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# Online platforms as a complex digital environment characterised by a lack of transparency on the role and status of the parties involved, as well as the use of unfair commercial practices

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Abstract
*The contribution analyzes the critical issues related to the affirmation of technological platforms in the digital market and the dissemination of unfair commercial practices, facilitated by the inadequacy of the reference regulations to fill the information asymmetry and the lack of transparency in the relationships between the interested parties.*

Keywords: Technological platforms; Digital market; Unfair commercial practices.

Summary: Introduction. – 1. Digital platforms: scope of application and limits. – 2. Unfair commercial practices: reform interventions and remedies. – 3. Intervention perspectives and overseas solutions. – Conclusions.

## Introduction.

The consolidation of the digital economy, the result of the exponential growth of companies (Google, Amazon, Facebook, Apple and Microsoft) which, over time, have managed to master every corner of the internet, has given rise to food for thought in doctrine and jurisprudence.

The intrusive affirmation of technological platforms has led European and overseas institutions to investigate the capacity of existing regulatory systems to face the challenges offered by the rise of a digitised information and communication society, in which the highest risks concern user privacy, transparency of commercial transactions and regular competition on the markets.

The birth of a new economic system is evident which, through the extraction and processing of personal data, draws on the daily experience of the associates as a "raw material"[1] in which the data, especially the personal one, becomes *a qualified and precious resource beyond what a bargaining chip*[2].

The digital market opens the frontier to so-called big data[3] and raises many questions of interpretation, dividing those who tend to favour the automatic aggregation and processing of data from those who, instead, focus on the content of the same[4].

The issue of data management by digital platforms intersects with that of the economic value of the data itself. Despite the alleged free service, with internet access consumers pay IT companies a price, represented by the management of information concerning them.

The strategy of the apparent provision of a free service is intended to attract a greater pool of users, indirectly increasing the economic value of participation in the market on the supply side.

[1] S Zuboff, *Il capitalismo della sorveglianza. Il futuro dell'umanità nell'era dei nuovi poteri* (1st edn, Luiss University Press 2019), 18.

[2] G D'Ippolito, 'Commercializzazione dei dati personali: il dato personale tra approccio morale e negoziale' (2020) 3 Dir. inf., 634.

[3] The expression big data encompasses four fundamental characteristics: volume, speed, variety and value (G Pitruzzella, 'Big data, competition and privacy: a look from antitrust prospect' (2016) 23 Conc. merc., special edition *Big Data e Concorrenza*, 15-27: the first two are data recorded, respectively, the extent of the data and stored and the speed with which they are processed; the variety concerns the innumerable sources from which the same data can be drawn; the value constitutes the natural to which the operations of collection, processing and treatment of information lead.

[4] The expression "big data" refers to any information concerning a specific or determinable subject. 'The use of Big Data and its value have increased with the rise of Big Analytics: the ability to design algorithms that can access and analyse vast amounts of information', A Ezrachi- M Stucke, *Virtual Competition the promise and perils of the algorithm-driven economy* (1st Harvard University Press paperback edn 2019), 14.

*Image taken from https://www.sicurezzanazionale.gov.it/sisr.nsf/archivio-notizie/privacy-e-sicurezza-garante-privacy-e-intelligence-a-tutela-dei-cittadini.html*

The concept of privacy takes on a new value, becoming a resource sold in exchange for a provision of services, which corresponds to an economic return in terms of personal information and sales of advertising space.

The collection and processing of personal data, including sensitive ones, should take place in an adequate and effective way, in order to avoid aggression to the personal sphere and unfair commercial practices.

The need to reconcile apparently antithetical areas (privacy, competition and consumer protection) arises from the awareness that companies, in exchange for the services offered, acquire market power and are able to predict the behavior of users, or to anticipate their choices.

The meshes of reflection widen in an attempt to derive from the specificity of the disciplines involved a univocal reading key and uniform regulation.

The European bodies have on several occasions highlighted the need to balance the aim of creating a single digital market and the protection of the processing of personal data and the free circulation of the same.

