The Faux Pas in Modern Competition Law – Walled Gardens, Data Sharing and Algorithmic Decision Making

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I. Introduction

The milieu of the 21st century has triggered a wave of unprecedented changes across traditional market structures, igniting disruption and necessitating evolution in firms big and small.

A brief survey of the current global climate reveals the digital economy largely requiring some form of intervention – lest market abuse arise to the detriment of the modern consumer. In the United States, the Gordian Knot of *walled gardens* in the social media industry has triggered antitrust attention; where 'Google' and 'Facebook', juggernauts of the social media industry, have largely created a confined duopoly system.[1] Indeed, the ability for said companies to access much sought-after consumer data, led to regulation being necessary to prevent market abuse.

Winging this issue to the United Kingdom and the European Union, technological developments have led to a necessary change in regulations – to facilitate innovation, while at the same time to ensure adequate consumer protection. This paper will adopt a two-pronged approach – in the first part, an economics-focused view will be adopted to examine the present digital economy;

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[1] Criteo, Digiday, 'Life outside the walled gardens: Greater control, unique data and contextual advertising' (2019) <https://digiday.com/wp-content/uploads/2019/07/Criteo_2019U.pdf> (accessed on 8 June 2020).

and in the second - the current regime in the UK will be analysed from a legal perspective, focusing on how Art 101 TFEU and Chapter I of the UK Competition Act affects firms from a top-down level. The final scope of this argument contrasts the *Bundeskartellamt*'s investigation into Facebook with *AGCM*'s investigation in Italy, fully fleshing out the regulatory dilemmas encountered by competition authorities of the region. In the final analysis, this paper argues that more governmental intervention is required in three sub-areas; namely in (i) data sharing, (ii) self-learning algorithms and finally, (iii) marketplace(s) with walled gardens.

II. The Digital Economy

The G20 defined the digital economy as "a broad range of economic activities that include using digitised information and knowledge as the key factor of production, modern information networks as an important activity space, and effective use of information and communication technology as important drivers of productivity growth and economic structural optimization."[2] In essence, said term refers to daily economic activities stemming from the multifarious online transactions between businesses and consumers, accelerated by the Internet, Artificial Intelligence, Cloud Computing, Fintech and the Internet of Things.

Viewed thus, the digital economy is transforming at an unprecedented rate, with a myriad of new technologies constantly being introduced. 'Adapt or fade' has largely become the mantra of the twenty-first century - over the past decade, companies have been forced to adapt to the ever-changing playing field. Those failing to re-envision their business could lose previously attained competitive advantages and market share. Indeed, Uber, Facebook and Airbnb are but prime examples of how firms have leveraged on the digital economy, by staying ahead of the curve at breakneck speed while displacing traditional companies.[3]

III. Market Failure in the Digital Economy

Market Failure concerns the inefficient distribution of goods and services in the free market. Fundamentally, with the marketplace being driven by demand and supply, a failure to consider all costs and benefits leads to a change in one of the forces, thereby resulting in a divergence from the equilibrium. This article argues

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[2] G20 Digital Economy Development and Cooperation Initiative (2016) <https://www.mofa.go.jp/files/000185874.pdf> (accessed on 8 June 2020).

[3] Tom Goodwin, 'The Battle Is For The Customer Interface' (2015) <https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/> (accessed on 9 June 2020).

that three main areas of market failure continue to plague the digital economy, leading to opportunities fresh for government intervention.[4]

First, market failure looms large in the domain of collecting and sharing of data. As consumers may not have the technical knowledge to comprehend lengthy terms for access to online services, they may tend to bypass information which could be relevant to their decisions, thereby leading to imperfect information. In addition, asymmetric information may exist when there is a lack of transparency on companies' data security and utilisation of consumer data. The capacity to store data also increases the possibility of data breaches. Cybercrimes emanating from data breaches include identity theft, extortion and financial crime. Further, negative externalities would arise; third party consumers suffer distress for fear of becoming a victim, while businesses may lose the public's trust for being associated with the targeted company.

Second, algorithms may make tacit collusion easier. Algorithms increase transparency in data and enable firms to react to competitors rapidly. Hence, with escalating interdependence on each other's behaviours, firms strategically replicate actions using algorithms and set supra-competitive prices without explicit communication. In an oligopoly, tacit collusion is a crucial problem as prices may reach monopolistic levels. Barriers to entry are further exacerbated by costly machine learning and data-mining software vital to superior predictive algorithms. Smaller firms may not necessarily have the financial capacity to acquire these assets, and without any intervention, a 'David v Goliath' situation could never emerge in the digital economy.

