Co-funded by the Erasmus+ Programme of the European Union

Jean Monnet Network on EU Law Enforcement

Working Paper Series

The digital economy as a threat to the private enforcement of competition law

EU Competition Law Enforcement: Challenges to Be Overcome

Jeanne Mouton[1]

Abstract

The paper reviews the literature on the theories of harm in digital markets and the specific difficulties in quantifying the damage in private enforcement of competition. Then, the development of a tentative case law on private enforcement in digital markets in the European Union is observed in comparison with the US antitrust practice. Finally, the paper raises issues posed by the digital economy for competition law claims for damages and suggests some approaches to solve them.

Keywords:

Competition law, private enforcement, damages, digital markets

[1] Jeanne Mouton is a PhD student in Economics at Université Nice Côte d'Azur, GREDEG, and an academic assistant in the European Economics Department of the College of Europe for the European Law and Economic Analysis track.

I. Introduction

Competition law can be enforced by public or private enforcement with EU practice emphasising public enforcement, as opposed to the private enforcement culture of antitrust in the US. The Directive 2014/104/EU sets a framework for damages compensating breaches of Articles 101 and 102 of the TFUE. The European Commission published a working document on the implementation of the Directive in December 2020[2], to draw first indications of its impact, among which an increase of the number of cases related to cartel infringements. The actions for damages are indeed more frequently observed and studied in the framework of cartel infringements[3], with a under-representation of private enforcement when it comes to abuse of dominance position. Quoting the same study, which took into account 239 cases, 57% of those were following a decision from a Competition Authority and 40% a decision from the Commission. The stand-alone private enforcement, which are damages claims not following a decision from a Competition Authority, are poorly represented. This lack of representation of private enforcement of abuses cases might be explained by several factors and the success of the private enforcement of cartels favoured thanks to the presumption, Article 17 of the Directive, that cartel infringements cause harm.

As for any legal ground, assuming the rationality of criminals, an enforcement system is only deterrent when the risk of being sanctioned is higher than the expected utility of infringing the law (Becker, 1968). There is some literature on designing optimal enforcement systems, with both public and private enforcement, though less related to European competition law[4], where the debate was the one of over versus under enforcement of competition law[5]. Public and private enforcement differ by their objectives, means and methods. While public enforcers aim to maximize the social welfare, appreciate globally the damage and take into account the potential effects of the infringement in computing the fine, the private enforcement's goal is to compensate for an individual damage, for the real individual effect of the infringement. If the public enforcers answer to a deterrence goal, private parties do not integrate an objective of deterrence in their choice to introduce or not a private action, they are only motivated by the compensation of their harm. It does not mean that private enforcement does not have a deterrent effect, on the contrary, however, the deterrent effect is ex-post, unless private parties purposely decide to claim for damages based on a perceived injustice.

Jullien and Sand-Zantman (2020) question whether platform competition leads to monopolization. The authors focus on the demand-driven networks effects as the most striking aspect of digital markets favouring large firms. Each platform has incentives to reach a critical mass for which they need to attract more buyers in order to be attractive for the sellers' side. There is also a more than ever growing literature on the risks of algorithmic collusion, both its legal and economic challenges and the theoretical possibility to detect these cartels with algorithmic evidence[6]. However, when relating to the digital economy, the characterisation and quantification of harm is not any longer "easier" for cartels (though it would be immensely interesting to face a private enforcement case of algorithmic collusion).

---

[2] EU Commission, SWD (2020) 338 final, on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2020]

[3] Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2019 ed.)', (2019), Concurrences

[4] A. Mitchell. Polinsky, 'Private versus public enforcement of fines' (1980) The Journal of Legal Studies

[5] Emmanuel Combe, Constance Monnier, 'Fines against hard core cartels in Europe: The Myth of Overenforcement', Antitrust Bulletin, (2011). Marie Laure Allain, Marcel Boyer, Rachidi Kotchoni, Jean-Pierre Ponssard, 'The determination of optimal fines in cartel cases The Myth of underterrence', (2011)