A significant sign of the change in perspective in the approach to the issues under discussion comes from the proposals of the European Commission for the enactment of a law on digital services[5] and a law on digital markets[6], on which the European Protection Supervisor has expressed a positive opinion.

Already in the Annual Report on Competition Policy for the year 2019[7], the European Parliament had highlighted the need to adapt competition to digital, underlining the difficulties associated with the slowness of intervention procedures and the inadequacy of late repression measures, hoping for the introduction of an *ex-ante* regulatory and monitoring system that could act as a deterrent to future anti-competitive intentions.

[5] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final. The EU Parliament approved the Digital Service Act on January 20, 2022.

[6] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final. The Council and the EU Parliament reached an agreement on the text of the Digital Markets Act on March 24, 2022.

[7] Report on competition policy – annual report 2019 (2019/2131(INI)).

In the analysis of the institutions involved, a comparative approach is decisive, made above all necessary by the extraterritorial vocation of the internet and the companies that hold the reins.

The dogmatic approaches to which the doctrine has reached (both on the historical and on the juridical level) must now be confronted with the continuous evolution of European and American jurisprudence, capable of undermining its basic assumptions.

In general, the boundary between lawfulness and illegality in commercial practices is rather blurred and, in the context of cyberspace, a greater effort is required, in order to recognize and repress behaviors that are actually harmful to businesses, consumers and users, without sacrificing the associated advantages. to the undeniable progress brought about by digitization.

The importance of the interests at stake makes reflection stimulating, despite the awareness of not being able to provide definitive answers.

## 1. Digital platforms: application scope and limits.

The rooting of the digital economy and the spread of online platforms have, in the last decade, upset the methods of communication and interaction between users, even in sectors that seemed far from the logic of renewal.

The acceleration imparted by modern technological tools to the information society portends the risks of undue intrusions to privacy and opaque behavior on the markets, if it is true that *there is no law that can protect us from what is unprecedented* [8].

Online infrastructures can include a varied typology of services (search engines, social networks, e-commerce, sale of multimedia content), destined to grow over time in conjunction with the evolution of marketing techniques and the conclusion of contracts in app.

*Image taken from https://www.nethics.it/metodi-di-pagamento-nelle-commerce/*

A cause for concern is the pervasive and invasive strategy with which the owners of IT assets are able to relate subjects, information and contents, not limiting themselves to mere intermediation, but affecting in a penetrating way the shape of the relationships between users. services.

Digital infrastructures, from a mere communication and exchange channel between customers and sellers, themselves become potential negotiating counterparts with the inevitable distortion of competitive dynamics.

The hybrid nature of IT platforms, intended to encompass a plurality of different services, makes it difficult to identify a unitary notion and apply uniform regulation[9].

[8] S Zuboff, *Il capitalismo della sorveglianza* (n 1), 531.

[9] The first attempt in this direction is represented by Directive 2000/31/CE on electronic commerce, aimed at regulating certain aspects of information society services that art. 1 letter b of the subsequent directive

The same Court of Justice of the European Union intervened in order to clarify the concept of online platform, making a distinction between those attributable to the category of information services and those connected to other economic activities, for which a different qualification is required in consideration of the nature of the service provided[10].

Concern for the consequences deriving from the uncontrolled use of technological resources has fueled the debate about the identification of the most suitable measures to protect consumers and regulate the legal situations that have arisen in the relationships undertaken through telematic connections.

The European Parliament with the resolution of 15 June 2017 noted the *difficulty of agreeing at EU level a single definition of online platforms that is legally relevant and adapted to future needs, due to factors such as the great variety of types existing online platforms and their sectors of activity as well as the rapidly changing digital world* (paragraph 6), advocating a distinction and definition of them *according to their characteristics, classifications and principles and following a problem-based approach* ( paragraph 8).

The creation of a secure digital environment that promotes development, innovation and competition involves the introduction of specific rules to define the sphere of action of the most active and unscrupulous operators on digital markets.

Among the practices susceptible to repression and more aggressive are the conducts aimed at transferring the field of action to different geographical contexts, in cases in which the company, operating both as owner of the platform and as a supplier, obtains additional advantages at the expense of commercial operators who use the same platform to promote products or services.

