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Adapting Competition Law to the digital transition. Two Challenges

Emanuele Fazio*

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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 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 transition, and to strengthen the resilience of the Single Market. This essay 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, referring 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 shall 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 European Union's and Member States' policies, but have also created momentum for renewed competition policy tools and enforcement procedure to complement

* Ph.D. Student in Law, Sant'Anna School of Advanced Studies, emanuele.fazio@santannapisa.it.

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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

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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].

The purpose of competition policy continues to be keeping markets open and competitive, as well as 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 essay will focus on the digital transition and specifically the need for cooperation and large-scale investments to support data sharing, data pools 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 shows that Member States are so far meeting this target[6]. Nevertheless, only a small fraction of enterprises uses advanced digital technologies (i.e., Big Data, Artificial Intelligence and Cloud computing). Importantly, even in several of the best performing countries, Big Data

(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, https://onlinelibrary.wiley.com/doi/epdf/10.1111/jcms.13271; B De Witte, 'The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift' (2021), *CMLRev*, 635, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/58.3/COLA2021046; J Echebarria Fernández, 'A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic' (2020), *European Papers*, 1399, https://www.europeanpapers.eu/en/europeanforum/critical-analysis-european-union-measures-overcome-economic-impact-covid19.

[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 Graig, G de Búrca, *The Evolution of EU Law* (Oxford, 2021), 363-372; E Chiti, 'In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum' (2015), *CYELS*, 311.

[3] Commission, 'A competition policy fit for new challenges' (Communication) COM (2021) 713 final, 19.

[4] *Ibidem* 6-7. It is noteworthy that the Commission explicitly uses the same wording as Art. 101(3) of the Treaty on the Functioning of the European Union (TFEU).

[5] Commission, '2030 Digital Compass: the European way for the Digital Decade' (Communication) COM (2021) 118 final, 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 the Commission's 'Proposal for a Decision of the European Parliament and of the Council establishing the 2030 Policy Programme Path to the Digital Decade' (Path to the Digital Decade) COM (2021) 574 final.

[6] Commission, 'Digital Economy and Society Index (DESI) 2022', available at https://digital-strategy.ec.europa.eu/en/library/digital-economy-and-society-index-desi-2022.

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 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 infrastructures. All 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, the essay stresses that the complementary role of competition law is characterised by two substantive and procedural tensions which require balanced solutions. The two tensions refer to the interpretation and application of competition rules, discussed in the second section of this paper, and to the degree of centralisation which is sought regarding the new mechanisms for the public enforcement, discussed in the third section. As a consequence, in the author's view EU competition law shall offer dynamic substantive and procedural responses to the challenges of the digital transition. The last section 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

[7] *Ibidem* 53-54. Moreover, 90 per cent of the EU's data are processed by US based companies and less than 4 per cent of the most popular online platforms, which collect substantial amount of data, are European. See Commission, '2030 Digital Compass: the European way for the Digital Decade' (Communication) COM (2021) 118 final, 3.

[8] See Recital 3, Recital 30, Art. 3(2) and Art. 12 of Path to the Digital Decade.

[9] Commission, 'Annex to the Communication A competition policy fit for new challenges' (Annex to the Communication) COM (2021) 713 final/2.

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 somewhat 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 actions promote data sharing and data pools 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

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

[14] *Ibidem* 1; Recital 2 of the DGA; Recital 3 of the DMA.

[15] With the aim of tackling digital 'gatekeepers' power see Arts 3, 5, 6 and 14 of the DMA as well as Recital 36, Art. 5(2) and Art. 6(2) of the Data Act.

[16] For an accurate reflection on the necessity to adopt open and standardised Application Programming Interfaces (APIs) by private and public undertakings see O Borgogno, G Colangelo, 'Data sharing and interoperability: Fostering innovation and competition through APIs' (2019), *Computer Law & Security Review*. To facilitate the interoperability of data processing services see e.g. Recitals 59 and 60 of the DMA and Chapter VIII of the Data Act.