Finally, the increasing emergence of *walled gardens* generates monopolies. A *walled garden* is a corporation which retains user data and information, having no desire to share it. In the advertising technology (Adtech) domain[5], the Facebook-Google duopoly has dominated the market, accounting for almost 59% of digital advertising spending in 2019. Just like algorithms, *walled gardens* could also amplify barriers to entry. Indeed, most walled garden corporations possess dedicated in-house developers to update and debug advanced software and tools. Hence, smaller firms are typically unable to keep up with this inherent advantage, rendering it unsustainable for them to survive in the long run. The domination of user data by walled garden corporations will ultimately inflate the expenses of other advertisers

4   Wolfgang Kerber, 'Digital markets, data and privacy: Competition Law, Consumer Law and Data Protection' (2016) <https://www.econstor.eu/bitstream/10419/144679/1/850599016.pdf> (accessed on 9 June 2020).

5   Natalie Klym and David Clark, 'The Future of the Ad-Supported Internet Ecosystem – Internet Policy Research Initiative', Massachusetts Institute of Technology (2019) <https://internetpolicy.mit.edu/wp-content/uploads/2019/03/publications-ipri-2019-01.pdf> (accessed on 9 June 2020).

and smaller firms in the marketplace, adding costs to society and hence leading to market failure.

The present stance is clear – government intervention is required; lest market failure forces continue to loom amidst the UK Digital Economy. Viewed thus, the current legislative regime governing the UK marketplace will first be analysed, before solutions to tackle market failure be suggested.

IV. Competition Law in the UK

The Competition Act largely forms the framework within the UK, integrating traditional market structures with new industry models ushered in by the digital economy. Yet, in the UK's 2018 *Furman Review*, concerns were expressed by the panel commissioned by the Government in the adequacy of said act to address the economic challenges posed by digital markets.[6] Indeed, the Panel viewed the Competition Act as 'insufficient to address the challenges of the digital market', with said policy reforms being 'slow and unpredictable', as regulators are often plagued with an 'enormous informational disadvantage', as compared to conventional technological companies.

The Furman Panel concluded with six main suggestions – (i) that a pro-competition digital markets unit should be created; (ii) that the Competition and Market Authority ('CMA') should be strengthened with enforcement powers against anti-competitive conduct; (iii) that merger control rules should be adopted to enhance the CMA's ability to challenge mergers detrimental to consumer welfare; (iv) that a formal CMA study be conducted specific to the digital market; (v) that developments relating to self-learning algorithms be conducted; and (vi) that international engagement to increase cross-border cooperation across countries. This paper argues said issue(s) narrows down to three principal areas of concern – the issues associated with (i) data sharing, (ii) self-learning algorithms and, (iii) marketplace(s) with walled gardens. This paper will address each limb part by part, weaving the economic concepts posited in the first part of this Article to determine the optimal level of governmental intervention required in each area.

A. Data sharing

The surge of big data has led to an increased risk of anti-competitive behaviour – particularly in agreements between firms for 'exclusive access' to a

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6   Digital Competition Expert Panel, 'Unlocking Digital Competition, Report of the Digital Competition Expert Panel' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> (accessed on 10 June 2020).

specific data set.[7] Akin to exclusive access to intellectual property rights between firms, exclusive licenses may similarly hamper market efficiency in the digital economy, very much to the detriment of consumers. Such practices may likely breach s 2 of the Competition Act.

The orthodox elements of competition between firms are conventionally based on factors such as price, quality, ability to create consumer loyalty and the like. The milieu of the digital economy has then led to firms competing on the level of privacy protection offered to said consumers as well (cf WhatsApp, Telegram on end-to-end encryption services offered to users). Viewed thus, competitors in this oligopolistic market may agree to reduce the level of protection offered to consumers, enabling them to drive down internal costs.[8] However, this may potentially breach s 2 of the Competition Act, and regulators should remain alert of such situations.