The imbalance between the positions of the contracting parties and the information asymmetry, that characterizes their relationships, do not find adequate protection through the manifestation of consent, since the latter is given almost automatically and, more often than not, only for the initial

2015/1535/EU qualifies as 'service' means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. With the legislative proposals on services (see above note 5) and on digital markets (see above note 6), the European legislator aims to introduce a uniform discipline that takes into account the challenges and risks associated with the emergence of new and more invasive digital services.

[10] CJEU, C-320/16, Uber France SAS (2018), in which the Luxembourg Court ruled on the dispute between the Associated Professional Elite Taxi and Uber System Spain SL, connected to Uber Technologies Inc., relating to the supply by the latter, through an application for smartphones, a service for putting in contact non-professional drivers who used their own vehicle with people who wanted to make urban trips. The Court clarified that Uber's brokerage service should be considered an integral part of an overall service in which the main element is a transport service and, consequently, not meeting the qualification of an information society service pursuant to Article 1, point 2, of Directive 98/34, to which Article 2, letter a), of Directive 2000/31 refers, but of service in the transport sector, pursuant to Article 2, paragraph 2, letter d), of Directive 2006/123(paragraph 33). On the contrary, see the Opinion of Advocate General Szpunar, presented on 30 April 2019 in case C-390/18, Airbnb Ireland, which, strictly interpreting the criteria set out in the Uber judgement, clarified (paragraph 89) that 'Article 2(a) of Directive 2000/31, read in conjunction with Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service within the meaning of those provisions.'.

activities of collection and processing and not for subsequent data transfer from one platform to another[11].

A concrete approach to the problems mentioned can be seen in the legislative proposals on services and digital markets[12], in which the European legislator, while maintaining the application of the rules contained in the directive on electronic commerce, aims at harmonising the matter through rules aimed at collecting the challenges that the technological world poses, not only to society, but also to the individual users of its resources, adapting the provisions of civil and commercial law for those who operate online.

The resolution relating to the law on digital services, with a view to guaranteeing consumer confidence in the online market, promotes the adoption of measures aimed at safeguarding users and filling the gaps and the inability of existing systems to prevent the spread of illegal and the transmission of illegal content.

The expansion of the range of action of IT assets generates three categories of risks: the first relates to the consequences arising from the abuses associated with the use of telematic services; the second concerns the effects on the fundamental rights of users most exposed to the dangers of the network; the third concerns prejudices to public health and safety connected to incorrect and deceptive behaviour (paragraph 57).

The Digital Market Act is placed in the same direction and in a complementary function which aims to dictate rules for digital operators who act as "gatekeepers", identified on the basis of the size of the company, the powers exercised and the position held on the market. The companies, falling within the scope of the provisions of the document, must comply with the provisions on the obligations imposed on gatekeepers (articles 5, 6 and 7 of the proposal), under penalty of the imposition of specific sanctions, such as fines and late payment penalties (articles 26, 27).

The text on digital markets, taking note of the rise to power of technological operators who, over time, have built real monopolies on the net, intends to restore the equity and contestability of the markets, exploiting the benefits of the platform economy and of the digital economy in general.

Due to the position held, monopolistic companies have a decisive impact on internal market dynamics, ending up by managing one or more access points to customer platforms.

Both legislative designs are inspired by a logic aimed at protecting network users and encouraging the growth of European digital entities, set aside by the intrusive affirmation of Californian companies.

The cross-border nature of the activities of dominant companies on the net makes legislative initiatives unsuitable for offering adequate and uniform

[11] It has been asked whether the manifestation of consent determines a real transfer of ownership over the personal data or a delegation to use it. The thesis of the transmission of a property right on the data would seem to be supported by the provision referred to in art. 20 of Regulation 679/2016 (GDPR) on the right to data portability which, providing the right of the interested party 'to receive in a structured format, commonly used and readable by automatic device, the personal data concerning him provided to a holder of the processing and ... to transmit such data to another data controller without impediments by the data controller to whom it has provided ', increases the control of the interested party over their data and promotes its circulation, A Maceratini, 'Privacy e informazione nell'era dei Big Data' (2019) 2 Tigor - Rivista di scienze della comunicazione e di argomentazione giuridica, 87.

