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BALANCING NET NEUTRALITY AND USER RIGHTS IN THE EU / US LEGAL FRAMEWORK

Salvatore Vigliar

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Balancing Net Neutrality and User Rights in the EU/US Legal Framework

SALVATORE VIGLIAR

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Introduction

As it is well known, the Internet is a communication tool between multiple access points (nodes) using the same language (the so-called TCP/IP protocol). The centrifugal approach theorised by Paul Baran coincided precisely with the libertarian and equal assumption of guaranteeing a connective system between different transmission centres that could transport, in the fastest way possible, a certain data package from one point to another, even under conditions of disturbance to the pre-constituted equilibrium[1].

Even today, the network fully embodies this design, with the difference that it is used on a global scale for every type of human activity. The user not only transmits but also independently produces and provides information in a conscious or implicit way. Public bodies and companies manage the infrastructure and provide for payment or, apparently in the absence of an economic payment, access to the connectivity services or to the multiple types of services associated thereto.

In order to prepare an initial classification, one can effectively distinguish between three types of service providers: *backbone networks*, or companies that develop large fibre optic networks around the world; *broadband providers*, companies that provide domestic, professional or individual data services; *edge providers* service providers that are accessible once one is connected to the network.

The exponential growth of economic activities carried out through the Internet poses three interconnected regulatory problems: *a*) on the one

[1] See Baran P., *On Distributed Communication Networks* (Memorandum RM-3420-PR), Santa Monica, 1964; Cairncross F., *The death of Distance: How the Communication Revolution is Changing Our Lives*, Boston, 2nd ed., 2002; Kim B.K., *Internationalising the Internet the Co-evolution of Influence and Technology*, Cheltenham-Northampton, 2005, 51-55; Ciacci G., *Le fonti del diritto dell'informatica*, in Valentino D., *Manuale di diritto dell'informatica*, Napoli, 2016, 7.

hand, to encourage the free flow of digital information; *b*) to guarantee a competitive market open to innovation; *c*) to protect the fundamental rights of the user.

Following this analytical perspective, this essay focuses on the regulatory framework in force in the United States and in the European Union concerning *net neutrality*, with the aim of verifying how these types of rules, placed at the top of an ideal pyramid of rules, affect the entire system by helping to ensure a fair balance between the interests at stake.

2. *Regulatory reform on net neutrality: imitation or unification? The US Open Internet Order*

Net neutrality has long represented a technical-legal concept not transposed into written standards, but implicit and codified into the architecture of the network.

While there is no single definition, net neutrality generally refers to the services offered by Internet access providers (the aforementioned *backbone networks*), declaring a prohibition against imposing restrictions and arbitrary limits on devices and terminals that access the Internet and, more generically, on the methods of use and access to services and digital content by end-users[2].

[2] In argument see Wu T., *Network Neutrality, Broadband Discrimination*, 2 *J. on Telecomm. & High Tech. L.* 141 (2003) « Neutrality, as a concept, is finicky, and depends entirely on what set of subjects you choose to be neutral among»; Yoo C.S., *Beyond Network Neutrality*, 19 *Harv. J.L. & Tech.* 1 (2005); Id., *Network Neutrality and the Economics of Congestion*, 94 *Geo. L.J.* 1847 (2006); Id., *Network neutrality or Internet Innovation?*, 33 *Regulation* 22 (2010); Lessig L., *Coase's First Question*, 27 *Regulation* 38 (2004); Id., *In Support of Network Neutrality*, 3 *ISJLP* 185 (2007); Patrick A. and Scharphorn E., *Network Neutrality and The First Amendment*, 22 *Mich. Telecomm. & Tech. L. Rev.* 93 (2015); Fachechi A., *Net neutrality e discriminazioni arbitrarie*, in Perlingieri C. and Ruggeri L. (eds.), *Internet e diritto civile*, Napoli, 2017, 255.

The *Open Internet Order* of the Federal Communication Commission (FCC)[3] and the EU Regulation No. 2120/2015 "laying down measures concerning access to an open Internet"[4], have been discussed and approved with the aim of crystallising existing principles, and introducing rules that are more uniform on neutrality, aimed at maintaining and promoting a fast, fair and open network.

The *Order* dated 26 February 2015 represents an extended continuation of the *Verizon v. FCC* judgement[5], whereby the Court of Appeals for the Second Circuit accepted the appeal raised by major US access providers, overruling some parts of the previous *Open Internet Order* of 2010. In that judgement, the Court had concluded that despite the possible discriminatory behaviour by the telecommunications network operator, the legal basis on which the FCC based its rules of conduct was apparently not sufficiently robust.