Another issue which relates to data sharing involves agreements between firms to practice price discrimination based on consumer preference. For instance, data on the willingness of consumers to pay for a certain item, or information on the amount of 'clicks' a certain item has, may signal potential future market trends. Should data sets be shared widely between huge oligopolistic firms on the market, this could distort competition and impact consumer welfare. In this light, it is argued that the United Kingdom could draw inspiration from the Competition Commission of Singapore – so long as said data set is (i) historical; (ii) sufficiently aggregated; (iii) cannot be attributed to particular business; (iv) not confidential; and (v) shared with consumers or governmental agencies, data sharing should not be prohibited.[9]

However, Sloan and Quan-Hasse (2016) caution that where said data exceeds the earlier mentioned boundaries, particularly in markets with large oligopolies as opposed to monopolistically competitive industries, a regulator should arm itself

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[7]   Nestor Dutch-Brown, Bertin Martens, Frank Muller-Langer, 'The Economics of Ownership, Access And Trade in Digital Data' (2017) <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756. pdf> (accessed on 11 June 2020).

[8]   Antonio Capobianco, OECD, 'Quality Considerations in Digital Zero-Price markets' (2018) <https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf> (accessed on 12 June 2020).

[9]   Competition Commission of Singapore, 'CCCS Guidelines on The Section 34 Prohibition 2016', [3.17]–[3.24].

with antitrust alarm bells to prevent any adverse effects on competition in the free market.[10]

B. Self-learning algorithms

Paroche (2019) warns that the increased use of algorithms by large firms could lead to ease of collusion amongst companies.[11] Three main concerns are at play. Firstly, such algorithms could be used for real-time analytics, allowing for collection of prices, decisions and data of competitors; they may be used to detect "intentional deviations from collusion"[12]; and can be used to suggest optimal reactions to changes in competitor behaviours, market conditions, or mistakes.

Picture this – self-learning algorithms, operating unfettered in the free marketplace, may possibly communicate with other separate algorithms used by other independent market operators, where said algorithm(s) may conclude that the best way for profit maximisation would be through colluding with other algorithms by price-fixing. The lack of a human agent in reaching said agreement brings to light questions of liability attribution – indeed, the toolkit offered by the current Competition Act may not be sufficiently robust in handling the myriad of challenges brought forth by the digital economy.

Currently, s 2 will only catch instances where an algorithm is used to facilitate any agreement already breaching said provision; or when said algorithm is used through a 3P intermediary in rigging or fixing prices to the detriment of consumers. As such, self-learning algorithms are not caught under s 2.

C. Marketplaces with walled gardens

The main issue in marketplaces with walled garden stems from the relationship between data held by an organisation and the competitive advantage to which it will ultimately derive. In this situation, the *kind* of data held ought to determine whether said company should be subject to scrutiny. This paper (and the Global Competition Review) believes that in the context of regulating data held in said marketplaces, said data's capability to generate (i) network effects; (ii)

[10]   Luke Sloan and Anabel Quan-Hasse, *The SAGE Handbook of Social Media Research Methods* (SAGE Publications Ltd 2017) 156, 160.

[11]   Paroche, 'Algorithms in the Spotlight of Antitrust Authorities' (2019) <https://www.lexology.com/library/detail.aspx?g=4bb4088e-ab54-4862-9d73-f83f4f344266> (accessed on 14 June 2020).

[12]   DAF/COMP (2017), 20 at [46].

multi-homing properties and (iii) dynamism within marketplace ought to be factors a regulator should account for.[13]

D. Network Effects

Mitomo (2017) posits that network effects are particularly amplified in E-Commerce markets.[14] Network effects involve an economic phenomenon where the value of one product increases through gaining an increasing consumer following in the marketplace.

Bifurcating the abovementioned market into two limbs, the use of data could potentially lead to 'traditional effects', and 'spill-over effects'. For the former, the value of a product largely depends on how many end-users there are on the market. For the latter, an increase in users on one side of the marketplace attracts more sellers (cf digital marketplaces, whereby more downloads attract an increased number of sellers to the marketplace).

Said network effects are responsible for increasing barriers to entry for SMEs; for Stucke and Grunes (2016) posit that if a player is able to harness data to 'tip' the market in favour of a number of suppliers, the leading firm may acquire such dominance, ultimately drowning out competition and preventing small firms from gaining the required quantity and quality of data necessary to achieve any competitive edge.[15]

It is ultimately in the interest of a regulator to find out the minimum efficient scale before the scale is 'tipped' and regulate the marketplace at said point.