[12] See notes n 5 and 6.

regulation. In such a context it is not surprising and, indeed, the interest of jurists in the subject dealt with appears enlightening, since the radical nature of the changes underway is a threat to society in general and human civilization in particular.

Addiction to technological progress generates a sort of "utopia of certainty", increasing the false belief in individuals that they can satisfy any need and inducing them to abandon any capacity for self-determination. What is alarming is the tendency of internet giants to monitor what occurs off-line with obvious prejudice for users, unaware of being constantly monitored.

The companies that, over time, have built the digital empire have skillfully captured information on the tastes, needs and preferences of potential customers, in order to anticipate competitors in market offers[13].

The dependence of society and economy on technological tools if, on the one hand, it feeds the future optimism towards progress in all sectors of modern life, on the other hand, it raises doubts about the proper functioning of digital services and the guarantee of the fundamental rights of the users of the same.

An organic intervention is necessary to favour the creation of a competitive digital environment, safe and sensitive to the needs of all network operators, even those less attentive.

## 2. Unfair commercial practices: reform measures and remedies.

Unfair practices and the lack of transparency in the digital sector threaten not only market equilibrium, but also the dynamics of relationships between consumers and professionals and between users and owners of online platforms. The growth of telematic intermediation services has prompted the competent Authorities to question themselves about the measures to be taken to prevent illegal activities and behaviors detrimental to the interests of the associates.

The inadequacy of control and repression tools offers technology companies fertile ground for circumvention of the relevant regulations.

The discipline on unfair commercial practices, contained in Directive 2005/29/EC [14], amended by the subsequent Directive (EU) 2019/2161 [15],

[13] S Zuboff, *Il capitalismo della sorveglianza* (note 1), 107: the author notes that a lot of information collected is used to improve the quality of products and services, but "the rest becomes a behavioral surplus" intended to predict the future choices of users.

[14] The Directive 2005/29/EC was implemented in Italy by Legislative Decree 2 August 2007, n.146 which amended the Consumer Code (Legislative Decree 6 September 2005 n. 206) to articles 18-27 and introduced arts. 27 *bis*, *ter* and *quarter*, distinguishing misleading commercial practices (section 1), aggressive commercial practices (section 2) and practices that are presumed to be unfair in any case falling within the so-called blacklist (attachment 1).

[15] The Directive in question amends Council Directive 93/13 /EEC (on unfair terms), Directives 98/6 /EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council (respectively relating to information on prices and unfair commercial practices and consumer rights). Directive 2019/2161 was preceded by Directives (EU) 2019/770 (relating to certain aspects of contracts for the supply of digital content and digital services) and (EU) 2019/771 (relating to certain aspects of contracts for the sale of goods), with the aim of promoting the growth of electronic commerce in the internal market, ensuring the right balance between a high level of consumer protection and the protection of the competitiveness of businesses.

acquires a more meaningful value in the context of online transactions, the cross-border nature of which makes processing more difficult of uniform rules.


*Image taken from https://www.lentepubblica.it/cittadini-e-imprese/direttiva-europea-e-commerce/*

The European legislator intends to safeguard the consumer's freedom of choice, in the phase prior to the conclusion of the agreement, conditioned by information asymmetries and imbalances in contractual power that may affect the weak subject's right of self-determination in dealing with the professional.

The change of perspective, from the negotiation act to the activity that precedes its realization, arises from the importance of the interests at stake (the consumer, on the one hand, the fairness of the market on the other) and the need to introduce preventive protection in the phase of promotion of goods and services[16].

Due to the emergence of increasingly sophisticated digital tools, the new directive (EU) 2019/2161 aspires to a modernization of European legislation aimed at greater transparency for web transactions and more effective protection for users.

Misleading marketing finds, in the digital environment, a facilitated channel of dissemination, due to the lack of attention of users in evaluating the contractual conditions, increasingly expressed, even graphically, in such a way as to confuse or mislead the interlocutors.