Following the points made by the Court of Appeal, the FCC extended its scope to any type of network service (broadband, mobile or fixed) and reclassified access to the Internet as a telecommunications service and no longer as a mere information service, equating it to an asset of primary utility with public relevance such as the telephone (a so-called *common carrier*)[6].

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[3] Federal Communication Commission, *In the Matter of Protecting and Promoting the Open Internet*, Docket No. 14-28, 12/03/2015.

[4] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, *OJ* L 310, 26.11.2015, 1-18.

[5] *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014).

[6] See Title II of the *Communications Act* and § 706 of *Telecommunications Act of* 1996. See also *U.S. Telecom Association e al. v. Independent Telephone & Telecommunications Alliance e al.*, dock no. 15-1063 (D.C. 2016) and § 8.2 (a) dell'*Open Internet Order*: «A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, *including any capabilities that are incidental to and enable the operation of the communications service*, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent

The general principles of *Open Internet Order* (the so-called *bright line rules*) prohibit the network operator from blocking access to legitimate content, applications, services, or non-malicious devices (*no blocking*), from reducing or degrading legal Internet traffic based on non-malicious content, applications, services or devices (*no throttling*)[7] and finally from offering paid Internet traffic services that can create unequal connections to the Internet through the supply of *fast lanes* (*no paid prioritisation*).

The principle of non-discrimination with regard to access to or provision of services is also reinforced by the affirmation of the rule of *no unreasonable interference or disadvantage to consumers or edge providers*", which modulates the regulatory action more generally around the interests of users and web service providers. In fact, despite it being allowed in the abstract that even *edge* providers (such as the manager of a *social network*) can offer its users differentiated or *premium* services in return for payment, the order requires that such activities should not cause unreasonable interference or disadvantage to all other consumers or competing suppliers[8].

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of the service described in the previous sentence, or that is used to evade the protections set forth in this Part».

[7] See 47 C.F.R. §§ 8.11 («Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule») e 8.2 (f) dell'*Open Internet Order*, per cui «A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service».

[8] FCC, *In the Matter of Protecting and Promoting the Open Internet*, cit., 9, 60 and 285: «§8.11: Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule».

3. *(continued) The EU framework and the "Open Internet" Regulation*

At an EU level, the evolution of net neutrality must be considered alongside the concept of technological neutrality, created within the introduction of the rules on so-called electronic communications[9].

In order to carry out a brief historical reconstruction of the European regulatory framework, it is firstly necessary to refer to Directive 2002/21/EC (the so-called framework directive for electronic communications networks and services) and the four provisions issued during the same period of time to regulate specific areas such as the processing of personal data and the protection of privacy in the specific electronic communications sector (Directive No. 2002/58/EC)[10], authorisations for electronic communications networks and services (Directive No. 2002/20/EC), access to electronic communications networks and related resources as well as to the interconnection of the same (Directive No. 2002/19/EC), and universal service and the rights of users in the field of electronic communications networks and services (Directive No. 2002/22/EC). After less than a decade, the initial regulatory framework was then subject to changes with the enactment of the following directives: 2006/24/EC on the conservation of data generated or processed in the context of the provision of electronic communications services accessible to the public or of public communication networks (which modified Directive No. 2002/58/EC), 2009/140/EC (the so-called better regulation directive, which modified . 19, 20 and 21 of 2002) and

[9] On the matter see Franceschelli V., *Convergenza*, Milano, 2009; Sbrescia V.M., *Le comunicazioni elettroniche tra tecnologia e regolazione*, *Riv. it. dir. pubbl. comun.*, 2011, 1207 ss.; Bassan F., *Diritto delle comunicazioni elettroniche*; Milano, 2010; Pollicino O., *Accesso, interconnessione ed interoperabilità: le novità apportate dal recepimento del "pacchetto telecom" ne confermano il ruolo chiave nel nuovo assetto regolatorio del settore delle comunicazioni elettroniche*, *Dir. inf.*, 2012, 743.

[10] See also Vigliar S., *Privacy e comunicazioni elettroniche: la direttiva 2002/58/CE*, *Dir.inf.*, 2003, 424.

2009/136/EC (the so-called directive on citizens' rights amending Directives Nos. 22 and 58 of 2002, as well as of the EC Regulation No. 2006/2004 on cooperation between national authorities in the matter of consumer protection) and finally with the establishment of the Body of European Regulators of Electronic Communications (BEREC) with Regulation (EC) No. 1211/2009.