[6] Ariel Ezrachi, Maurice E. Stucke. 'Artificial intelligence & collusion: When computers inhibit competition' (2017) *U. Ill. L. Rev.*; Ulrich Schwalbe, 'Algorithms, machine learning, and collusion' Journal of Competition Law & Economics, (2018); Axel Gautier, Ashwin Ittoo, Pieter Van Cleynenbreugel, 'AI algorithms, price discrimination and collusion: a technological, economic and legal perspective' (2020) European Journal of Law and Economics; Nathalie de Marcellis-Warin, Frédéric Marty, and Thierry Warin, 'Vers un virage algorithmique de la lutte anticartels?' (2022)

The theories of harm are as varied as the business models of the online platforms and their severity differ and depend on the place of the private parties inside the ecosystem of the platform. Moreover, when considering all the users and trading partners of digital markets, one can expect very spread damages. Taking the example of "attention brokers" (Prat and Valletti, 2019), where an online platform would be defined by the ability to obtain information about the individual preferences of their users and to target the advertisements displayed on their platform, this business model may lead to abuse of exploitation with an excessive data collection on the consumers' side. We could also think of loss of quality, loss of chance, loss of innovation, self-preferencing, as examples of theories of harm in digital markets.

We are then faced with the challenge of compensating hardly imputable spread damages, causing harm to various types of private parties under different theories of harm, the quantification of which may require thinking outside our current legal toolbox.

If the public enforcement authorities famously sanctioned online platforms for their abuses, it seems to be very few follow-on damages cases, which may be surprising since the private parties would have benefited from the establishment of the infringement[7].

Having in mind that damages actions are still under-represented related to abuse of dominance cases, this paper aims to reflect on whether the digital economy adds extra challenges, or a threat, to competition law private enforcement. First, the paper opens on a theoretical section reviewing theories of harm in digital markets. Secondly, the private enforcement case law in digital markets is discussed. Finally, the paper lists (non-exhaustive) issues raised by the digital economy for competition law private enforcement and considers some proposals to tackle these challenges.

II. Theories of harm in digital markets

The definition of digital markets has been approached by the academic literature, Competition Authorities and institutions with a list of common characteristics. As an example, the Crémer report[8] identifies some key characteristics of the digital economy, among which, networks externalities, extreme return to scale and the role of data. These characteristics favour market concentration to the benefit of a handful players, so increasing risks of abuses of dominance.

The digitalisation of the economy makes it impossible to reach a one-definition-fits-all. On the contrary, it seems that the understanding of the digital markets is only possible with the recognition of the heterogeneity of the players.

For this reason, Caffarra (2020) proposes to "follow the money", meaning starting from the business models of the platforms or the aggregators to map the competitive issues. This idea of framing the business models in the digital economy was researched by Brousseau and Pénard in 2007. The authors define a digital business model by a combination of three roles played by platforms, which can be either a pure market intermediary, a pure assembler, a pure knowledge manager or combine two or three of these identified roles. Bock and Wiener, in 2017, conducted a review of the digital business models literature, with a sample of 56 studies from 25 journals and four conference proceedings, with the aim to draw a taxonomy of digital business models. From their research the authors identified five key dimensions: digital offering, digital experience, digital platforms, data analytics and digital pricing. Caffarra (2020) focuses on the monetisation strategies in digital markets to draw the incentives of these platforms. She relies on the distinction from between platforms and aggregators and lists what incentives play for advertising-funded models and platform

[7] As opposed to stand-alone actions, which also raises the question of the optimal sequentiality, are follow-on actions more efficient than stand-alone actions?

[8] Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, Competition Policy for the digital era, EU Commission (2019)

models. The author then argues that all the competitive issues raised can be tackled with available theories of harm, such as foreclosure, exploitation, misinformation and self-preferencing.

A background note from the OECD reviews the type of abuses of dominance in the digital market[9], from the observed conduct to the matching theory of harm. This report linked "traditional" theories of harms to seven specific anticompetitive conduct or market outcome observed in digital markets, among which, for example, a dominant, vertically integrated charging downstream rivals higher prices or offering less advantageous terms or quality can be analysed under the margin squeeze theory of harm. In the end, the report rely on several very known theories of harm in competition case law: refusal to deal, exclusive dealing, loyalty rebate, bundling or tying, predatory pricing. To this list we could add the difficult case where the competitor or complementor is eliminated even before entering the market (which would be analysed as a loss of chance for quantification purposes).

