Economic dependence in digital markets: EU remedies and tools

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Economic Dependence in Digital Markets: EU Remedies and Tools*

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ABSTRACT: While the application of the abuse of dominant position struggles to face some exclusionary and exploitative abuses in digital markets, new tools and remedies are being explored within the EU multi-level context to address the abusive behaviours towards economically dependent businesses.

This article discusses whether the doctrine of abuse of economic dependence may constitute a flexible remedy to complement the application of the abuse of dominant position and face the increasing economic dependence and imbalance of bargaining power in digital markets. Although not harmonised at EU level, this tool has been enhanced in national realms to tackle some abusive conducts in digital markets, such as the refusal to share datasets, the sudden interruption of commercial relationships, and the imposition of unfair conditions for the use of online intermediation services. Starting from a comparative analysis of some recent national applications of this tool in digital markets, the article questions whether an EU doctrine of abuse of economic dependence in digital markets may represent a feasible option, at the same time avoiding the risk of interpretative fragmentation among Member States.

The article then compares different *ex ante* regulatory options proposed at the EU level to tackle (among others) the problems arising from the "dependence" of businesses on large online platforms, followed by a discussion on the possible role of the abuse of economic dependence among the spectrum of different *ex ante* and *ex post* EU remedies and tools for behaviours of abuse of economic power in digital markets.

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KEYWORDS: Abuse of economic dependence, digital markets, online platforms, competition law, *ex-ante* regulation.

1. Introduction

While the application of the rules on the abuse of dominant position struggles to face some exclusionary and exploitative abuses in digital markets[1], new tools and remedies are being explored within the EU multi-level context to address abusive behaviours towards economically dependent businesses.

Digitalization, data-driven innovation, and the rise of digital intermediaries are shaping "the way companies operate and do business"[2]. The specific features of digital markets and their (still) limited regulation[3] have favoured situations of economic dependence and bargaining imbalances, especially within the commercial relationships between businesses and online platforms.

In the platform economy, in particular, there is evidence showing businesses' dependence on platforms, such as the level of the "turnover from sales and share of revenue via online platforms as a proportion of the

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[1] For the EU see, in particular, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer "Competition policy for the digital era – final report", Luxembourg 2019, Publications Office of the European Union, http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.
This Report was also complemented by other national reports and surveys such as AGCM, AGCOM, AGPDP, "Big Data joint survey, 2019"; M. Schallbruch, H. Schweitzer and A. Wambach, "A new competition framework for the digital economy: Report by the Commission "Competition law 4.0", 2019; Autoridade da Concorrência, "Digital ecosystems, Big Data and algorithms", 2019; Joint memorandum of the Belgian, Dutch and Luxembourg Competition Authorities on "Challenges faced by competition authorities in a digital world", 2019.
Other reports from different jurisdictions underline the problems of competition law enforcement in digital markets and call for a reform. See, *inter alia*, F. Scott Morton, et al., *Report of the Committee for the study of digital platforms*, Stigler Center for the Study of the Economy and the State, 2019; J. Furman, D. Coyle, A. Fletcher, D. McAuley and P. Marsden, "Unlocking digital competition", 2019; for Australia ACCC, "Digital platforms enquiry: Final report", 2019.

[2] See Antonio Capobianco and Anita Nyeso, "Challenges for competition law enforcement and policy in the digital economy", *Journal of European Competition Law & Practice* 9, no. 1 (2018): 19-27, https://doi.org/10.1093/jeclap/lpx082.

[3] While in the EU the discussion focuses on how to enhance the role of competition law rules, "UK, Australia, and Japan are all taking practical steps towards introducing pro-competitive ex ante regulation". See Amelia Fletcher, "Market investigations for digital platforms: Panacea or complement?", *Journal of European Competition Law & Practice* 12, no. 1 (2021): 44-55, https://doi.org/10.1093/jeclap/lpaa078.

company's total revenue from e-commerce"[4], and the reliance on platforms for marketing goods and services, particularly on the part of SMEs.

The exploitation of such dependence often allows for unfair and abusive practices that may threaten the freedom to compete in the market and have direct or indirect effects on market contestability (both from the standpoint of competition *for* the market and from the standpoint of competition *in* the market), whose extent may vary according to the subjects and the commercial relationships involved.

The problem of economic dependence and imbalanced bargaining power is exacerbated in what regards large-sized online platforms because of the "level of dependency and the important scale of power imbalance"[5]. Given their key role to reach consumers, the arsenal of data they hold and the sophisticated algorithms to analyse them, they may be in a position of setting rules on access and use of the platform and to unfairly exploit the economic dependence of businesses.

Among the possible tools to tackle such problems, this article focuses on the abuse of economic dependence (thereinafter, a.e.d.). Although not harmonised at EU level, this tool is attracting increasing attention in national realms to tackle some abusive conducts in digital markets such as the refusal to share datasets, the sudden interruption of commercial relationships, and the imposition of unfair conditions for the use of online intermediation services. In Germany, the rule of the abuse of economic dependence has been enhanced within a large reform allowing a greater control of the emergence of market power in digital markets, while in France and in Italy the tool has been used within some cases of unfair conditions imposed by platforms. Across the Atlantic, two "twin" cases (*PeopleBrowsr v. Twitter* and *hiQ v. LinkedIn*) have raised questions about the dependence of small businesses on access to data from large (albeit non-dominant) platforms, as well as in other relevant technological settings.