E. Multi-Homing

The digital economy introduces 'multi-homing', as Digital marketplaces, compared to the conventional industry, have created marketplaces where 'membership' is required to access said digital services.

Loyalty programs advanced by a myriad of digital companies (cf Cab hailing apps in the UK) shows an array of 'loyalty programs' locking consumers into said service unless a certain amount is spent in a given time. Viewed thus,

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[13] GCR Insight (2019) <https://globalcompetitionreview.com/edition/1001419/e-commerce-com-petition-enforcement-guide-second-edition> (accessed on 15 June 2020).

[14] Hitoshi Mitomo, 'Data Network Effects: Implications For Data Businesses' (2017) <https://www.econstor.eu/bitstream/10419/169484/1/Mitomo.pdf> (accessed on 19 June 2020).

[15] Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (Oxford University Press 2016).

switching to a new service requires one to give up on said benefits on another platform, and points towards market power of the digital company in question.

It is in the interest of a regulator to examine the existence of multi-homing in any given digital economy, in order to detect any type of anti-competitive behaviour.

F. Dynamism of Digital Markets

Large oligopolistic firms have huge resources for R & D, allowing smaller firms to be easily edged out. This points back to the Gordian Knot of *walled gardens*, which should not be an issue discounted in the UK. The FCO's investigation into Facebook[16]; the European Commission's raids into alleged agreements by Polish Banks in refusing to provide data to rivals in the Fintech marketplace[17]; alongside Google's walled garden advertising methods[18] are but three instances of this emerging issue.

Furthermore, the merger of walled gardens (cf Google/DoubleClick[19]; Facebook/WhatsApp[20]) still falls outside of the ambit of the CMA. Likewise, in *Asnef-Equifax*, the ECJ opined that privacy concerns arising as a result of the digital economy were outside the scope of powers which a competition authority may interfere in.[21]

Taking stock, the present position appears rigid. Yet, the boundaries may be shifting, particularly following the 2018 *Furman Review*.[22] In fleshing out the future position that English Competition Law should head towards, it would be helpful to study two cases in detail as mentioned earlier in the introduction

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[16] Bundeskartellamt (FCO) (2019) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=5> (accessed on 20 June 2020).

[17] European Parliament, 'Competition Issues in the Area of Fintech Technology' (2019) <https://www.finextra.com/finextra-downloads/newsdocs/ipol_stu.pdf> (accessed on 21 June 2020).

[18] John Kornfield, 'The Socioeconomic Impact of Internet Tracking' (2020) <https://www.hbs.edu/faculty/Publication%20Files/The%20Socio-economic%20Impact%20of%20Internet%20Tracking_9383a3a2-0299-4489-ad6b-113fb1328acc.pdf> (accessed on 22 June 2020).

[19] Commission of the European Communities, Case No COMP/M.4731 – Google/Doubleclick.

[20] Commission of the European Communities, Case No COMP/M.7217 – Facebook/Whatsapp.

[21] Commission of the European Communities, Case No C-238/05 – Asnef-Equifax.

[22] UK Government, 'CMA Welcomes Furman Review Recommendations' (2019) <https://www.gov.uk/government/news/cma-welcomes-furman-review-recommendations> (accessed on 24 June 2020).

- the *Bundeskartellamt*'s investigation into Facebook with *AGCM*'s investigation in Germany.

V. Germany and Italy's Investigations into Facebook's Abuse of Dominance

A. Bundeskartellamt's investigation

In the *Bundeskartellamt*'s investigation against Facebook Inc. and Facebook Germany GmBH[23], the *Bundeskartellamt* pointed out that Facebook was 'abusing its dominant position in the marketplace, by only allowing use of its social media application conditional on forcing users to surrender any kind of user data given to its platform'.[24] There, the panel established a distinction between the collection and use of data on (i) Facebook; and (ii) 3P websites; concluding that only 3P websites were subjected to an investigation by said panel. In summary, the *Bundeskartellamt* prohibited Facebook from imposing terms on its users which may have the effect of forcing such users to consent to the collection of personal data through 3P applications, and thereafter assigning such information to individual accounts.[25]

Viewed thus, the merging of data between (i) and (ii) will only be possible should said user have given 'voluntary consent'; however, should said element not be present, the *Bundeskartellamt* opined that the data sharing must then be 'substantially restricted'.