During the implementation of the aforementioned directives, the Italian legislator made a choice aimed at ensuring a strong internal harmonisation of the subject, up to then governed by numerous and fragmented sectoral measures.

Excluding the so-called Directive 2002/58, invalidated (together with Directive 2006/24/EC) by the recent ruling from the Court of Justice of the European Union in the *Digital Ireland* case [11] and subject to revision in

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[11] CJEU (Grand Chamber) 8-4-2014, C-293/12 and C-594/12, *Digital Rights Ireland e Seitlinger et al.*, *Digital ECR*, 2014, parr. 65-69: «It follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.

Moreover, as far as concerns the rules relating to the security and protection of data retained by providers of publicly available electronic communications services or of public communications networks, it must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data. In the first place, Article 7 of Directive 2006/24 does not lay down rules which are specific and adapted to (i) the vast quantity of data whose retention is required by that directive, (ii) the sensitive nature of that data and (iii) the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down.

Article 7 of Directive 2006/24, read in conjunction with Article 4(1) of Directive 2002/58 and the second subparagraph of Article 17(1) of Directive 95/46, does not ensure that a particularly high level of protection and security is applied by those providers by means of technical and organisational measures, but permits those providers in particular to have regard to economic considerations when determining the level of security which they apply, as regards the costs of implementing security measures. In particular, Directive 2006/24 does not ensure the irreversible destruction of the data at the end of the data retention period.

In the second place, it should be added that that directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements

the context of the renewal process that is being undergone by the personal data protection rules starting with EU Regulation No. 679/2016[12], the other directives mentioned above (as well as Directive 2002/77/EC of 16 September 2002, concerning the competition in the markets of electronic communications networks and services) have been implemented in the context of a single legislative decree, known, in fact, as the "Code of electronic communications" (Legislative Decree No. 259 of 1 August 2003). This code, duplicating the lines of the revision process followed by the EU regulatory framework, was the subject of some modifications and adaptations made with the entry into force of Legislative Decree No. 70 of May 28, 2012[13].

Article 4 (3), sub-paragraph h) of the Code establishes among the objectives of the rules for electronic communications networks and services, that of guaranteeing technological neutrality, understood as the "*non-discrimination between particular technologies, non-imposition of the use of a particular technology with respect to others and the possibility of adopting reasonable measures in order to promote certain services independently of the technology used*".

Furthermore, Article 13(2) affirms that "*the Ministry and the Authority in exercising the functions and powers indicated in the Code shall pursue, wherever possible, the principle of technological neutrality, in compliance with the principles of guaranteeing competition and non-discrimination between companies*".

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of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data (see, to that effect, Case C-614/10 *Commission* v *Austria* EU:C:2012:631, paragraph 37).

Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter».

[12] In argument see Sica S., D'Antonio V. and Riccio G.M. (eds.), *La nuova disciplina europea della privacy*, Padova, 2017, 13-31; Calzolaio S., *Protezione dei dati personali*, in *Dig. disc. pubbl.*, VII Agg., Torino, 2017, 594.

[13] See Vigliar S., Varriale V. and Giannone Codiglione G., *Le comunicazioni elettroniche*, in Sica S. and Zeno-Zencovich V. (eds.), *Manuale di diritto della comunicazione e dell'informazione*, Padova, 3rd ed., Padova, 2015, 351.

This principle represents the synthesis of a more general intervention strategy followed by the Community and national legislators and consistent, on the "active" side, in creating a competitive, open and non-discriminatory market among the different operators while, on the "passive" side, in the protection of users and the related right to free access to media.

The technological neutrality of the Community kind can be defined as an essential requirement of any modern communication network, which ensures the promotion of an open and technologically advanced market, where innovation and pluralism of information represent the guidelines to follow (as well as the balancing elements) for a constant and balanced growth and development.

In this sense, the changes made in the Community have stressed the need to guarantee and pursue, also thanks to the intervention of the national regulatory authorities, three fundamental objectives, which are linked and instrumental to the principle of neutrality:

a) *access*, intended as an obligation to make resources and services accessible to another company in order to provide electronic communication services[14];

b) *interconnection*, i.e. the physical and logical connection between public communication networks, even between different operators, in order to allow all users to communicate with each other or to access the services offered by another operator[15];

c) interoperability of services, which takes concrete form in the removal of all regulatory, technical and functional obstacles (for example in terms of compatibility, unification and accessibility of procedures or the minimum technical requirements adopted) that prevent the

[14] Article 1(1), lett. b), Legislative Decree no. 259/2003.

