits, while NCAs share the responsibility to apply effectively arts 101 and 102 TFEU with the Commission.[50]

It is appropriate to recall that the EU merger provisions[51] and State aid rules[52] have not become *prima facie* directly applicable, and the Commission has retained the

[44] Recital 80 and chapter V Regulation 2022/1925 cit.

[45] P Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' cit. 4-5; G Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (TILEC Discussion Paper 2021-04) 17.

[46] For the relevant concerns in terms of coordination between authorities, see G Colangelo, 'European Proposal for a Data Act: A First Assessment' (20 July 2022) CERRE cerre.eu 29-30

[47] Arts 1(7), 37 and 38 Regulation 2022/1925 cit.

[48] The term 'exemption' is related to the former enforcement procedure of Regulation (EEC) 17/1962 of the Council of 21 February 1962 – First Regulation implementing Articles 85 and 86 of the Treaty, in which undertakings had to notify their agreements to the Commission in order to obtain an 'individual exemption' provided by art. 101(3) TFEU. Subsequently, art. 1 Regulation 1/2003 cit. made art. 101(3) TFEU directly applicable. See e.g. R Whish and D Bailey, *Competition Law* cit. 174-175.

[49] Art. 5 Regulation 1/2003 cit.

[50] See D Chalmers, G Davies and G Monti, *European Union Law* (4th edition Cambridge 2019) 900-903.

[51] According to arts 1 and 4 of Regulation 139/2004 cit., concentrations having an EU dimension must be notified to the Commission. Furthermore, they are investigated by the Commission and not by the Member States, in line with the principle of 'one-stop merger control'. See e.g. R Whish and D Bailey, *Competition Law* cit. 852-853.

[52] Art. 108(3) TFEU provides that any plan to grant or alter aids must be notified to the Commission by the Member State concerned. The Commission's powers in connection with State aid control are generally set out in Regulation (EU) 2015/1589 of the Council of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union and Regulation (EC) 794/2004 of the

centralised power to establish whether concentrations with an EU dimension and aids are compatible with the Single Market. However, as a result of an ongoing 'modernisation' process, Member States[53] are nowadays called on to verify the conditions for exemption even without prior notification to the Commission.[54] Therefore, even merger and State aid control mechanisms hinge on multi-level systems, which should secure uniformity and legal certainty to the discussed dynamic balance between rules and exceptions.

The shift from centralised to decentralised enforcement models has allowed the Commission to focus its enforcement activities on the cases with the most substantial competitive concerns. At the same time, it has required more action on Member States' side and more control of consistency on the Commission's side for all the other numerous competition cases.[55] It is clear that the digital targets will cause widespread challenging evaluations of the dynamic balance of rules and exceptions at both competition enforcement levels. On the other hand, it is unclear what degree of centralisation will best satisfy the uniformity and legal certainty requirements of a well-functioning Single Market in the digital transition.[56] In the author's view, the effective functioning of decentralised enforcement procedures to favour the digital targets without causing fragmentation and uncertainty in the Union should not be taken for granted.

So far, the mere obligation to enforce the same Treaty provisions and the duty of sincere cooperation[57] have proved insufficient to ensure consistent enforcement of the discussed dynamic balance.[58] This result derives from the fact that NCAs' decisions on exceptions are not binding either on the Commission or on other NCAs.[59] Indeed, only the Commission can adopt binding decisions declaring that an agreement or behaviour

Commission of 21 April 2004 implementing Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. See R Whish and D Bailey, *Competition Law* cit. 252-254.

[53] The expression 'Member States' is used to refer to all national organs in charge of enforcing merger and state aid rules, including national competition authorities.

[54] See arts 4(4) and 9 of Regulation 139/2004 cit. as well as Regulation (EU) 651/2014 of the Commission of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, and the various Notices and Guidelines in support of the modernisation process. The Commission has recognised that the lion's share of aid granted to businesses is based on previously approved schemes or under Block Exemption Regulations. Therefore, they are implemented by lawful channels that do not require prior notification to the Commission. See Staff Working Document SWD(2018) 349 final from the Commission accompanying the document Report on Competition Policy 2017, 34-35.