Specifically to exploitative abuses, for which fewer case law have been observed, Botta and Wiedmann (2019) analyse in depth three categories of exploitative abuses by dominant platforms having the potential to directly harm consumers: excessing pricing taking the form of an excessive data collection, discriminatory pricing facilitated via algorithms and unfair trading conditions where data protection terms and privacy policies could be unfair from a competition law point of view. Additionally, Bougette, Budzinski and Marty (2022) propose to address the self-preferencing theory of harm as an exploitative abuse where marketplace providers have the ability to engage in self-preferencing strategies and where they experience incentives to profitably employ self-preferencing.

However, if anticompetitive behaviours in digital markets can be approached with traditional theories of harm, there is one significant difference between public and private enforcement once the infringement is established: damages action aim to compensate for an individual harm that must be quantified, which can be particularly difficult in digital markets.

The practical guide on the quantification of harm in damages action published in 2013 by the EU Commission[10] distinguishes between two broad categories of harmful effects following infringements to Article 101 or 102: increase in the price paid by customers of the infringing undertakings (an overcharge) and exclusion from the market or reduction of the market shares. The guide does not aim to exhaustively cover all possible theories of harm and their quantification, but rather to offer some guidance on the two categories raised above. Nonetheless, the guide confirm the flexibility of the Directive 2014/104/EU to various theories of harm, confirming that infringements to Article 101 and 102 may result in "further harmful effects, for example adverse impacts on product quality and innovation".

The private enforcement of competition in digital markets also raises broader issues. Looking at the transatlantic literature, Newman (2016) stresses the increase complexity of proofs for customers seeking damages for attentional or informational overcharges. While reviewing several approaches to damages valuation in zero-priced markets, only the stated preferences approach (and its limits) seems transposable in the EU practice. The author, quoted by the OECD on a background note on quality considerations in digital zero-price markets[11], insists on the importance of public enforcement in these markets to deter anticompetitive conduct because of the difficulties in proving damages in cases involving zero-rpcied products.

To add to these hurdles, an infringement to competition law in a digital market has the potential to impact an entire eco-system, from business partners, complementors, clients and consumers. Hence, the economic players on the market face the risk of a widespread damage, than can be diffuse, but also future and hardly attributable and compensated. Future if no proper remedies can alter the behaviour from the digital entity, hardly attributable if the technology is advanced or involve many intermediaries and hardly compensated in

[9] OECD, 'Abuse of dominance in digital markets' (2020)

[10] EU Commission, SWD(2013) 205, Practical guide quantifying harm in actions for damages based on breaches of article 101 and 102 of the Treaty of the functioning of the European Union [2013]

[11] OECD, 'Quality considerations in the zero-price economy' (2018)

the event of non-monetary damage. Furthermore, one could question the role of private enforcement in digital markets if a player was to be excluded from the market and compensated for this exclusion, are the damages replacing the private parties in the situation that would have prevailed before the infringement or are damages playing a role of distributive justice only? Finally, a two-fold difficulty adds up. Consumers are unaware of the [12]. On the contrary, business partners, complementors, may have the signal of the infringement on the market but are exposed to a retaliation risk taking the form of the exclusion from the eco-system on a very concentrated market[13]. To sum up, the business partners have the ability to detect damage, while the consumers have not, but business partners have no incentives to bring a claim for damages.

III. The private enforcement competition case law in digital markets

Private parties can introduce a private enforcement action following an infringement to Article 101 or 102, with the aim to be fully compensated for the damage suffered. The full compensation shall replace private parties in the situation that would have prevailed should the infringement have not occurred. An action for damages can either be stand-alone or follow-one, meaning in the last case that the action would follow a sanction of the infringement through public enforcement. Follow-on actions are then reputed more attractive for private parties since the infringement has already been established.

Public enforcers, in particularly the EU Commission, made of the digital market one of their key enforcement priorities, leading to numerous heavy sanctions. In some of these cases, formal complaints were introduced by competitors, raising the expectation of follow-on private enforcement. Then, one must ask how could we explain that there was not a "boom" of private enforcement actions in the digital markets. Is it a hint that there is no incentives for private parties to introduce an action for damages or should we blame it on unobserved data?