[15] Article 1(1), lett. m), Legislative Decree no. 259/2003.

open and interactive use of communication services[16].

The convergence between objectives of a general promotion of competition among companies and the "instrumental" protection of end users, understood as the endpoints of the production chain, is a consolidated paradigm in the policies of Community intervention that have been implemented in the last twenty years (take for example the consumer protection rules[17]), but it is this precise sector that is being enriched with new elements.

In fact, access to a communication network can not only be considered as an act of exploitation of a service provided by the supplier and subject to a specific regulatory framework (licensing regime, operators' obligations, etc.), but it is also a fundamental prerogative for the full development of the personality of each member of Society (Article 3, paragraph 2 of the Constitution), expression of the right to freedom of expression of thought (Article 21 of the Constitution) and other fundamental rights enshrined in the national and community sphere.

This assumption is confirmed by Article 36 of the Charter of Fundamental Rights of the European Union, included in Chapter IV, of solidarity, which recognises and affirms the autonomous right to access services of general economic interest "*in order to promote the social and territorial cohesion of the Union*".

The regulation on electronic communications is therefore required as a

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[16] See Article 4(3), lett. g) and Articles 14, 15, 20, 21, 41, Legislative Decree no. 259/2003.

[17] In argument see Alpa G., *I contratti dei consumatori e la disciplina generale dei contratti e del rapporto obbligatorio*, *Riv. dir. civ.*, 2006, no. 6; Calvo R., *Il concetto di consumatore, l'argomento naturalistico ed il sonno della ragione*, *Contr. impr./Eur.*, 2003; Id., *Tutela del consumatore alla luce del principio di eguaglianza sostanziale*, *Riv. trim.*, 2004; Id., *I contratti del consumatore*, in *Tratt. dir. comm. e dir. pubb. ec. Galgano*, XXXIV, Padova, 2005;. Castronovo C. and Mazzamuto S. (eds.), *Manuale di diritto privato europeo*, I, Milano, 2007; Perlingieri P., *La tutela del consumatore nella Costituzione e nel Trattato di Amsterdam*, in Perlingieri P. and Caterini E. (eds.), *Il diritto dei consumi*, I, Rende-Napoli, 2005; Reich N., *Il consumatore come cittadino – Il cittadino come consumatore: riflessioni sull'attuale stato della teoria del diritto dei consumatori nell'Unione europea*, *Nuova giur. civ. comm.*, 2004, II; Stanzione P. and Musio A. (eds.), *La tutela del consumatore*, Vol. XXX, in Bessone M., *Trattato di diritto privato*, Torino, 2009.

sensitive matter, subject to different kinds of tension: the regulation and control of the activity of companies operating in this sector directly affects the fundamental needs of citizens, as well as the future technological structure of contemporary society.

With respect to these issues, technological neutrality acts as an indispensable parameter of orientation and the structure of Member State *policies*, as well as the operators' activities themselves, setting transparency and openness obligations towards a more virtuous approach, geared towards innovation and, at the same time, protecting the subjective positions of EU citizens.

In this framework, the "open Internet" regulation follows the forecasts adopted overseas, adapting them to the previous legislation.

Firstly, pursuant to Article 1 (1), the Regulations defines common rules to ensure fair and non-discriminatory treatment of traffic in the provision of Internet access services and the related rights of end users. Article 3 (1) establishes the right for users *to "access information and content and disseminate them, as well as to use and provide applications and services, and to use terminal devices of their choice, regardless of the end user's or supplier's location, source or destination of information, content, applications or service, through the Internet access service*".

Article 3 (3), first paragraph, requires on the other hand that Internet access service providers have to deal with "*all traffic in the same way, without discrimination, restrictions or interference, and regardless of source and destination, content accessed or disseminated, applications or services used or supplied, or terminal devices used*".

The procompetitive principle of 'no unreasonable interference' from the US matrix is then differently interpreted with regard to the different figures involved in the offer of online services:

i) the content provider is free to offer better quality services, provided

that they do not go against the availability or the general quality of internet access services for other users (Article 3 (5));

ii) pursuant to the exception in Article 3 (3), the access provider is authorised to implement reasonable measures of traffic implementation provided that they are transparent, non-discriminatory, proportionate and not based on commercial considerations, but on the objective difference in the technical quality of the service requirements for specific traffic categories. Furthermore, these measures must not monitor the specific content or last longer than necessary.