[55] See R Whish and D Bailey, *Competition Law* cit. 298-300; D Chalmers, G Davies and G Monti, *European Union Law* cit. 903-904, 998-1000; B Nascimbene and A Di Pascale, *The Modernisation of State Aid for Economic and Social Development* (Springer 2018) 19-20.

[56] Communication COM(2017) 713 final cit., 18.

[57] The duty of sincere cooperation of the Union and the Member States is provided by art. 4(3) of the Treaty on European Union (TEU).

[58] For empirical findings regarding the divergent approaches and conclusions adopted by the national competition authorities, see O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) CMLRev 121.

[59] Case C-375/09 *Tele2 Polska* ECLI:EU:C:2011:270 paras 21-30.

is compatible with the Treaties due to counterbalancing benefits, such as advancement of the digital transition.[60] Insofar as a NCA can only adopt non-binding decisions with regard to counterbalancing benefits, and the Commission as well as other NCAs may subsequently reach different conclusions, decentralised enforcement runs the risk of fragmented and uncertain application of competition rules.

To address the future risks of fragmentation and legal uncertainty caused by the substantive challenges of the digital targets, the Commission's Communication proposes an extended use of top-down measures, namely Notices, Guidelines and Block Exemption Regulations, to guide NCAs and stakeholders through the digital transition.[61] For instance, the Commission is willing to issue guidance to assist the progress of pro-competitive agreements, under which any potential restriction to competition is outweighed by digital transition benefits.[62] It is also considering the conditions in which cooperation agreements between competitors and State aid can contribute to achieving the digital targets in the ongoing review of the Horizontal and Vertical Block Exemption Regulations (HBERs[63] and VBER[64]) as well as in the amendment of the State Aid General Block Exemption Regulation (GBER).[65]

It is necessary to stress that Notices and Guidelines are soft law instruments designed as top-down measures. They will certainly be of increasing importance for NCAs and undertakings since they are an expression of how the Commission would handle the substantive dynamic balance. Yet, as non-binding regulatory measures, these soft law instruments do not compel national authorities to follow them. Consequently, it is submitted that even if they stimulate, to some degree, voluntary convergence toward the Commission's guidelines, they will not eliminate the risk of fragmented enforcement by NCAs.[66] Scholars have also noted that, following the modernisation and decentralisation processes, national courts have not made preliminary references to the European Court of Justice (ECJ)[67] regarding issues already addressed by the Commission's guidelines.[68]

[60] See art. 10 Regulation 1/2003 cit.; art. 8 Regulation 139/2004 cit.; art. 10 Regulation 651/2014 cit.

[61] See Annex to the Communication COM(2021) 713 final cit., 1-6.

[62] Communication COM(2021) 713 final cit.

[63] The Horizontal Block Exemption Regulations (HBERs) provide 'safe harbours' to certain categories of horizontal cooperation agreements which are more beneficial than harmful to the Single Market, and are therefore allowed under competition rules. For further details regarding the ongoing review, see European Commission, *Review of the two Horizontal Block Exemption Regulations* ec.europa.eu.

[64] Similar to the HBERs, the Vertical Block Exemption Regulation (VBER) provides 'safe harbours' to certain agreements between firms at different levels of the market. It is also under an ongoing review process. For further details, see European Commission, *Review of the VBER and Vertical Guidelines* ec.europa.eu.

[65] Regulation 2021/1237 cit.

[66] Proposal COM(2020) 767 final from the Commission for a Regulation of the European Parliament and of the Council on European data governance, 5; I Lianos and D Geradin, *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar 2013) 578-583.

[67] The preliminary reference procedure is governed by art. 267 TFEU.

[68] See O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' cit. 31.

Therefore, although Notices and Guidelines are non-binding soft law instruments, they will deprive the ECJ of the opportunity to clarify its approach on the substantive dynamic equilibrium in the digital transition.