The definition of 'online markets' should be broadened: in order to cover new technologies (recital 25), consumers must be guaranteed detailed information *on the main parameters that determine the classification of offers* and on their counterpart in the negotiation, if *a trader, a non-professional or another consumer* (recital 26).

With a view to discouraging unlawful conduct, individual remedies are recognized, such as compensation for damage, price reduction or termination of the contract (Article 11 bis included in Directive 2005/29/EC), without prejudice to the operation of other instruments provided for by EU law or national law (paragraph 2); 'effective, proportionate and dissuasive' sanctions are imposed for violators of national provisions concerning unfair commercial practices (Article 13 of Directive 2005/29/EC as replaced by Directive 2019).

It is no coincidence that (recital 33) the application of consumer protection also in cases of contracts for the supply of free digital content, in which the consumer undertakes to provide personal data (for reasons other than those related to legal obligations): the definition of price is thus extended to the hypothesis of payment through the provision of personal data of free services.

[16] Consumer law seems to be oriented towards a model of business and market law. See C Camardi, 'Pratiche commerciali scorrette e invalidità' (2010) 6 Obbl. e contr., 408.

The peculiarity of the service provided by users of the platforms through the entry of their personal data, not strictly economic, but susceptible of economic evaluation, leads us to reflect on the connotation that the information provided by customers must assume, whether moral or negotiable, also for a correct identification of the protection instruments that can be implemented.

The only certainty, regardless of the privileged qualification, is that, once transmitted, the data escape from the sphere of users, who are unable to hinder its dissemination with the inevitable sacrifice of their privacy[17].

In order to ensure more effective protection for network operators, specific *additional information obligations for contracts concluded on online markets* (Article 6 bis inserted in Directive 2011/83/EU) are envisaged, which guarantee the consumer a Directive 2011/83/EU complete the aspects inherent to the conclusion of the agreement, before being bound by a distance contract.

The provisions set out in Regulation (EU) 2019/1150 of the European Parliament and of the Council are in the same direction, which aim to contribute to the functioning of the internal market by establishing rules aimed at ensuring that commercial users of online intermediation services and users owners of corporate websites that are connected with online search engines have adequate transparency, fairness and effective appeal possibilities (Article 1).

Potential victims of misconduct online are not only consumers, but also private individuals who trade in the field of professional properties, or legal persons who offer goods or services to consumers through online intermediation services for purposes related to their own. commercial, entrepreneurial, craft or professional activity (Article 2), which can equally be misled by omitted, misleading or inaccurate contractual information.

The fact that the EU legislator has included commercial users in the category of subjects in need of protection demonstrates that the potential victims of the online giants are not only those who use the related resources for private and consumer purposes, but also small and medium-sized entrepreneurs.

The proposal for a Regulation of the European Parliament and of the Council on the respect for private life and the protection of personal data in electronic communications (E-Privacy Regulation) is inspired by the protection of the privacy of network operators, both natural and legal persons. The regulatory text will repeal Directive 2002/58 / EC, integrating the provisions of the GDPR (General Regulation for the protection of personal data 2016/679). After four years of gestation (the first draft dates back to 10 January 2017) the Council of the EU, on 10 February 2021, reached an agreement on the final draft of the Regulation, which will replace the aforementioned directive, no longer adequate in the face to changes marked by technological and economic developments.

The new discipline, in order to create uniform rules for a digital single market, will protect, unlike the GDPR, also legal persons and will regulate large

[17] There are four types of activities likely to cause damage to privacy: 1) collection of information; 2) processing of the same to derive useful insights; 3) dissemination of information and insights themselves; 4) influence of interested parties based on information and to the insights gained (DJ Solove, 'A Taxanomy of Privacy' (2006) 154 U. Pa. L. Rev. 477, 482).

international companies (the so-called over the top), which until now had remained outside the scope of application. of the reference regulations.

The need to find repressive and sanctioning tools to guarantee vulnerable groups is felt most at the present time, following the changes resulting from the health emergency for the spread of COVID 19.