The US Antitrust practice, more litigation based, tackled damages action in the digital sector. In May 2019, the US Supreme Court, in the Apple vs. Pepper case, ruled that iPhone's users could introduce overcharges claims as direct buyers and have standing to introduce an action against the platform distributing their phones. The ruling clarified the *Illinois Brick* rule as regard to litigation in the digital markets. In this particular case, iPhone's users contested the monopolization from Apple of the after-market of iPhone's software applications allowing the dominant platform to charge a 30% fee to independent developers eventually causing higher prices to the consumers purchasing these apps. The Amicus Curiae by Alden F. Abbott provides guidance on the application of the Illinois Brick rule by stating that Apple "acts as an agent for the developers, completing sales on the developers' behalf at prices the developers set", Apple has then contractual relationships with both the developers and the consumers[14]. The key point of the Illinois Brick rule is that "Section 4 cases should not conduct what this Court deemed to be unacceptably complicated inquiries about how to "apportion the recovery" among the various parties in the chain of distribution", and the Apple vs. Pepper case makes clear that final consumers can seek damages whenever they are in contract with the dominant platforms in digital markets.

Google and Facebook are also facing private enforcement actions for anticompetitive practices in the US. In 2020, private publishers filed antitrust lawsuits against Google after experiencing decreases in their revenues. The publishers accused Google to make it impossible for them to set business deals with smaller advertisers competing with Google because of its position allowing the platform of representing buyers, sellers and

[12] Pinar Akman, 'A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets' (2022) Law and Business Review; Alessandro Acquisti, 'The economics of personal data and the economics of privacy' (2010) OECD Working paper on the information economy

[13] Hence, no private enforcement actions but public enforcement launched following formal complaints by complementors and competitors (AT. 39740 Google Shopping, AT.40437 App Store)

[14] Brief for the United States as Amicus Curia, Apple Inc. v Pepper, Alden F. Abbott, n°17-204, [2018]

controlling the exchange, by setting the auction and pricing rules. These antitrust allegations are also followed by complaints from state attorney general and the Justice Department. The proceedings are still ongoing with a trial date for fall 2023. On another GAFAM's side, a class action was introduced against Facebook in December 2020, following antitrust lawsuits brought by the FTC and 48 attorneys general. The class action seeks treble damages to compensate for Facebook's abuse of dominant position, which allegedly allowed the company to implement dark patterns causing both the "consumers to pay a higher price than they would freely choose" and allowing Facebook to "sell its adds at higher prices than they would otherwise garner".

With a slight delay, and in spite of soon entry in force of the DSA and DMA confirming a public enforcement practice (since both Regulations did not included specific provisions encouraging actions for damages), the European Union may catch up on private enforcement in digital markets.

The price parity clauses, which restrict sellers's ability to set prices, in the market of online booking, led to several competition law public enforcement sanctions. Specifically to Booking.com, Competition Authorities of France[15], Sweden[16], Germany[17], Russia[18], Hong-Kong[19], Czech Republic[20], to name of few, introduced public proceedings against the platform's price parity clauses. In Germany, following a global debate on the anticompetitive issue, about 2 000 hotels would have launched damages action against the platform's use of wide price parity clauses[21]. Furthermore, the EU Court of Justice, in the context a preliminary ruling, brought clarification on actions for damages following the anticompetitive behaviours from the online booking platform. Following a request from the German Federal Court of Justice, the EU Court of Justice clarified the jurisdiction rules related to action for damages[22]. To measure the impact of this ruling, we could quote the Hungarian Competition Authority, which entitled his press release following the preliminary ruling: "Amazon, Facebook, Google, Apple, Booking.com – domestic undertakings can also sue foreign 'giants' in Hungarian courts"[23]. The clarification of procedural rules relatively to competition action for damages definitely acts in favour of the private parties.