In contrast to Notices and Guidelines, Block Exemption Regulations are hard law instruments designed as top-down measures. Block Exemptions assert that certain categories of agreements and aid meeting predefined criteria merit directly applicable exemptions, without prior notification. This will facilitate disbursement of aid to enable Member States to provide the necessary support to make the digital transition happen. However, the adoption of Block Exemption Regulations to favour the digital targets also arguably has some shortcomings. Firstly, there is a high risk of a straitjacket effect.[69] Stakeholders may structure their agreements and contractual relations according to the Block Exemption terms, which might twist their true commercial interests. Secondly, digital targets require open-ended solutions that may not yet be devised. Considering that Block Exemptions are *ex ante* regulatory measures, they may not cover those solutions and thus jeopardise innovation. Therefore, the top-down safeguards proposed by the Commission would likely be insufficient to ensure uniformity and legal certainty for the dynamic equilibrium necessary for the digital transition.

In the author's view, a solution to the deficiency of the top-down measures might be an increased use of bottom-up safeguards conceived within the European Competition Network.[70] In the ECN there are indeed regular discussions among the NCAs and the Commission concerning the enforcement of European competition law as well as national rules.[71] Consequently, the ECN may take a lead role in ensuring consistency in the enforcement of competition rules to achieve the digital targets. More precisely, it might represent the forum in which the NCAs and the Commission coordinate their respective assessments of competition rules and exceptions for digital targets. The ECN's success in providing safeguards is related to its character as a mode of enforcement based on consultations, negotiations and instruments designed as bottom-up measures. These measures respect national particularities (which a centralised system does not) and hinder the emergence of national divergences (to which a decentralised model might lead). Thus, the ECN could successfully combine the advantages of both centralised and

[69] D Chalmers, G Davies and G Monti, *European Union Law* cit. 901.

[70] As is well known, the ECN is a network formed by the NCAs and the Commission in which they cooperate closely, as prescribed by Regulation 1/2003 cit. The Commission has a central role in ensuring consistency of competition enforcement, particularly as a result of its examination of draft decisions submitted by the NCAs. Although the ECN is primarily designed as an enforcement network, it also functions as a policy-making network through mutual policy learning among the NCAs. See J Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer 2020) 126-128; R Whish and D Bailey, *Competition Law* cit. 299; I Lianos and D Geradin, *Handbook on European Competition Law: Enforcement and Procedure* cit. 566-569.

[71] I Lianos and D Geradin, *Handbook on European Competition Law: Enforcement and Procedure* cit. 567-568.

decentralised enforcement models,[72] and thus may well emerge as the ideal forum for solving the challenges of the digital transition.

IV. Final considerations

The European responses to the COVID-19 outbreak have triggered an ongoing review process of competition rules and enforcement procedure to support Union's priorities. More precisely, competition law has been identified by the Commission as a complementary tool to *ex ante* regulations to facilitate the green and digital transition, and to strengthen the resilience of the Single Market. In the Commission's Communication the success of the complementary role of competition law is owed to the flexibility of the related rules and procedures, and to the case-by-case approach.

This *Insight* has reflected on the substantive and procedural challenges posed by the digital transition. Indeed, the complementary role of competition law to stimulate the achievement of the digital targets is characterised by two tensions, relating respectively to the interpretation and application of competition rules and to the degree of centralisation with regard to the enforcement mechanisms.

To be beneficial to the digital targets, competition rules should be interpreted and applied dynamically, investigating the equilibrium between restrictive effects on competition and countervailing benefits. As a result, substantive challenges need to be resolved by supervisory authorities which should find appropriate solutions to the dynamic balance between rules and exceptions. At the same time, it will be necessary to prevent the risk of fragmentation and uncertainty across the Union, caused by the substantive dynamic challenges and national divergent approaches to the exceptions of competition rules.

Procedural safeguards seem to ensure uniformity and legal certainty to the discussed substantive evaluations of rules and exceptions. However, a procedural tension between centralised and decentralised enforcement models needs to be clarified in advance to ensure uniformity and legal certainty to the challenges of the digital targets. The Commission has proposed an extended use of top-down measures to guide stakeholders and NCAs through the digital transition. These top-down measures have already proved insufficient to ensure consistency in the decentralised enforcement models of competition rules. Therefore, it is submitted that it will be necessary to develop parallel bottom-up safeguards within the European Competition Network that consider the common European interest and national particularities to the digital transition.

[72] C. Potocnik-Manzouri, 'The ECN+ Directive: An Example of Decentralised Cooperation to Enforce Competition Law' (2021) European Papers europeanpapers.eu 987.