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[4] See European Commission, *Commission Staff Working Document Impact Assessment Report Accompanying the Document. Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, Brussels, 15.12.2020 SWD(2020) 363 final, Section 2. §58 "According to the Observatory's estimates, around half of enterprises derived more than 25% of their revenues from online platforms. For almost 10% of companies, online platform sales exceed 75% of all revenues; while according to Statista estimates, in 2017, 18% of company revenues across the EU-28 came from e-commerce, the highest proportion being 33%".

[5] Ibid, Section 2.§85

Starting from a comparative analysis of the national applications of the abuse of economic dependence in digital markets, the article questions whether an EU doctrine of abuse of economic dependence in digital markets may represent a feasible option, at the same time avoiding the risk of regulatory and interpretative fragmentation among Member States.

The article then moves on to compare different *ex ante* regulatory options proposed at the EU level in order to tackle the problems arising from the "dependence" of businesses from online platforms and discusses the possible role of abuse of economic dependence among the spectrum of different *ex ante* and *ex post* EU remedies and tools for the abuse of economic power in digital markets.

2. The abuse of economic dependence in digital markets

2.1. Basic features of the abuse of economic dependence

The possibility for Member States to adopt and apply on their territory "stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings", which may include "provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings", is encompassed by Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now 101 and 102 TFEU)[6].

Member States are, indeed, free to envisage rules attributing relevance to the inequality of economic and contractual power between businesses, thus conforming private autonomy for purposes of economic public order that the discipline basically shares with competition law[7], although in

[6] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, 1-25, Art. 3.2, and Recital no. 8.

According to Inge Graef, "Differentiated treatment in platform-to-business relations: EU competition law and economic dependence", *Yearbook of European Law* 38 (2019): 448-499, https://doi.org/10.1093/yel/yez008, this freedom "reflects the compromise that was found during the adoption of Regulation 1/2003 to accommodate concerns from a number of Member States whose national competition laws went beyond the types of abuse of dominance covered by Article 102 TFEU".

[7] For an analysis of the goals of abuse of dominance and abuse of economic dependence see, *ex multis*, Philipp Fabbio, *L'Abuso di Dipendenza Economica* (Milano: Giuffré, 2006), Giuseppe Colangelo, *L'Abuso di Dipendenza Economica tra Disciplina della Concorrenza e Diritto dei Contratti. Un'Analisi Economica e Comparata* (Torino: Giappichelli, 2004); Mor Bakhoum, "Abuse without dominance in competition law: Abuse of economic dependence and its interface with abuse of dominance", in *Abusive Practices in Competition Law*, eds. F. di Porto, R. Podszun (Cheltenham: Elgar, 2018),

some legal systems a.e.d. may also be dissociated from the impact on competitive mechanisms and may only involve contractual relationships[8].

Several Member States, including Germany[9], France[10], Italy[11], Portugal[12], and Spain[13], have adopted rules on the prohibition of a.e.d., albeit with different structures and approaches. Belgium introduced the prohibition of a.e.d. very recently[14] in order to "fill a perceived gap in the existing Belgian and European rules on abuse of dominance and fair commercial practices"[15], especially in what regards competition law enforcement in digital markets. It is worth mentioning that the introduction of this prohibition within the national competition legal frameworks was also complemented by new rules banning certain unfair market practices and abusive clauses in business-to-business (B2B) contracts.

Despite the differences of the national versions of the doctrine[16], in most Member States a.e.d. usually has a general nature ("i.e., applicable also outside digital platforms"[17]) and its application basically requires two

157-184, https://ssrn.com/abstract=2703809; Fabiana di Porto, "Abuses of dominant and non-dominant position. A tale of (ir)reconcilable views?" (2018). *Abusive Practices in Competition Law*, eds. F. di Porto, R. Podszun (Cheltenham: Elgar, 2018), https://ssrn.com/abstract=3183146.

[8] In Italy, for instance, a.e.d. can also involve a bilateral contractual relationship and be sanctioned only with private law remedies. See M. Rosaria Maugeri, *Abuso di Dipendenza Economica e Autonomia Privata* (Milano: Giuffré, 2003). In Greece, a.e.d. was first included in the national competition act, and then moved Law 146/1914 on Unfair Competition Practices. See Emmanuela Truli, "Relative dominance and the protection of the weaker party: Enforcing the economic dependence provisions and the example of Greece", *Journal of European Competition Law & Practice* 8, no. 9 (2017): 579-585, https://doi.org/10.1093/jeclap/lpx022.

[9] See, *infra*, § 2.2.

[10] See, *infra*, § 2.2.

[11] See, *infra*, § 2.2.

[12] See Article 12 of the Portuguese Competition Act, Law No. 19/2012 of 8 May.

[13] See Article 6.2 LCD; Spanish Competition Act, Ley de Defensa de la Competencia; LDC (Law 16/1989, of 17 July) and Article 16 of Law 3/1991 of 10 January, "de competencia desleal" (LCD).

[14] See Act of 4 April 2019 amending the Code of Economic Law as concerns the abuse of economic dependence, abusive clauses and unfair market practices between undertakings, BS/MB 25 May 2019, and the Royal Decree of 31 July 2020 amending books I and IV of the Code of Economic Law as concerns the abuse of economic dependence, BS/MB 12 August 2020.

[15] See Jan Blockx, "Belgian prohibition of abuse of economic dependence enters into force", *Journal of European Competition Law & Practice* (2021), https://doi.org/10.1093/jeclap/lpaa102.