Recently, Google has been the target of damages actions following the Google Shopping case[24]. In Italy, 7 Pixel, active in the Italian market for e-merchant product comparison services, introduced a request to the Court of Milan for a "preventive technical expertise", which is an alternative of action to damages, as an amicable method of settling disputes. 7 Pixel claims between 811 and 906 million euros of damages for the harm suffered. The request has been rejected by the Court in January 2021, opposed by the argument from

[15] European Competition Network Brief, 'The French Competition Authority accepts the commitments made by an online travel agency (Booking.com)′ (2019) e-Competitions

[16] Viktor Wahlqvist, 'The Swedish Competition Authority approves the voluntary commitments of an online hotel booking company subject to a *fine* (Booking.com)' (2015) e-Competitions

[17] Andrzej Kmiecik, Laura Lehoczky-Deckers, 'The German Federal Court of Justice finds narrow price parity clauses anticompetitive (Booking.com)′ (2021) e-Competitions

[18] Russian Competition Authority, 'The Russian Competition Authority imposes a fine on an online travel agency for abuse of its dominant position (Booking.com)' (2021) e-Competitions August

[19] Hong Kong Competition Commission, 'The Hong Kong Competition Authority accepts voluntary commitments by three major online travel agents (Booking.com / Expedia / Trip.com)′ 52020-e-Competitions May

[20] Barbora Cejkova Vickers, Vojtech Chloupek, 'The Czech Competition Authority rejects the appeal brought by an online travel agency company and confirms the fine imposed for entering into prohibited vertical agreements (Booking.com)' (2019) e-Competitions

[21] Klara Janiec, Sebastian Plötz, Sinziana Lanc, 'Germany's Federal Court of Justice on price parity clauses: rechtswidrig!', (Linking Competition Blog, 8 June 2021) < Germany's Federal Court of Justice on price parity clauses: rechtswidrig! | LinkingCompetition | Blog | Insights | Linklaters> accessed 8 May 2022

[22] Hannah Lesley, 'The EU Court of Justice clarifies the application of the special jurisdiction rules in the Brussels recast regulation regarding an action based on an abuse of dominant position (Wikingerhof / Booking.com)′ (2020) e-Competitions November

[23] Hungarian Competition Authority, Press release, 'Amazon, Facebook, Google, Booking.com – domestic understakings can also sue foreign 'giants' in Hungarian courts', (2020)

[24] Google Search (Shopping), (Case COMP/AT.39740) Commission Decision of 27 June 2017; Case T-612/17 Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763

Google that the decision from the Commission was not final[25]. To monitor. Even more recently, as a follow-on action on the same case, Price Runner, a price comparison service, introduced a private enforcement case against Google for 2.1 billion euros at the Patent and Market Court in Stockholm[26]. Price Runner published a price release which counted two strong statements, first "since the violation is still ongoing the amount of damages increases every day", and secondly, "Price Runner [...] is expecting the process to take several years".

Competitors and sellers in the digital markets are closely followed by consumers in these new developments. The Portuguese consumer group "Ius Omnibus" announced on the 22 of March 2022 that they have submitted two actions for consumers' compensation to the Portuguese Competition, Regulation and Supervision Authority. First, they claim that Portuguese consumers suffered from a passed-on 30% fee anticompetitively set by Apple to app developers[27] (sounds familiar?), and from a passed-on 30% commission anticompetitively set by Google entering into contracts with Android equipment manufacturers and app developers[28].

In the UK Dr. Liza Lovdhal Gormsen made the headline when she announced the launch of an opt-out class action in January 2022 against Meta to the Competition Appeal Tribunal for a minimum of 2.2 million pounds[29]. The class action is brought to compensate for Meta's exploitative abuse of imposing unfair trading practices and unfair prices to consumer. The Competition Appeal Tribunal, by an order dated from the 15 March 2022, allowed the class representative to serve Meta[30]. The stand-alone claim for damages may go forward.

In France, two additional damages cases targeted practices from Google. In Google/Oxone, a telephone services company alleged that Google illegally suspended its Ads account. Interestingly this case is considered being a stand-alone action, in which the claimant obtained 1.2 million euros of damages from Google[31]. The platform announced that they will appeal the decision. In Google/Leguide, the Paris Court of Appeal was seized on the question of jurisdiction in a follow-on damages claim related to the Google Shopping case. The Court confirmed the French jurisdiction over the damages suffered by the price comparison engine editor[32].

Finally, we should not forget the unobserved data: how many private settlements instead of litigation? How many undertakings evicted from the market for which a monetary compensation would not allow them to "re-enter" the market? How many consumers unaware that they are exploited on their use of platforms? How many undertakings dependent of an eco-system, in a concentrated market, expect retaliation should they come forward with a competition law claim?