[17] See Recital 27 of the DGA which assigns to data intermediation services 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 of the DGA 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), *IIC*, 1168, https://doi.org/10.1007/s40319-020-00990-3; E Fazio, 'Il problema delle competenze settoriali e l'adozione di un approccio olistico alla data-driven economy' (2020), *Il diritto dell'economia*, 653, https://www.ildirittodelleconomia.it/wp-content/uploads/2021/03/23Fazio.pdf.

and a lack of adequate infrastructures[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].

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 represents 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 recently 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 are more likely to restrict competition than vertical agreements between companies operating at different levels of the supply

[19] Data Act, 11.

[20] See e.g. Art. 1 of the Data Act. Furthermore, it is interesting to note that 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 of the DMA; Recitals 13, 15, 25, 37 and 60 of the DGA; Recital 88 of the Data Act.

[22] The boundaries between competition law and regulation have been long debated. A shared conclusion 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* (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. For such debate see e.g. P Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022), *ELR*, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978625; G Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022), *ICLE White Paper*, a revised version of the paper is forthcoming in *ELR*, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4070310; P Larouche, A de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021), *Journal of European Competition Law & Practice*, 542.

[23] See J Drexl, F Di Porto, cit. 153-162.

[24] See Annex to the Communication, 1-6.

[25] Commission, 'A competition policy fit for new challenges' (Communication) COM (2021) 713 final, 15.

[26] The term 'agreement' is used to also refer to decisions and concerted practices in this essay.

[27] Commission, 'Annex to the Communication 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' (Annex on the applicability of Article 101 TFEU to horizontal co-operation agreements) COM (2022) 1159 final.

chain[28]. Nevertheless, the Commission has adopted a similar review approach for the Guidelines of 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). The second one is to verify the type of benefits resulting from that agreement and to assess whether those benefits outweigh the restrictions on competition according to Art. 101(3). If the agreement satisfies the conditions and justifications provided by Art. 101(3) it shall not be automatically void[30].

According to the Commission's view, cooperation agreements that bring together different research capabilities, complementary skills and data assets are likely to prompt efficiency-enhancing effects that benefit consumers[31]. 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), even if the sharing has anti-competitive effects under Art. 101(1)[32].

It is true that, under Art. 2 of Regulation 1/2003, the relevant authority must provide proof of an infringement of Art. 101(1) while the undertaking has the burden of proving that the agreement produces the benefits to meet the criteria of Art. 101(3). 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 itself within Art. 101 TFEU should be applied *ope legis*[33] and on the basis of a unitary reasoning, despite the burden of proof being distributed[34]. As a consequence of this *ope legis* application, in the author's opinion authorities may follow a narrower interpretation of Art. 101(1) with a view to favouring the digital targets.

Similarly lenient outcomes may also stem from the interpretation and application of competition rules also 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[35] and from Merger Regulation[36] on the basis of digital transition considerations that counteract the restrictive effects on

[28] R Whish, D Bailey, *Competition Law* (9th edition, Oxford, 2018), 4.

[29] Commission, 'Annex to the Communication 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', COM (2021) 5026 final.

[30] Art. 101(2) TFEU.

[31] Annex on the applicability of Article 101 TFEU to horizontal co-operation agreements, 15-16.

[32] *Ibidem* 93.

[33] Art. 1 of Regulation 1/2003.

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

[35] See M Libertini cit. 270-274 and 307; P Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge, 2018), 29-32.

[36] See Recital 29 and Art. 2(1) of Regulation 139/2004; P Ibáñez Colomo cit. 29-32.

competition. Indeed, even in such cases the authority assessment presupposes a comprehensive analysis of the undertaking's behaviour and its possible benefits to the market and consumer interests; 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 infrastructures, which require large-scale investments by public and private entities[37]. Similar 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[38]. According to the provisions contained in Art. 107(2) and 107(3) TFEU, it is possible to derogate to the prohibition of State aid provided by Art. 107(1) TFEU when the benefits to society outweigh the restrictions on competition that the aid may cause to the Single Market[39]. In particular, Member States, as well as other public or private entities, in close cooperation with the Commission turn to Art. 107, para. 3, let. b) TFEU on promoting the execution of Important Projects of Common European Interest (IPCEIs) in the form of Multi-Country Projects[40]. 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[41].