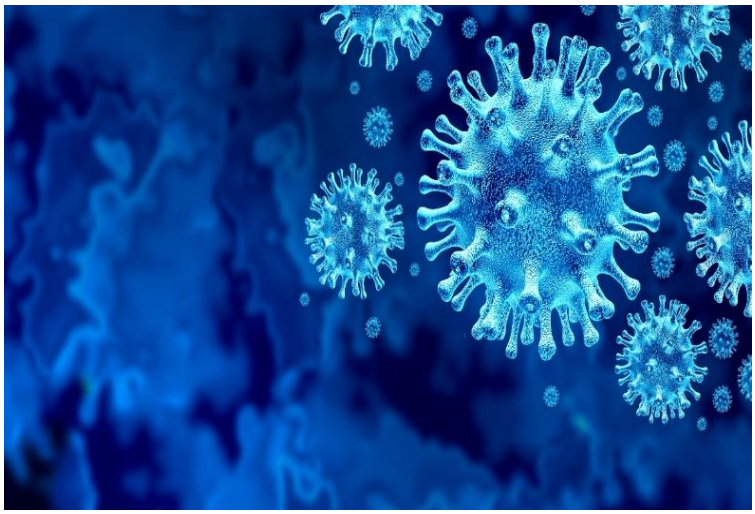

*Image taken from https://ilbolive.unipd.it/index.php/it/news/covid19-ricerca-unipd-svela-possibile-manifestarsi*

The forced closure of activities and services of all kinds and levels has favored the consolidation of the digital empire through the activation of remote communication and interaction techniques between citizens and businesses, replacing face-to-face methods, to avoid collapse of the inevitably compromised economy.

Technology companies have taken advantage of the dramatic situation to further strengthen their dominance and also extend into contexts in the past outside their sphere of action.

The panic generated by the pandemic has led to the spread of misleading advertising slogans, the increase in wholesale and retail prices of basic necessities and a real business of kits, masks, sanitizers and other products to prevent the infection.

The National Competition and Market Authority has intervened, on several occasions, on the recommendation of consumer associations, requesting information from the platforms concerned and arranging, in cases of abuse, the suspension of the promotion and sale of the products subject to investigation[18]. Even the marketing of a generic drug (Kaletra), advertised as the only remedy to fight COVID 19, even though the world health authorities agreed on the inexistence of a definitive cure to heal the infectious disease, has also fallen into the antitrust's crosshairs: the Guarantor Authority, considering the details of an incorrect commercial practice integrated, ordered, as a precautionary measure, the blackout of the website accused of advertising and disseminating misleading information[19].

The emergency phase we are going through has urged the national, international and European authorities to confront each other in order to reach a common solution to the problems dealt with.

[18] AGCM, *PS11752 - VOVA – Vendita on line prodotti emergenza sanitaria*, Provvedimento n. 28247 del 20 maggio 2020, in *Boll.* 22/2020.
[19] AGCM, *PS11723 - Farmaco coronavirus.it- KALETRA*, Provvedimento n. 28389 del 13 ottobre 2020, in *Boll.* 43/2020.

The implementation of the reference regulations and the adoption of the measures envisaged by them constitute a deterrent in the fight against online infringements, but require a strengthening of the enforcement system, in order to neutralize the plurioffensive nature of the offenses and to guarantee an appropriate use of the resources offered by the network.

## 3. Prospects for intervention and overseas solutions.


*Image taken from https://www.techeconomy2030.it/2020/09/21/un-paio-di-obiezioni-sulla-sostenibilita-della-digitalizzazione-italiana/stop-1374937_1920/*

The US Congress, like the European Union, recently spoke on the issue of competition in digital markets with an accurate investigative report[20], highlighting the monopoly of Google, Amazon, Facebook and Apple (GAFA) and the strategies used by them to maintain your domain on the network. The document provides a clear vision of the repeated illicit conduct to the detriment of users and operators with less contractual force and intends to outline an antitrust project to dismantle the monopoly power of Big Tech.

The companies, placed under the magnifying glass of the Antitrust Subcommittee of the American Chamber and the Justice Commission, have acted in an ambiguous and opaque manner, sometimes hiding behind apparently harmless market operations (mergers or acquisitions).

The survey revealed that companies set prices, dictate negotiation conditions, set the rules for search engines and advertising with serious damage to other operators, unable to compete or discouraged from investing.