[25] Silvia Pietrini, 'Italy: The Court of Milan rejects request for technical expertise to end competition dispute through conciliation *(*7 Pixel / Google)' (2021) Concurrences

[26] Price Runner, Press release, (07 February 2022) 'PriceRunner sues Google for 2.1 billion', < PriceRunner sues Google for 2.1 billion euros>, accessed 08 May 2022

[27] Press release, Ius Omnibus, ' Popular action for the compensation of consumers following Apple's anticompetitive practices' (2022)

[28] Press release, Ius Omnibus, ' Popular action for the compensation of consumers following Google's anticompetitive practices ' (2022)

[29] BBC News, 'Meta faces billion-pound class-action case' (2022)

[30] Competition Appeal Tribunal, Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others, Case No: 1433/7/7/22, [2022]

[31] Michaël Cousin, 'The Paris Commercial Court imposes a €1.2 million fine on a Big Tech company for abuse of dominant position against a telephone directory services company (Oxone Technologies / Google)', e-Competitions, Art. N° 99689 (2021)

[32] Rafael P. Amaro, Malik Idri, Bastien Thomas, 'Private Enforcement of Antitrust Law in France' (Apr. 2021 - Nov. 2021) (2022) Concurrences

IV. Identification of the issues and proposals

This section aims to raise both some issues that are specifically impeding private enforcement in digital markets, but also some well-known lacks of the Directive that are particularly problematic when facing anticompetitive conducts in digital markets. Moreover, some issues raised in this section could be depicted as transversal issues when it comes to regulating digital markets, among them, online architecture and the exploitation of the cognitive biases of the users as well as the multiplication of the legal instruments applicable to digital markets.

As a reminder, the two main specificities of private enforcement is that private parties introduce damages action only if they are incentivized to do so and they claim for the full compensation of the harm suffered following an anticompetitive conduct on the market. Then, could the characteristics of digital economy be a threat to the private enforcement of competition?

Follow-on damages action should be more attractive for private parties, with the infringement being established. Indeed, Article 9 of the Directive 2014/104/EU "Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law". However, even in the event of the infringement established, the harm still need to be quantified, and only victims from cartels infringements benefit from a presumption of harm (Article 17). The preamble of the Directive states that is is "appropriate" to limit this presumption to cartels, "given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm". Should the appropriateness of the limitation of the presumption be challenged now? The information asymmetry is also present when consumers are unaware of the business model of the platform they are using and may be unaware of the harm caused when their cognitive biases are being exploited. Regarding the collection of evidence necessary to prove the harm, the length of the public enforcement cases in digital markets speak for itself. Several options could be explored to facilitate the characterization and quantification of harm among which a presumption of harm following abuses of dominance in digital market, should the same approach of facilitating actions for damages for potentially the most harmful infringements. However, recognizing the large variety of harm possible in digital market (loss of quality, loss of choice, decrease of innovation), the presumption should only be stay a "presumption of harm" to avoid a too narrow concept. Finally, it could be interesting to update the 2013 guidance document from the EU Commission on the quantification of harm with the aim to answer the following question: how to build a counterfactual in fast innovative digital markets? Updating the guidance document would be a call answering the growing need of experts from different backgrounds, not only economists in microeconomics and industrial organisation, but also comportemental economist and data scientists, when it comes to private enforcement in digital markets.

Potentially solving both the quantification and compensation issue, Benjamin Lehaire suggested a lump-sum award of competition damages[33]. His reasoning comes from the observation of Québec civil law. The author suggests to sharpen the concept of competition damages by distinguishing a competitive consumer harm and competitive business harm. Competitive consumer harm would be "the harm suffered by the purchaser of a good and the user of a massively available service which has been the object of an anti-competitive practice", by encompassing a multitude of victims this latter has a collective character. The competitive business loss would be the consequence of "operations of any kind related to the exercise of an industrial, commercial or financial activity in connection with anti-competitive practices". The advantage of this distinction would be to open up a lump-sum award for consumer competition damage, which would both circumvent the obstacle of small amounts of often diffuse harm, but it would also alleviate the evidentiary difficulties that a