[16] For a comparative overview, see Andrea Renda et al., , *Study on the impact of national rules on unilateral conduct that diverge from Article 102 of the Treaty on the Functioning of the European Union*, November 2012, http://ec.europa.eu/competition/calls/tenders_closed.html.

[17] See European Commission, *Commission Staff Working Document Impact Assessment Report Accompanying the Document*, which lists the existing fragmentation resulting from divergences in the laws of Member States addressing the economic power of digital platforms.

main features: a state of economic dependence of an undertaking and the abuse thereof. Moreover, some national legislations[18] that frame a.e.d. as a competition law infringement require an additional criterion to trigger its application, that is, the (actual or potential) impact of the conduct on the functioning and the structure of the competition in the market[19].

The conditions for applying a.e.d. do not necessarily contemplate the existence of a dominant position on the market, only requiring the exercise of a relative or "relational" power. The focus of the doctrine is on the relationship of dependence, i.e., a situation in which the dependent firm is locked in a commercial relationship and subject to the unilateral conducts of the counterparty rather than dependent on market dominance. Even though the requirements for the assessment of the "state of economic dependence" and the prohibited abuses may vary from country to country, this characteristic allows the abuse of economic dependence to potentially be a more flexible tool for sanctioning some abusive conducts in digital markets, where it can sometimes be difficult to ascertain the dominant position of companies and where the abuse of economic power within asymmetrical relationships between undertakings could more easily emerge.

With "the increasing dependence of businesses on platforms to reach consumers", the issues revolving around economic dependence, and its possible abuse or misuse, are becoming more and more "pronounced and urgent in the online platform economy"[20].

However, in order to understand the potential of the doctrine and to discuss its possible extension to the EU extent, it is first necessary to deep dive the specific features and the current application of a.e.d. to prohibit abusive conducts in digital markets within the national experiences.

2.2. Recent examples of national applications of the abuse of economic dependence in digital markets

In France, the prohibition of a.e.d. is codified in Article L. 420-2, paragraph 2, of the French Code de Commerce (Commercial Code), right beside the abuse of dominant position. It prohibits "the abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings" […], "if it is likely to affect the functioning or structure

[18] See, for instance, France, Belgium, and Portugal.

[19] See *infra* § 2.2.

[20] Inge Graef, *Differentiated Treatment in Platform-to-Business Relations*.

of competition"[21]. According to the French rule, such abuse "may include a refusal to sell, tie-in sales or discriminatory practices".

The Article is therefore addressed to sanctioning abusive behaviours within a situation of economic dependence of one undertaking on another and when the abuse has an actual or potential impact on the functioning or structure of competition in the market. Although in France a.e.d. is included within the same provision that sanctions the abuse of dominance, the prohibition does not concern "whether a dominant undertaking has the market power to behave independently of the other actors on the market, but rather whether an undertaking is dependent on its bilateral relationship with a (non-dominant) undertaking in order to operate"[22].

According to the interpretation given by the case-law, the state of economic dependence must fulfil *in concreto* four cumulative conditions: "(1) the notoriety of the trading partner; (2) the significance of its market share; (3) the importance of the part of turnover achieved with this trading partner in the total turnover of the business affected; and (4) the difficulty for the business affected to find alternative commercial partners offering similar commercial solutions"[23]. These conditions are so strict that for a long time the prohibition has received only limited application by the Autorité de la Concurrence (French Competition Authority, thereinafter FCA) and by the judges[24].

Despite the concerns raised for the lack of flexibility in the interpretation of the prerequisite of the state of economic dependence[25], the tool has

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[21] See official translation available at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrancetranslations.

[22] Thomas Tombal, "Economic dependence and data access", *International Review of Intellectual Property and Competition Law* 51, no. 1 (2020): 70-98, https://ssrn.com/abstract=3421374 or http://dx.doi.org/10.2139/ssrn.3421374. However, on the similarities between abuse of dominance and abuse of economic dependence in France, see Anne-Sophie Choné-Grimaldi, "Les géants du numérique face à l'interdiction des abus de dépendance économique: Les Français contre-attaquent", *Concurrences* 4, no. 1 (2020): 84-92.

[23] See Andrea Renda et al., *Study on the impact of national rules on unilateral conduct that diverge from Article 102 of the Treaty on the Functioning of the European Union*.

[24] See Andrea Renda et al., *Study on the impact of national rules on unilateral conduct that diverge from Article 102 of the Treaty on the Functioning of the European Union,* 51-53. See also Cons. conc., déc. no 93-D-21, 8 June 1993, *Cora*.

[25] Anne-Sophie Choné-Grimaldi, "Les géants du numérique face à l'interdiction des abus de dépendance économique: Les Français contre-attaquent", 84-92.

recently received renewed attention in what regards the banning of abusive behaviours in digital markets.

In its Report "Competition and e-commerce", the FCA enhanced the role of a.e.d. as a potential useful tool to address the problem of the dependence of affiliated businesses on online marketplaces, as these affiliated businesses may have "difficulty finding any alternative to being referenced with such marketplaces"[26]. Although similar issues have been addressed under the rules that ban significant imbalance – e.g., by the Paris Commercial Court in a case related to Amazon's abusive clauses towards its resellers[27] –, according to the FCA there is room also for the application of a.e.d.

Moreover, some recent applications of this tool by the FCA may confirm the possibility of a broader use of the doctrine in the national realm.