The legal basis for this decision in restricting Facebook's ability to share data is interesting, as the Commission choose to prosecute the case through Competition Law, as opposed to consumer protection or data protection law. Indeed, Colangelo and Maggiolino (2018) argue that the latter should have been the unravelling knot in the German Facebook Case.[26] This is because an attack through the fortress of Competition Law requires the Commission to (1) define the relevant market and (2) prove that *Facebook* is indeed abusing a dominant position. The Commission had no choice but to choose this route of attack as it lacked the competence to proceed via consumer protection or data protection law. This is because under German Law, only qualified institutions, associations and chambers of industry

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[23] See (n 16).

[24] ibid [1].

[25] Bundeskartellamt (FCO) Facebook Proceedings Paper Background, [2] (2019), <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6%20and%20the%20corresponding%20press%20release> (accessed on 25 June 2020).

[26] Maggiolino Colangelo, 'Data Accumulation and the Privacy-Antitrust Interface – Insights from the *Facebook* Case' (2018) <https://www-cdn.law.stanford.edu/wp content/uploads/2018/02/colangelo_maggiolino_wp31.pdf> (accessed on 26 June 2020).

and commerce may enforce such instances in Civil Courts, and the *Bundeskartellamt* does not fall in such a category.

Within its armoury, the Commission then utilised Art 19(1) of *Gesetz gegen Wettbewerbsbeschränkungen* (analogous to Article 102 TFEU). However, this mode of attack does not sit neatly with EU Law. Wiedemann and Botta (2019)[27] posit that pursuant to Article 3(1) Reg. 1/2003, regulators are required to apply Article 101 and 102 when said anti-competitive conduct has an impact on 'intracommunity trade'. Said legislative provision ought to be effective here; for Facebook, Inc. does operate in Europe through its Irish counterpart. Pursuant to Article 3(2) Reg. 1/2003, EU Member States have the option of relying on its National Law should said provision be stricter than Art 101 or 102.

Through contrasting Article 19(1) with Art 20 of *Gesetz gegen Wettbewerbsbeschränkungen*, which prevents the abuse of 'relative' market power, Weidemann and Botta posits that the former is not as strict as the latter, and hence the exception allowed by Article 3(2) Reg. 1/2003 ought not to apply. This case in German Law thus sits uneasily with EU Law, as Article 102(a) should instead have been used as the legal basis for said prosecution. The CJEU has interpreted Article 102(a) to regulate any 'unfair trading practices imposed by dominant firms on consumers', which clearly covers the *Bundeskartellamt Facebook* case.[28]

B. AGCM's investigation

In *AGCM's* investigation of Facebook[29], the AGCM sanctioned Facebook for (i) misleading consumers[30], and for (ii) aggressive consumer practices through encouraging users not to 'block' transfer of their data to 3P applications. Indeed, the default choice for consumers was to opt into said abovementioned transfer of data to 3P intermediaries.

The legal basis for this decision was the *Codice del Consumo*, otherwise the Consumer Protection Code of Italy, which incorporates the Unfair Consumer Practices Directive. This code prevents any 'unfair practice' from being operative in the marketplace. An 'unfair' practice, pursuant to the code, is defined as one

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[27] Botta Weidermann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) <https://journals.sagepub.com/doi/full/10.1177/0003603X19863590> (accessed on 30 June 2020).

[28] See CJEU's interpretation regarding Article 102(a) to cover such instances from Case C-27/76 - *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*; Case C-179/90 - *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* and Case C-7/82, *esellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities*.

[29] *Autorità Garante della Concorrenza e del Mercato*, Facebook Inc Judgment (2018) <https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf> (accessed on 30 June 2020).

[30] ibid [4].

which is 'contrary to the requirements of professional diligence, which materially distorts the economic behaviour in the marketplace'.[31]

At [56] of the decision, the AGCM posited that the practice of Facebook was contrary to the *Codice*, as Facebook did not 'adequately inform consumers with regard to the extent of their data which was required to access Facebook's networking websites'. In a series of examples listed under Annex I of the Unfair Commercial Practices Directive, the actions of Facebook easily breach the instance where said company describes 'a product as free, but the consumer has to pay anything other than the unavoidable cost of responding to a commercial practice' – here, the users are giving up data, enabling the AGCM to conclude that Facebook has certainly misled its users.