[33] Benjamin Lehaire, 'Réparer le préjudice concurrentiel : pour une évaluation forfaitaire du préjudice concurrentiel de « consommation »' (2018) n°78 Revue Lamy de la concurrence

consumer must overcome. The lump-sum award would also increases the consumers to seek redress. In such a procedure, the procedure the judge would still have a role to play, since lump-sum assessment implies an overall assessment at the discretion of the judges, based on evidence. The author draws a parallel between his proposal and the nominal damages awarded in Quebec law for victims of anti-competitive actions. The latter is a lump sum award made when the assessment of the harm is so complex that it is "almost impossible to attach an exact figure" to "roughly cover the harm". The lump-sum assessment, as proposed by Benjamin Lehaire (2018), inspired by solutions adopted in the context of unfair competition litigation in France and Quebec civil law, would make it possible to replace an economic assessment of the competitive loss with a legal assessment for the competitive loss of "consumption". If the author does not specifically suggest the application of his proposition to digital markets, it would certainly compensate for some issues previously identified.

However, is the monetary compensation of anticompetitive conduct relevant in digital markets? In a paper questioning the expectations of claims for damages following the General Court decision in the Google Shopping case, we argued with Reed (2022)[34] that in fast-moving markets, innovative with a handful numbers, if competitors or sellers exited the market, the monetary compensation would not replace them in the situation that would have prevailed should the infringement had not occurred. In this situation, the solution of remedies should be considered, with their potential to achieve structural change on the markets.

Additionally, some well known lacks of the Directive are also particularly impeding an effective private enforcement in digital markets. Among which: the lack of an harmonized class action for competition damages in the EU to improve the individual incentives and the lack of a time frame for the judges if there is a risk to see a competitor being excluded from the market. Again here, the DMA has introduce reasonable delays, but no damages action are specified in the last version of the text.

Finally, this section categorizes transversal issues when it comes to regulating digital markets: the online architecture and the exploitation of the cognitive biases of the users as well as the multiplication of the legal instruments to regulate online platforms. These two points are not specific to private enforcement, rather to regulating digital markets, no matter the legal ground, however they can impede claim for damages in competition law. The exploitation of the cognitive biases of the users may impede their ability to detect an exploitative damage and so to introduce a private action. As regards to the multiplication of the legal instruments, there is no issue from the public enforcement side, each public enforcers will pursue the enforcement of the legal text that it should protect according to its status. However, from the private enforcement side, should the same infringement on a digital markets be subject to a claim for damages on several legal grounds, is not there a risk to induce a selection effect from the private parties?

V. Conclusion

If the literature reviews the theories of harm according to the specificities of digital markets, in private enforcement it is not about sanctioning a potential effect, but about compensating a real damage to private parties. For example, it is theoretically possible for the public enforcement to sanction a risk of eviction from the market, in a claim for damages the private parties would need to prove the causality and quantify the eviction. The public enforcement sanctions a hypothetical damage to competition versus the real damage for the private enforcement. If you would think that public enforcing digital markets is struggling, the difficulties are increased for claims for damages.

The difficulties posed by privately enforcement digital markets explain the timid case law observed in the European Union, with two limits: there may be unobserved data (as private settlements) and the case law is

[34] Jeanne Mouton, Lewis Reed, Following the Google Shopping Judgment, 'Should We Expect a Private Enforcement Action?' (2022) Volume 13 Journal of European Competition Law & Practice 154

very recent, should they succeed, we might observe more claim for damages where the harm is widespread and can affect the entire eco-system of the platform.

Finally, the paper suggests some approaches to increases incentives and effectively enforces private enforcement in digital markets. The issues to be tackle are either specific to the private enforcement of digital markets, well known lacks of the Directive 2014/104/EU or transversal issues when it comes to regulating digital markets. Among the leads to be researched: a presumption of harm to be included in the damages Directive for abuses of dominance in the digital market, calling the experts to step in, a lump-sum award of competitive damages and making remedies available for private enforcement.