Indeed, in a decision of March 2020, the FCA applied a.e.d. to sanction Apple for some abusive practices in the distribution of some of its digital devices in France. In addition to the sanction for having engaged in anti-competitive agreements within its distribution network, Apple was accused of an abuse of economic dependence towards its Premium Distributors (APRs) by "subjecting them to unfair and unfavourable commercial conditions compared to its network of integrated distributors"[28]. Indeed, Apple was not only a supplier *vis-à-vis* its APRs, but also a competitor, having its own integrated distribution channels (such as *Apple Stores*). Even though the appeal of this decision is still pending, the decision is interesting for the interpretation of the requirements of a.e.d. in a case where an operator that is vertically integrated is both supplier and competitor of its contractor, a situation which is also common in online markets.

In order to ascertain a.e.d., the FCA verified the three conditions required by Article L. 420-2, paragraph 2 of the French Code de Commerce: (i) the existence of a state of economic dependence, (ii) the abuse thereof, and (iii) the real or potential effect on the functioning or structure of competition.

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[26] Autorité de la Concurrence, *Concurrence et commerce en ligne*, étude, mai 2020, § 150.

[27] Commercial Court of Paris, 2 September 2019, Amazon, Décision no. 2017050625.

[28] See Autorité de la Concurrence, Décision 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector, https://www.autoritedelaconcurrence.fr/en/decision/decision-20-d-04-16-march-2020-regarding-practices-implemented-apple-products-distribution. See also the English press release published on March 16, 2020, *Fines handed down to Apple, Tech Data and Ingram Micro*, https://www.autoritedelaconcurrence.fr/en/press-release/fines-handed-down-apple-tech-data-and-ingram-micro. For an analysis see Liesbet Van Acker, "The French Apple products distribution decision: Breathing life into vertical restraints enforcement?", *E.C.L.R.* 42, no. 1 (2021): 3-8.

As for the first requirement, the FCA deemed that the four (burdensome) cumulative conditions to assess the state of dependence were fulfilled. The FCA devoted particular attention to the criteria of the "absence of alternative solutions" for APRs, defined as the "inability of a distributor to replace its supplier with one or more suppliers that meet its supply needs under equivalent technical and economic conditions, and within reasonable timeframe". In such case, the absence of alternative solutions was proven by the existence of contractual limitations to the reorientation of APR, the lack of equivalent economic and technical alternatives, with APRs' customers being strongly attached to the Apple brand, and the limited financial room for manoeuvre of APRs, which makes it impossible for them to leave Apple "in the short term" without incurring in a "total loss of value of their business"[29].

Once the state of economic dependence was proven, the abusive nature of Apple's behaviour was identified by the FCA in "a set of rules and conducts implemented by Apple which, taken together, [abused the economic dependence of APRs] by restricting the commercial freedom of APRs in an abnormal and excessive manner"[30]. According to the FCA, these elements "have had a direct impact on the business activity of the APRs beyond what an economic stakeholder can reasonably expect from a commercial partner and have created an imbalance in their relationship with Apple"[31].

Finally, the decision recalled an important principle of the application of the doctrine, which is that it is not necessary that competition has actually been affected. Therefore, although in the case at stake the FCA assessed that the abusive practices affected the functioning and the structure of intra-brand competition and were likely to distort inter-brand competition with regard to manufacturers of competing products, to sanction an a.e.d. it suffices that the functioning or even only the structure of competition could potentially be affected.

Another French case regarding a.e.d. consists of the FCA's investigation on the possible a.e.d. of Google *vis-à-vis* press publishers and news agencies after the refusal of Google to remunerate press publishers and news

[29] Autorité de la Concurrence, Décision 20-D-04, § 1011 ff.

[30] Autorité de la Concurrence, Décision 20-D-04, §1043. This particularly includes supply difficulties, discriminatory treatment, unstable remuneration conditions for APR business (discounts and credits), and discretionary implementation of certain rules.

[31] Autorité de la Concurrence, Décision 20-D-04, §1044.

agencies for the online reuse of their publishing content[32]. Indeed, after the introduction within the French legal system of a new related right for press publishers over the online uses of their publications by information society service providers[33], Google unilaterally decided "that it would no longer display article extracts, photographs, infographics, and videos within its various services (Google Search, Google News and Discover), unless the publishers grant them the authorisation to use them free of charge[34]. Press publishers and news agencies therefore claimed before the FCA that Google would have abused not only its dominant position, but also the situation of economic dependence of such subjects towards Google, an unavoidable trading partner for them. Although the investigation on a possible a.e.d. is interesting, the main focus of this investigation is actually Google's alleged abuse of dominance, for which the FCA already ordered urgent interim measures to force Google to negotiate in good faith a remuneration for the reuse of publishing content. Therefore, only the investigation of the merits will qualify Google conducts *vis-à-vis* press publishers as abuse of dominance and/or abuse of economic dependence.

Despite these new perspectives for the application of a.e.d., some scholars have pointed out some flaws and shortcomings of the French version of the doctrine that prevent the rule from being effective[35], in particular the conditions to assess the state of economic dependence, which may circumscribe the application of the doctrine to a limited extent.

In Italy, the doctrine has been applied to tackle the abuse of economic dependence within online intermediation services.

Before analysing the case, it is worth recalling the specific features of the Italian rules about a.e.d. Such a rule has been introduced in Article 9 of the

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[32] Autorité de la Concurrence, Décision 20-MC-01 of 09 April 2020.

[33] See French Law no. 2019-775 of 24 July 2019, "tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse", which implemented art. 15 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[34] For a comment see Silvia Scalzini, "The new related right for press publishers: What way forward?", in *Handbook of European Copyright Law*, ed. Eleonora Rosati (Routledge, forthcoming), https://ssrn.com/abstract=3664847 or http://dx.doi.org/10.2139/ssrn.3664847.