As compared to the *Bundeskartellamt*, the AGCM relied on consumer protection law as opposed to competition law, hence enabling it to sidestep the ambit of Article 102(a) TFEU. This was possible, as the AGCM had the competence under Italian Law to transverse into the field of consumer protection, hence enabling it to route its attack using an easier framework.

C. The lessons for English competition law

The two cases examined reveal a fundamental unease within Competition Law in the EU, which presents important lessons for English Competition Law. As observed, there are a number of different attack routes for regulators in any given unfair practice within the digital economy - the trifurcation of options as seen in *Bundeskartellamt*'s and AGCM's instance are but an instance of the dilemma faced by any regulator. Indeed, a digital company's compliance with one legal regime may not guarantee its compliance with another regime, with this being clearly recognised by the AGCM at [46] in its sanctioning of Facebook.[32]

The Gordian Knot therefore arises – the present lack of harmonisation between several different areas of law inevitably leads to legal uncertainty for business stakeholders, as digital companies may simply end up being sanctioned a myriad of times. Indeed, this has triggered a serious need for the reform of Competition Law in the region, and the European Data Protection Supervisor has called for more co-operation between leaders of various legal regimes.[33] Viewed thus, there is a general sense of confusion for competition authorities which possess competency in more than one legal regime. The question of which area of law

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[31] Unfair Commercial Practices Directive, Article 5(2).
[32] (n 29).
[33] European Data Protection Supervisor EDPS Opinion on Coherent Enforcement of fundamental rights in The age of big Data (2016) <https://edps.europa.eu/sites/edp/files/publication/16-09 23_bigdata_opinion_en.pdf> (accessed on 1 July 2020).

to tap upon often becomes an important issue and has evolved into a potential source of legal confusion. For example, the AGCM has often invoked the *Codice* without considering Article 102(a) TFEU, as it often provides for an easier route to sanctioning. One such instance would be in the earlier mentioned *Facebook/ Whatsapp* merger case. There, the AGCM followed an established line of decisions under Italian Consumer Law to sanction the merger, and concluded that Whatsapp users 'were misled' by Facebook itself.[34]

A regulator should always seek the route which provides 'deterrence', instead of 'ease of prosecution'. It is hence argued that Competition Law should be the route regulators should transverse to tackle the emerging market failures presented by the digital economy. Under competition law, behavioural commitments can be encouraged; and a competition regime fit to address challenges introduced by the digital economy will create a regulation asymmetry encouraging smaller firms to enter the market, thus preventing monopolistic behaviour. This is the better approach, as compared to Consumer or Data Protection Regimes, as said regimes often impose a burden on smaller firms as well. In the context of English Law then, it is especially relevant to note the conclusion of the *Furman Review*, which argues for a strengthening of present merger control rules currently possessed by the CMA.[35]

VI. Conclusion

The conclusion of the Furman Panel is striking – the present Competition Act in the UK is insufficiently robust to address the challenges of the digital economy. In addition to the six recommendations as offered by the Furman panel, this paper also argues that regulators should take a more interventionist approach in areas of (i) data sharing; (ii) self-learning algorithms; and (iii) marketplaces containing walled gardens, and the normative view as argued in the earlier part of this Article is relevant – indeed, market failure is rampant in the present digital economy. The optimal level of intervention would be for CMA to address *asymmetric information* and privacy protection issues in the area of data sharing; setting key standards on ethical and permitted usage of self-learning algorithms for the second; and weakening barriers to entry, equipping smaller firms with the ability to penetrate said market, largely reanimating a 'David v Goliath' situation in the modern world. This can be done through the harmonisation of different legal regimes and

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[34]   *Autorità Garante della Concorrenza e del Mercato*, Sanzione da 3 milioni di euro per WhatsApp, ha indotto gli utenti a condividere i loro dati con Facebook (2017) <https://www.agcm.it/dotcms-DOC/allegati-news/CV154_vessestratto_omi.pdf> (accessed on 1 July 2020).

[35]   See (n 6).

focusing on Competition Law as the panacea against the emerging monopolistic practices by firms harnessing technology and data.

In the final analysis, the legislative champagne should not be put on ice – CMA should be encouraged to intervene in the aforementioned areas to ensure an open and fair digital marketplace of tomorrow.