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[42]. Therefore, it is necessary to establish appropriate safeguards which minimise competition restriction and ensure that counteracting benefits are shared without discrimination across the Union. It is the author's view that, rather than rigid and inflexible rules infringing on

[37] Commission, 'A competition policy fit for new challenges' (Communication) COM (2021) 713 final, 17.

[38] See Annex to the Communication 3-6.

[39] See e.g. the Sixth Amendment of the State aid Temporary Framework and the Amendment of the State Aid General Block Exemption Regulation in light of MFF which will further enable combined public and private interventions to ensure the digital transition of the Union. Commission, 'Communication from the Commission Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (2021/C 473/01); Commission Regulation 2021/1237 amending Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2021] OJ L 270/39.

[40] Art. 13, para. 4, let. e) of Path to the Digital Decade.

[41] Compare with the partial list of Multi-Country Projects provided by Commission, '2030 Digital Compass: the European way for the Digital Decade' (Communication) COM (2021) 118 final, 16.

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

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 the 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, the essay advances the necessity to settle 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 shall be thus 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[43] and the Data Act[44] maintain decentralised systems, on the other hand the DMA opts for a centralised model to limit gatekeepers' power[45]. 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[46]. Nonetheless, the DMA, the DGA and the Data Act acknowledge the complementary application of decentralised EU competition law and corresponding national rules[47]. 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)[48]. Therefore, it is the author's opinion that the risk of fragmentation and legal uncertainty posed by the 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

[43] Recital 55, Art. 26 and Art. 34 of the DGA.

[44] Art. 31 of the Data Act.

[45] Recital 80 and Chapter V of the DMA.

[46] P Akman cit. 4-5; G Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021), *TILEC*, 17, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797730.

[47] For the relevant concerns in terms of coordination between authorities see G Colangelo, 'European Proposal for a Data Act: A First Assessment' (2022), *CERRE*, 29-30, https://cerre.eu/publications/european-proposal-for-a-data-act-a-first-assessment/.

[48] Arts. 1(7), 37 and 38 of the DMA.

multi-level enforcement system. In particular, Regulation 1/2003 abolished the Commission's exclusive right to grant 'individual exemption' to anti-competitive agreements[49] and decentralised the enforcement of Art. 101 and Art. 102 TFEU to NCAs[50]. This means that undertakings must now self-assess whether their agreements and conducts infringe antitrust rules or provide counterbalancing benefits, while NCAs share the responsibility to apply effectively Arts 101 and 102 TFEU with the Commission[51].

It is appropriate to recall that the EU merger provisions[52] and State aid rules[53] have not become *prima facie* directly applicable and the Commission has retained the centralised power to establish whether Union dimension concentrations and aids are compatible with the Single Market. However, as a result of an ongoing 'modernisation' process of the respective enforcement, Member States[54] are nowadays called to verify the conditions for exemption even without prior notification to the Commission[55]. 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[56]. It is clear that the digital targets will cause widespread challenging

[49] The term 'exemption' is related to the former enforcement procedure of Regulation 17/1962, in which undertakings had to notify their agreements to the Commission in order to obtain the 'individual exemption' provided by Art. 101(3) TFEU. Art. 1 of Regulation 1/2003 has rendered the exceptions of Art. 101(3) TFEU, i.e. benefits and conditions, directly applicable. See R Whish, D Bailey cit. 174-175.

[50] Art. 5 of Regulation 1/2003.

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

[52] According to Arts 1 and 4 of Regulation 139/2004 concentrations having a Union dimension are 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 R Whish, D Bailey cit. 852-853.

[53] Art. 108(3) TFEU provides that any plans to grant or alter aids shall be notified to the Commission by the Member State concerned. The Commission powers in connection with State aid control are generally set out in Council Regulation 2015/1589 and Commission Regulation 794/2004. See R Whish, D Bailey cit. 252-254.

[54] 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.

[55] See Arts 4(4) and Art. 9 of Regulation 139/2004 as well as Commission Regulation 651/2014 (GBER) and the various Notices and Guidelines in support of the modernisation process. The Commission 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 Commission, 'Staff Working Document Accompanying the document Report on Competition Policy 2017', SWD (2018) 349 final, 34-35.