[35] See Anne-Sophie Choné-Grimaldi, "Les géants du numérique face à l'interdiction des abus de dépendance économique: Les Français contre-attaquent". According to Grimaldi, its conditions of application "should be made more flexible in order to prevent this qualification from duplicating that of abuse of a dominant position, while at the same time strengthening the requirements relating to the condition of restriction of competition" to draw a clear line between "what constitutes harm to an operator and what constitutes harm to the market".

law on industrial subcontracting, no. 192 of 1998. Although contained in a rule about industrial subcontracting, the general scope of application of the prohibition[36] is now widely acknowledged.

It bans the abuse of the "state of economic dependence", which is defined by two criteria: the strong company's possibility of determining an "excessive imbalance of rights and obligations" "in commercial relations" with the counterpart, and the "real possibility" for the abused subject" to find satisfactory alternatives elsewhere on the market. If the first criterion can be considered essentially descriptive of the position of strength of one company over another in relation to a situation in which it can compress the entrepreneurial autonomy of the dependent business, the second criterion concerns a two-step test. The first phase of the test concerns the objective existence of alternatives on the market for the dependent company, while the second phase of the test is aimed at assessing whether these alternatives are "real" and satisfactory", that is, "reasonable from the point of view of the dependent company"[37]. Once the economic dependence has been proven, it is necessary to ascertain the respective abuse, which, according to Art. 9, paragraph 2, may consist of a "refusal to sell or buy", "the imposition of unjustifiably burdensome or discriminatory contractual conditions", or "the arbitrary interruption of established commercial relations".

Art. 9 explicitly states private law sanctions for the abuse of economic dependence: the agreement to achieve abuse of economic dependence is null and void; moreover, the ordinary judge can grant restraining orders, injunctions, and compensation for damages.

In addition, paragraph *3-bis* attributes the Italian Competition Authority the power to sanction undertakings abusing economic dependence "which is relevant to the protection of competition" and "notwithstanding the possible application" of the abuse of dominance[38]. In the specific case of repeated violations of the rules on late payment in commercial transactions, which damage small and medium-sized enterprises, an abuse is assumed regardless of the ascertainment of economic dependence[39].

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[36] See Italian Supreme Court (Corte di Cassazione), United Divisions, S. U. ord. 25.11.2011, no. 24906.

[37] See Philipp Fabbio, "Abuso di dipendenza economica", *Diritto Online*, 2012, https://www.treccani.it/enciclopedia/abuso-di-dipendenza-economica_%28Diritto-on-line%29/.

[38] For a comment on such tangled rules see Valeria Falce, "Abuse of economic dependence and competition law remedies: A sound interpretation of the Italian regulation", *European Competition Law Review* 36, no. 2 (2015).

[39] See also art. 17, co. 3, d.l. 24.1.2012, no. 1, conv. in l. 24.3.2012, no. 27.

Within this framework, according to the Italian legal scholarship[40] it is possible to distinguish the following hypotheses: (i) a.e.d. which does not affect the functioning of competition on the market (or affecting it only to a limited extent), for which only private law sanctions are available, (ii) a.e.d. that is relevant for the protection of competition, where also public enforcement is triggered and (iii) a.e.d. that overlaps with abuse of dominance.

This spectrum of hypotheses and remedies (potentially) makes a.e.d. a flexible and granular tool to be adapted to different settings in the digital economy and to be a residual doctrine to tackle abusive behaviours that harm the development of fair competition on the market.

The doctrine was applied back in 2016 by the Tribunal of Milan[41] in a case of an abuse by Google of the economic dependence of Attrakt, an undertaking offering the development and the management of websites, including online advertising. Interestingly, the Court found Google liable of having abused the state of economic dependence after only one and a half years after the beginning of the commercial relationship.

Attrakt concluded two different service contracts with Google: the AdWords contract, allowing companies to buy keywords in order to be listed on Google's search engine within users' queries, and the AdSense contract, allowing companies to sell and buy advertisement spaces thanks to Google's intermediation. However, Google terminated the Adsense contract due to an alleged violation of Adsense policy made by Attrakt, despite the latter having affirmed to have complied with all Google's requests in due time. Moreover, Google retained the sums due to Attrakt as a compensation for the AdSense contract. Attrakt claimed that the termination of such contract was due to Google's intention to eliminate the company from the market.

In addition to the qualification of Google's behaviour as abuse of right consisting in the withdrawal from the contract with AdSense, contrary to the principle of good faith, the Court found that Google also abused Attrakt's state of economic dependence. According to the Tribunal, the position of "total economic dependence" from Google was based on the "excessive imbalance of rights and obligations", resulting from the content of the AdSense contract, the correspondence between the parties, the exclusive nature of their relationship, the Attrakt turnover, and the incomes

[40] See, in particular, Mario Libertini, "La responsabilità per abuso di dipendenza economica: La fattispecie", *Contratto e Impresa* 29, no. 1 (2013): 14.

[41] Trib. Milano no. 7638/2016, Attrakt s.r.l. c. Google Ireland Ltd.

deriving exclusively from Google, to the point of being completely eroded after Google's withdrawal. By imposing burdensome conditions, interrupting the ongoing commercial relations, and keeping the sums due to Attrakt as a compensation, which were essential for the continuation of the company's activity, Google was deemed liable of having abused the position of economic dependence of Attrakt. All these conditions prevented the abused undertaking to find satisfactory alternatives elsewhere on the market.