References

Alessandro Acquisti, 'The economics of personal data and the economics of privacy', OECD, Working paper on the information economy (2010)

Pinar Akman, 'A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets' (2022) Virginia Law and Business Review 217

Rafael P. Amaro, Malik Idri, Bastien Thomas, 'Private Enforcement of Antitrust Law in France (Apr. 2021 - Nov. 2021)' (2022) Concurrences

Gary S. Becker, 'Crime and punishment: An economic approach', The economic dimensions of crime. Palgrave Macmillan, London (1968) 13-68

Bock Maximilian, Martin Wiener, 'Towards a Taxonomy of Digital Business Models-Conceptual Dimensions and Empirical Illustrations.' (2017)

Marco Botta, Klaus Wiedemann, 'Exploitative conducts in digital markets: Time for a discussion after the Facebook Decision' (2019) Journal of European Competition Law & Practice (2019) 465

Bougette Patrice, Oliver Budzinski, Frédéric Marty, "Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses." (2022) The Antitrust Bulletin

Brousseau Eric, Thierry Penard, 'The economics of digital business models: A framework for analyzing the economics of platform' (2007) 6.2 Review of network Economics

Cristina Caffarra, '"Follow the Money" - Mapping issues with digital platforms into actionable theories of harm' (2019) e-Competitions Platforms

Emmanuel Combe, Constance Monnier, 'Fines against hard core cartels in Europe: The Myth of Overenforcement' (2011) Antitrust Bulletin. Marie Laure Allain, Marcel Boyer, Rachidi Kotchoni, Jean-Pierre Ponssard, 'The determination of optimal fines in cartel cases The Myth of underterrence', (2011)

EU Commission, SWD (2013) 205, Practical guide quantifying harm in actions for damages based on breaches of article 101 and 102 of the Treaty of the functioning of the European Union [2013]

EU Commission, SWD (2020) 338 final, on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2020]

Michaël Cousin, 'The Paris Commercial Court imposes a €1.2 million fine on a Big Tech company for abuse of dominant position against a telephone directory services company (Oxone Technologies / Google)' (2021) e-Competitions

Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, Competition Policy for the digital era, EU Commission (2019)

Ariel Ezrachi, Maurice E. Stucke. 'Artificial intelligence & collusion: When computers inhibit competition' (2017) *U. Ill. L. Rev.*

Axel Gautier, Ashwin Ittoo, Pieter Van Cleynenbreugel, 'AI algorithms, price discrimination and collusion: a technological, economic and legal perspective' 50.3 (2020) European Journal of Law and Economics

Klara Janiec, Sebastian Plötz, Sinziana Lanc, 'Germany's Federal Court of Justice on price parity clauses: rechtswidrig!', (Linking Competition Blog, 8 June 2021) < Germany's Federal Court of Justice on price parity clauses: rechtswidrig! | LinkingCompetition | Blog | Insights | Linklaters> accessed 8 May 2022

Bruno Jullien, Wilfried Sand-Zantman. 'The economics of platforms: A theory guide for competition policy' 54 (2021) Information Economics and Policy

Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2019 ed.)' (2019) Concurrences

Benjamin Lehaire, 'Réparer le préjudice concurrentiel : pour une évaluation forfaitaire du préjudice concurrentiel de « consommation »' 78 (2018) Revue Lamy de la concurrence

Hannah Lesley, 'The EU Court of Justice clarifies the application of the special jurisdiction rules in the Brussels recast regulation regarding an action based on an abuse of dominant *position* (Wikingerhof / Booking.com)' (2020) e-Competitions

Nathalie de Marcellis-Warin, Frédéric Marty, and Thierry Warin, 'Vers un virage algorithmique de la lutte anticartels?' (2022)

Jeanne Mouton, Lewis Reed, Following the Google Shopping Judgment, Should We Expect a Private Enforcement Action? 13 (2022) Journal of European Competition Law & Practice 154

John M. Newman, 'Antitrust in zero-price markets: applications' (2016) *Wash. UL Rev.*

Silvia Pietrini, 'Italy: The Court of Milan rejects request for technical expertise to end competition dispute through conciliation (7 Pixel / Google)' (2021) Concurrences 214

A. Mitchell. Polinsky, 'Private versus public enforcement of fines' (1980) The Journal of Legal Studies 105

Andrea Prat, Tommaso M. Valletti, 'Attention oligopoly' (2021) American Economic Journal: Microeconomics

Ulrich Schwalbe, 'Algorithms, machine learning, and collusion' 14.4 (2018) Journal of Competition Law & Economics