The technological platforms consolidate their strength in the digital markets, in which they are rooted, by playing an intermediary role and becoming a gateway or gatekeeper between commercial and end users with consequent strengthening of entry barriers.

The American initiative stems from the need to review the antitrust regulations, that are no longer adequate to contain the impact of distorting phenomena on several levels, caused by the expansion of mega technological groups and the tendency to operate in the dual role of owner of the asset. and supplier of products and services.

[20] *Investigation of competition in digital markets. Majority staff report and recommendations.* Subcommittee on antitrust, commercial and administrative law of the committee on the judiciary. United States 2020.

Unfair practices and lack of contestability produce inefficiencies, in terms of price, quality and innovation, to the detriment of consumers, who are forced to accept the conditions imposed.

The American Sub-Commission has identified effective remedies that can affect the autonomy of action of the companies concerned, such as structural separation[21], which considers technological platforms as platform utilities, distinct from any participant[22], to prevent conflicts of interest with competitors[23], and the principle of "non-discrimination" or "platform neutrality"[24], according to which platform owners should not be allowed to obtain benefits on their adjacent products.

Since the strongest companies usually implement preferential, discriminatory or self-preferential treatments, altering the genuineness of competition on the net, it is necessary to guarantee, for the same services offered, the same conditions of competition, taking into account not only the price parameter, but also of the criteria for access to goods or services.

Among the proposed solutions, interoperability between platforms and data portability are of particular importance, to eliminate the entry restrictions of competitors and reduce the related costs for consumers[25]. These are two fundamental aspects connected to each other: as the absence of interoperability strengthens the power of dominant operators, compromising the ability of competitors to intervene by offering lower prices or qualitatively better products or services; data portability, on the other hand, allows you to solve the inconvenience of arbitrary use and translation of the same from a dominant platform.

The need to reconcile competition and digital and to find the most appropriate strategies to contain their negative consequences requires Strengthening Antitrust Enforcement.

The fact that the construction of digital monopolies took place precisely in the homeland of antitrust law[26] demonstrates the bankruptcy of the institutions and the inadequacy of the regulatory systems in force.

The Federal Trade Commission, the simultaneous enactment of the Clayton Act and the introduction of specific antitrust agencies have failed to prevent the perpetration of harmful behavior for competition and the concentration of market power in the hands of economically stronger companies. Compounding

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[21] *Investigation of competition in digital markets* (note 20), 377-379.

[22] E Warren, *Here's How We Can Break up Big Tech Medium* (Mar, 8, 2019), on https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9ae0da324c, [https://perma.unl.edu/H447-G9DJ].

[23] MH Riordan, *Competitive Effects of Vertical Integration'*, in P Buccirossi (ed.), *Handbook of Antitrust Economics* (MIT Press 2008), 145-182; *Global Antitrust Institute, Competition and Consumer Protections in the 21st Century, Vertical Mergers*: Hearing Before the Fed. Trade Comm'n (2018), on *https://gai.gmu.edu/wp-content/uploads/sites/27/2018/09/GAI-Comment-on-Vertical-Mergers.pdf*.

[24] K Caves, H Singer, 'When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard' (2018) 26 Geo. Mason L. Rev., 395; F A Pasquale, 'Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines' (2008) U. Who. Legal F, 263; F A Pasquale, 'Dominant Search Engines: An Essential Cultural & Political Facility', in B Szoka, A Marcus (eds.), The Next Digital Decade: Essays on the Future of the Internet (TechFreedom 2010), 399. In contrast to the application of the principle of non-discrimination to platform owners, see P F Todd, 'Digital Platform and the Leverage Problem' (2019) 98 Neb. L. Rev., 486.

[25] *Investigation of competition in digital markets* (note 20), 383.

[26] The oldest antitrust legislation is the Sherman Act of 1890 which, in Section 1 and 2, sanctions prohibited agreements and monopolization and attempted monopolization.

the reference framework is the wide discretion on the part of the Courts, sometimes more likely to restrict, rather than widen, the meshes of the provisions in force, leaving unpunished conducts likely to fall under the prohibitions.