Although the abuse of economic dependence was relevant only between the two parties, the doctrine was used to assess a behaviour impacting the development (and the existence) of a start-up undertaking on the digital market totally dependent on its intermediary. In this case, the Court did not analyse the alleged abuse of dominant position, as it was deemed "absorbed" by the other considerations of the offence, already acknowledged[42].

Beside the imbalances of rights and obligations within the use of online intermediation services, the a.e.d. doctrine has been considered to tackle the dependence of businesses on access to data from large (albeit non-dominant) platforms.

Across the Atlantic, two "twin" cases (*PeopleBrowsr v. Twitter*[43] and *hiQ v. LinkedIn*[44]) have raised questions[45] about the possible use of the doctrine in cases of abusive refusal to share dataset with undertakings dependent on that access to develop their business activities online (as in the case of data analytics companies). Indeed, especially in the context of "value creation networks" (such as in Artificial Intelligence and Internet of Things settings), it is likely that access to data automatically generated or service usage data exclusively controlled by another company are necessary for "substantial value creation in [such] network"[46], where a.e.d. may consti-

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[42] Recently, the Italian Competition Authority opened an investigation against Google for an alleged abuse of dominance in the Italian market for display advertising A542, https://en.agcm.it/en/media/press-releases/2020/10/A542.

[43] Superior Court of the State of California, PeopleBrowsr, Inc. et al. v. Twitter, Inc. (PeopleBrowsr), No. C-12-6120 EMC, 2013 WL 843032, N. D. Cal., 6 March 2013.

[44] United States District Court, Northern District of California, hiQ Labs, Inc. v. LinkedIn Corporation, No. 17-cv-03301-EMC, 14 August 2017, https://epic.org/amicus/cfaa/linkedin/2017-08-15-PI-Order.pdf.

[45] Thomas Tombal, "Economic dependence and data access", 70-98.

[46] See Heike Schweitzer et al. "Modernising the law on abuse of market power, Report for the Federal Ministry for Economic Affairs and Energy" (Germany) (Executive Summary, October 2018), 2 https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3.

tute an useful tool to grant access in certain circumstances to undertakings dependent thereon.

It is for these possible promising applications that in Germany, the rule of the abuse of economic dependence has been enhanced within a large reform, allowing a greater control of the emergence of market power in digital markets, the "GWB Digitalisation Act"[47]. As part of the solutions presented, the applicability of the prohibition of abuse of economic dependence has been extended to certain situations relevant to digital markets. Section 20.1 of the Act expressly provides that this prohibition may extend to companies that operate as intermediaries in multi-sided markets "insofar as undertakings are dependent on their intermediary services with regard to access to supply and sales markets in such a way that sufficient and reasonable alternatives do not exist". Furthermore, section 20, 1.a. provides that the state of "dependence" could arise from a company's dependence on access to data "controlled" by another company for its own activities. Consequently, the refusal to allow the "dependent" company to access such data "for an adequate fee" may constitute "an unfair impediment under paragraph 1 in conjunction with section 19(2)(1)", even if markets for such data do not yet exist.

It is worth recalling that Germany was the first country in Europe to introduce provisions on the abuse of economic dependence[48]. The prohibition is contained within § 20 of the "Gesetz gegen Wettbewerbsbeschränkungen (GWB)", which in the modified version prohibits abuses of one or more undertakings "to the extent that undertakings as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist and, because of a significant imbalance, the dependence is not offset by a corresponding countervailing power of the

[47] See German Competition Act 2021 – Unofficial Translation, https://www.d-kart.de/–. For a first comment see Philipp Bongartz, "Happy new GWB!", blog post, https://www.d-kart.de/en/blog/2021/01/14/happy-new-gwb/. For a comment on the draft bill, see Thomas Höppner, "Digital upgrade of German antitrust law – Blueprint for regulating systemic platforms in Europe and beyond? *Hausfeld Bulletin* 1 (2020), https://ssrn.com/abstract=3575629 and Reasoning of the Draft Bill, 80.

[48] College of Europe, *Study on the impact of national rules on unilateral conduct that diverge from Article 102 of the Treaty on the Functioning of the European Union.* For a recent application of the doctrine in the digital markets see Bundeskartellamt, *Facebook: Konditionenmissbrauch gemäß § 19 Abs. 1 GWB wegen unangemessener Datenverarbeitung*, B6-22/16, 6 February 2019.

suppliers or customers of the undertaking with a strong market position (relative market power)"[49].

Moreover, the rules on a.e.d. and courts' interpretation thereof have identified "different types of economic dependence". The innovative feature of the revised rule consists of the extension of the rule beyond the protection of SMEs and of a set of detailed specific conducts of abuse of economic dependence in digital markets, to be seen as a piece of the framework aimed at updating competition law in the digital environment.

3. Towards an EU doctrine of abuse of economic dependence in digital markets?

From this empirical and comparative analysis it can be observed that the increasing dependence of businesses on service providers in digital markets has triggered the need to find available remedies to complement the application of the prohibition of the abuse of dominant position.