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

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[57]. 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 Treaties provisions and the duty of sincere cooperation[58] have proved insufficient to ensure a consistent enforcement of the discussed dynamic balance[59]. This result derives from the fact that NCAs' decisions on exceptions are not binding on neither the Commission nor other NCAs[60]. Indeed, only the Commission can adopt binding decisions declaring that an agreement, a conduct, and so forth is compatible with the Treaties due to counterbalancing benefits, such as digital transition advancement[61]. Insofar as a NCA can only adopt non-binding decisions on counteracting benefits, and the Commission as well as other NCAs may subsequently reach different conclusions, the 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 propose an extended use of top-down measures, namely Notices, Guidelines and Block Exemption Regulations, to guide NCAs and stakeholders to the digital transition[62]. 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[63]. It is also considering the conditions in which cooperation agreements between competitors and State aid can contribute to achieve the digital targets in the ongoing review of the Horizontal and Vertical Block Exemption Regulations (HBERs[64] and

[57] Commission, 'A competition policy fit for new challenges' (Communication) COM (2021) 713 final, 18.

[58] 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).

[59] For empirical findings to study 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.

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

[61] See e.g. Art. 10 of Regulation 1/2003; Art. 8 of Regulation 139/2004; Art. 10 Commission Regulation 651/2014 (GBER).

[62] See Annex to the Communication, 1-6.

[63] Commission, 'A competition policy fit for new challenges' (Communication) COM (2021) 713 final, 15.

[64] 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 on the ongoing review see https://competition-policy.ec.europa.eu/public-consultations/2019-hbers_en.

VBER[65]) as well as in the amendment of the State Aid General Block Exemption Regulation (GBER)[66].

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 the opinion of the author that even if they somewhat stimulate voluntary convergence to the Commission's guidelines, they will not eliminate the risk of fragmented enforcement by NCAs[67]. Scholars have also noted that, following modernisation and decentralisation process, national courts have not made preliminary references to the European Court of Justice (ECJ)[68] regarding issues already addressed by the Commission's guidelines[69]. 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 Exemptions 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, in the opinion of the author the adoption of Block Exemption Regulations to favour the digital targets also has some shortcomings. Firstly, there is a high risk of a straitjacket effect[70]. 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.

[65] Similar to the HBERs, the Vertical Block Exemption Regulation (VBER) provide '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 https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.

[66] Commission Regulation (EU) 2021/1237 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2021] OJ L 270/39.

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

[68] According to Art. 267 TFEU.

[69] See O Brook cit. 31.

[70] D Chalmers, G Davies, G Monti cit. 901.

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[71]. Within 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[72]. 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 to provide 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 (that a centralised system does not) and hinder the emergence of national divergences (that a decentralised model might lead to). Thus, in the author's opinion the ECN could successfully combines the advantages of both centralised and decentralised enforcement models[73], and thus may well emerge as the ideal forum to 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 the 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 as well as on the case-by-case approach.

This essay 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, referring respectively to: the interpretation and application of competition rules and to the degree of centralisation with regard to the enforcement mechanisms.

[71] The ECN is a network formed by the NCAs and the Commission in which they closely cooperate together for mutual learning and even converge enforcement procedures. The Commission has a central role in ensuring consistency of competition enforcement, particularly as a result of its examination of NCAs' draft decisions. Although the ECN has been primarily designed as an enforcement network, it may function even 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, D Bailey cit. 299; I Lianos, D Geradin cit. 566-569.

[72] I Lianos, D Geradin cit. 567-568.

[73] C. Potocnik-Manzouri, 'The ECN+ Directive: An Example of Decentralised Cooperation to Enforce Competition Law' (2021), *European Papers*, 987, https://www.europeanpapers.eu/fr/e-journal/ecn-directive-example-of-decentralised-cooperation-to-enforce-competition-law.

To be beneficial to the digital targets competition rules should be interpreted and applied dynamically, investigating equilibrium between restrictive effects on competition and counteracting 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 to 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 the author's opinion that it shall 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.