The Congress report, noting the gaps in the current enforcement system, identifies as a strategy to follow the strengthening of the sanctioning system and the supervisory powers of the Commission, the increase of transparency and public responsibility of the antitrust agencies.

The picture outlined in the investigative work conducted by the US authorities highlights the need to intervene at multiple levels to restore competition in the digital market. It is not enough to review and integrate the reference standards, but also to encourage vigorous supervision and application[27].

The increasingly pervasive and invasive affirmation of the internet in daily and market experience, despite being a predictable phenomenon, as it is intimately connected to the technological revolution underway, has reached an unimaginable extent. The difficulty in finding deterrent tools stems from the now evident defensive architecture that, skilfully, the network operators have managed to implement, masking violations and anti-competitive ambitions.

*We are interested in the puppeteer, not the puppet* [28]: the drama of our age is not the affirmation of technology, but the logic that inspires it, transforming it into action, that is the capitalism of surveillance [29], that takes hold of human experience as a good from to draw on to obtain data from the behaviors that allow gatekeepers to strategically operate on the markets, ousting the contenders.

## Conclusions.

The analysis of the current regulatory landscape regarding digital platforms and unfair commercial practices has highlighted the doubts and criticalities that arise for the jurist in considering the categories and institutions involved.

Artificial intelligence and technological architectures, which it uses, have conditioned every aspect of daily life, making the users of the related services totally dependent and subjugated to the disruptive force of an unprecedented phenomenon.

The stronghold of surveillance capitalism constitutes a new economic order, that exploits human experience, in the form of data, as a raw material for abusive behavior, challenging democracies and breaking their fundamental values.

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[27] The Antitrust Subcommittee of the American Chamber has developed three lines of intervention (*Restoring competition in the Digital Economy, Strengthening the Antitrust Laws and Antitrust Enforcement*) to restore online competition and distort the system on which digital operators have laid their roots. *Investigation of competition in digital markets* (note 20), 377- 404.

[28] S Zuboff, *Il capitalismo della sorveglianza* (note 1), 24.

[29] S Zuboff, ibid, 18-78. 'Surveillance capitalism' has its origin in the 'discovery of the behavioral surplus', or in the extraction of more data than those useful for increasing the quality of services and in their reinvestment, which makes it possible to predict the future choices of users by transforming search engines into 'an intelligence all-encompassing artificial'.

The dating and inadequate regulatory frameworks and the unpredictability of negative implications for competition, privacy and consumer protection, have facilitated the rise of an instrumentalizing power, that *reduces human experience to observable and measurable behavior, while remaining deliberately indifferent to the meaning of that experience* [30].

The bitter awareness that we are at a point of no return should not discourage the desire for change. The interest in the topics of reflection, shown both by America and by Europe, bodes well for a significant reaction to the domination of Big Tech.

From the analysis of the European provisions the concern emerged to anticipate the protection of the weak parties of contractual relations to the phase preceding the conclusion of the agreements, through the provision of information obligations that can bridge the asymmetry between the parties involved and allow a conscious choice between the offers proposed.

On the American antitrust side, however, the admission of guilt of a system that did not work, made it necessary to rethink the most suitable lines of action to contain the harmful consequences and to remedy them.

*The dogma of the invisible hand, which today has reached the stage of automation, takes the form of an established truth that leads to an artificial paradise destined to continually prevail* [31].

The logic underlying the sovereignty of digital platforms, dominated by man through technology, although difficult to subvert, must not lead to resignation, but serve as a stimulus and deterrent to react.

If *the challenge of algorithms* has opened the way towards undeniable progress in various sectors of individual and collective life, *it cannot be separated from an anthropocentric governance of innovation to be declined in a personalist and solidarity key*, following the canons traced by the national Constitutions and the Charter of Nice[32].

[30] S Zuboff, ibid, 393.
[31] E Sadin, *Critica della ragione artificiale. Una difesa dell'umanità*, (1st edn, Luiss University Press 2019), 123.
[32] P Stanzione, 'La democrazia alla sfida degli algoritmi', in *La Repubblica*, Domenica, 18 aprile 2021, 30.