Due to the increasing attention a.e.d. has attracted in national realms, some Authors envisage an EU doctrine of abuse of economic dependence in digital markets in order to have a more flexible tool to tackle some abusive conducts and to complement the abuse of dominance[50]. The desirability of such a tool stems not only from the need for more flexibility with respect to the application of competition law, but also from the divergences of national approaches and interpretations, with the risk of fragmenting the interpretation of business conducts within the EU single market[51]. Building on the "common core" of national experiences, an eventual EU a.e.d. doctrine could be adapted to the EU level in order for a residual tool to be designed to tackle the increasing economic dependence situations in the cross-border aspects of digital economy, such as in cases of

[49] The rules should be applied in the light of Section 19 (1) GWB in conjunction with subsection no. 2, devoted to Prohibited Conduct of Dominant Undertakings. Indeed, the prohibition of abuse of dominance is extended to situations of dependence or relative market power concerning any behaviour that "directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification". Moreover, Art. 20 (3) also prohibits conducts of undertakings with relative or superior market power.

[50] Thomas Tombal, "Economic dependence and data access", 96; Alice Rinaldi, "Re-imagining the abuse of economic dependence in a digital world", 9 June 2020, https://www.lexxion.eu/en/coreblogpost/re-imagining-the-abuse-of-economic-dependence-in-a-digital-world/.

[51] See European Commission, *Commission Staff Working Document Impact Assessment Report Accompanying the Document. Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector.*

refusal to share datasets or the imposition of unfair conditions for the use of online intermediation services, while still leaving a margin of discretion for national solutions. Moreover, the eventual application of such a tool (as a complement to the competition law enforcement) at the EU level should be circumscribed to situations where abusive behaviours may likely impact the structure or the functioning of competition in order to closely link such a tool with the goal of protecting the freedom of competition and the competitive process rather than individual competitors[52].

Although already contained in the ECJ case-law, the concept of economic dependence has long been neglected because of (i) the risk of "false positive decisions", (ii) the risk that the abusive behaviour may not affect the market, but harm competitors only, and therefore a prohibition could be detrimental to consumers, and (iii) the enhanced room for judges' discretion, given the trade-off between economic efficiency-based considerations and fairness-related concerns[53].

However, as the problem of the economic dependence of businesses on providers of online intermediation services, infrastructures and marketplaces is becoming urgent, new tools and remedies at the crossroads between regulation and competition have been proposed at the EU level[54]. Within this framework, the role of the a.e.d. doctrine, either in its national epiphanies or in its eventual expansion to the EU extent, should be discussed within the new emerging spectrum of tools and solutions.

4. The "dependence" of businesses on large online platforms: ex post *enforcement vis-à-vis ex ante regulation*

At the EU level (as well as at some Member States' national level), the problem of economic dependence on large online platforms has been explored under the light of the *ex-ante* "platform-specific" regulation.

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[52] For different opinions on the room for competition law to sanction non-dominant abuses see Thomas K. Cheng and Michal Gal, "Superior bargaining power: Dealing with aggregate concentration concerns", in *Abusive Practices in Competition Law*, eds. F. Di Porto, R. Podszun (Cheltenham: Elgar, 2018), https://ssrn.com/abstract=3508336; Florian Wagner-von Papp, "Unilateral conduct by non-dominant firms: A comparative reappraisal", in *Abusive Practices in Competition Law*, eds. F. Di Porto, R. Podszun (Cheltenham: Elgar, 2018).

[53] Patrice Bougette, Oliver Budzinski and Frédéric Marty, "Exploitative abuse and abuse of economic dependence: What can we learn from an industrial organization approach?", *Revue d'Économie Politique* 129, no. 2 (2019): 261-286, 265.

[54] See Peter Alexiadis and Alexandre de Streel, "Designing an EU intervention standard for digital platforms", *Robert Schuman Centre for Advanced Studies Research Paper*, 14 (2020). https://ssrn.com/abstract=3544694 or http://dx.doi.org/10.2139/ssrn.3544694.

Driven by fairness and pro-competitive rationales, several rules with specific subjective scope of application have been proposed, and issued, to prevent abusive behaviours.

4.1. B2P Regulation

A first answer to the "increasing dependence" in the online platform economy has been given by the issue of the Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (thereinafter, "B2P Regulation"). Indeed, according to the recitals of the Regulation, "the growing intermediation of transactions through online intermediation services, fuelled by strong data-driven indirect network effects, leads to an increased dependence of such business users, particularly micro, small, and medium-sized enterprises (SMEs), on those services in order for them to reach consumers"[55].

Therefore, the Regulation is aimed at addressing the frictions stemming from unilateral behaviours "that can be unfair and that can be harmful to the legitimate interests of [platforms'] business users and, indirectly, also of consumers in the Union"[56], such as the ones "which grossly deviate from good commercial conduct or are contrary to good faith and fair dealing"[57].

To this end, the Regulation lays down some fairness and transparency obligations for the providers of online intermediation services and online search engines, attributing its enforcement to Member States. Assuming a sort of systemic "dependence" of business users of intermediation services and corporate website users of online search engines, the Regulation provides for some obligations to respect in drafting terms and conditions and in terminating or suspending business accounts. Moreover, P2B Regulation lays down transparency obligations regarding access to data policies, and algorithmic transparency relating to ranking or self-preferences. Even without heavy prohibitions, the rules of the P2B Regulation aim at preventing some specific abusive conducts that might give rise to potential abuses of economic dependence, which would however remain as a residual *ex post* tool. Art. 3 specifies that the application of the Regulation "shall be without prejudice to national rules which, in conformity with Union law,

[55] P2B Regulation, Recital no. 2

[56] P2B Regulation, Recital no. 2

[57] P2B Regulation, Recital no. 2

prohibit or sanction unilateral conduct or unfair commercial practices, to the extent that the relevant aspects are not covered by this Regulation".

Although the *ex-ante* obligations are usually more targeted than *ex post* tools, it is expected that there will still be room for a.e.d. because of the circumscribed scope of the P2B Regulation's rules. Despite the respect of the disclosure obligations, there may still be room for abusive behaviours. For instance, the respect of the transparency obligation on data access policies does not prevent sudden refusals to share datasets with dependent data companies.

4.2. The proposal for an EU Digital Markets Act

Aware of the limited scope of the P2B Regulation, the EU Commission has recently taken a step forward in the regulation of the systemic risks of unfair exploitation of businesses which depend on large online platforms to offer their goods and services in the digital single market.

On 15 December 2020, the EU Commission proposed a Regulation on contestable and fair markets in the digital sector (Digital Markets Act, hereinafter DMA)[58] aimed at laying down rules to ensure contestable and fair markets and especially addressed to large online platforms acting as "gatekeepers". A gatekeeper is defined[59] as a "provider of core platform services" (such as online intermediation services, online search engines, online social networking service, operating systems, and so forth) that (i) has a significant impact on the internal market; (ii) serves as an important gateway for business users to reach end users; and (iii) enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.

The proposal aims at establishing obligations and prohibitions for gatekeepers in order to enhance fairness, namely interoperability obligations, data access obligations, and the obligation to provide tools to their business users for the independent verification of their advertisements hosted by the gatekeeper. The classification of platforms as "gatekeepers", as well as the rules applicable to them, are designed to have a flexible structure in order to empower the Commission, through market investigations and case by case assessments, to classify platforms as gatekeepers, to update

[58] 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.

[59] Digital Markets Act, Art. 2 and 3 DMA Proposal.

gatekeepers' obligations when necessary, and to design remedies to tackle systematic infringements of the Digital Markets Act rules.

The ambitious proposal has a broad rationale: it is clearly not only aimed at tackling the problem of the "increasing dependence" of businesses on a limited number of online large platforms, but also at preventing the possibility of such platforms extending their market power within secondary markets like wildfire, thus reducing and harming competition and consumers' welfare. Driven by a fairness and pro-competitive rationale, the proposal complements competition, and a.e.d. tools, in order to prevent, monitor and ban abusive behaviours carried out by "gatekeepers".

If DMA were to be finally adopted, the room for application of a.e.d. would presumably be more circumscribed in the platform economy, but still relevant for residual applications (especially *vis-à-vis* platforms not qualified as gatekeepers, as well as for conducts not encompassed by the proposed Regulation). Indeed, art. 1(6) of the proposed Regulation does not preclude the application of arts. 101 and 102 TFEU, nor of national competition rules prohibiting other forms of unilateral conduct "insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers". Recital 9 of the proposed Regulation explains that, in order to avoid fragmentation of the internal market, the application of EU and national competition rules "that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question" should not be prevented. However, such application "should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market"[60].

4.3. The spectrum of the EU tools and remedies to tackle abusive behaviours towards economically dependent businesses in digital markets

At the EU level, the strong need to ensure the fairness and the contestability of digital markets, while at the same time providing objective and predictable rules of the game, pave the way to the possibility of conceiving *ex*

[60] See Digital Markets Act, Recital 9.

ante regulation on some behaviours within the platform economy (especially if carried out by "gatekeepers").

Rules of conduct for platform operators ensure legal certainty and trust for all subjects involved. They usually have broader goals and an enhanced role in the promotion of competition in the market, although they require solid evidence and advanced knowledge on the conducts to be banned.

Rules on abuse of dominant position and abuse of economic dependence, instead, allow for *ex post* enforcement based on individualised and case-specific conducts, aimed at restoring competition on the market (and fairness, when the scope of a.e.d. is limited to a contractual relationship), and have a general application, not being limited to the abusive conducts of online platforms, but other unforeseen or unforeseeable conducts of different players in the digital economy market (*e.g.*, in the fields of Artificial Intelligence and the Internet of Things).

In this framework, a spectrum of concurrent regulatory and enforcement options for the digital economy is emerging both in the EU and in national landscapes. Although it is too early to have a clear overview of the legal evolution of such spectrum, there is already a need for efforts to systematize and coordinate the scope, the functions and the interplay of these tools and remedies to better clarify the respective goals of the different regulatory and competition tools for a more consistent application. If a.e.d. were to play an important role during the settling time of such a framework, it could be enhanced as a residual doctrine to address (some) gaps of protection alongside other tools.

5. Conclusive remarks

Due to the increasing imbalances of rights and obligations within the commercial relationships of digital markets, several tools and remedies have been used at the EU and national level to prevent and sanction abuses of economic and contractual power. This article has focused on the application of the abuse of economic dependence in digital markets because of the interesting use made of it in some national legal orders as a complementary tool to tackle the abuse of economic power and the excessive unfairness in business relationships. To this end, the article has underlined the convergences and the divergences of national approaches, questioning a possible extension of the doctrine at the EU level in cases of refusal to share datasets or the imposition of unfair conditions for the use of online

intermediation services when precise conditions to identify the state of economic dependence and the abuse are met.

Then the article moves on to comparing different *ex ante* regulatory options proposed at the EU level in order to tackle (among others) the problems arising from the "dependence" of businesses on (specific kind of) online platforms, and discusses the possible role of abuse of economic dependence among the emerging spectrum of different *ex ante* and *ex post* EU remedies and tools for abusive behaviours in digital markets. The article concludes with the need to systematize the available concurrent EU and national regulatory and enforcement options in order to strike a balance between the fight against abuses of economic power and the need to ensure legal certainty in digital markets.

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