Similarly to what was stated by the *bright line rules*[18], the regulation then requires the access provider not to block, slow down, modify, limit, interfere, degrade or discriminate specific content, applications or services, except as necessary and only for the time necessary to: *a)* implement a Community law or judicial order; *b*) preserve the integrity and security of the network, the services provided and the user terminal; *c*) prevent network congestion or mitigate its effects[19].

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[18] FCC, *In the Matter of Protecting and Promoting the Open Internet*, cit., 284, § 8.2 (f): «A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service».

[19] See Article 3(3) and Recital no. 9: «The objective of reasonable traffic management is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic, and thus of the content, applications and services transmitted. Reasonable traffic management measures applied by providers of internet access services should be transparent, non-discriminatory and proportionate, and should not be based on commercial considerations. The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services from implementing, in order to optimise the overall transmission quality, traffic management measures which differentiate between objectively different categories of traffic. Any such differentiation should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the specific categories of traffic, and not on the basis of commercial considerations. Such differentiating measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally. Such measures should not be maintained for longer than necessary».

In essence, the substance of the two regulatory acts can be said to be oriented towards the same goals, favouring a model of implementation and management of the Internet based on three assumptions:

i) information can circulate freely and without undergoing substantial slowdowns and accelerations with respect to other flows, except in cases of excessive traffic congestion, security reasons, execution of judicial orders;

ii) connectivity to an endpoint of the network is free both for users and for any type of technical entity designed and suitable for accessing the communication flow[20];

iii) the provision of services on the Internet must be carried out in such a way as not to cause an unreasonable disadvantage to others or, in accordance with EU terminology, must respect the principles of proportionality and non-discrimination.

Given these common bases, the European regulation concerning the Open Internet is more specifically expressed with regard to the role played by intermediaries, admitting in the abstract that providers other than access providers, in the hypothesis of services of public interest or, for example, "some new machine-to-machine communication services"[21], may offer

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[20] Article 2 of the Regulation defines the Internet access service as «a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used». Similarly, § 8.2 (a) of the *Open Internet Order* affirms that: «A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, *including any capabilities that are incidental to and enable the operation of the communications service*, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part».

[21] See Recital no. 16: «There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than internet access services, for which specific levels of quality, that are not assured by internet access services, are necessary. Such specific levels of quality are, for instance, required by some services responding to a public interest or by some new machine-to-machine communications services. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services should therefore be free to offer services which are not internet access services and which are optimised for

content, applications or services or combinations thereof with different and high-quality standards, provided that this offer does not degrade the availability and general quality of Internet access services for end users[22].

4. *The US Counter-Reformation: Restoring Internet Freedom Order.*

The apparent regulatory convergence of US and EU regulations, the result of an exercise of partial imitation of homologous origins following the

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specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality. National regulatory authorities should verify whether and to what extent such optimisation is objectively necessary to ensure one or more specific and key features of the content, applications or services and to enable a corresponding quality assurance to be given to end-users, rather than simply granting general priority over comparable content, applications or services available via the internet access service and thereby circumventing the provisions regarding traffic management measures applicable to the internet access services».

[22] See also Recital no. 17: «In order to avoid the provision of such other services having a negative impact on the availability or general quality of internet access services for end-users, sufficient capacity needs to be ensured. Providers of electronic communications to the public, including providers of internet access services, should, therefore, offer such other services, or conclude corresponding agreements with providers of content, applications or services facilitating such other services, only if the network capacity is sufficient for their provision in addition to any internet access services provided. The provisions of this Regulation on the safeguarding of open internet access should not be circumvented by means of other services usable or offered as a replacement for internet access services. However, the mere fact that corporate services such as virtual private networks might also give access to the internet should not result in them being considered to be a replacement of the internet access services, provided that the provision of such access to the internet by a provider of electronic communications to the public complies with Article 3(1) to (4) of this Regulation, and therefore cannot be considered to be a circumvention of those provisions. The provision of such services other than internet access services should not be to the detriment of the availability and general quality of internet access services for end-users. In mobile networks, traffic volumes in a given radio cell are more difficult to anticipate due to the varying number of active end-users, and for this reason an impact on the quality of internet access services for end-users might occur in unforeseeable circumstances. In mobile networks, the general quality of internet access services for end-users should not be deemed to incur a detriment where the aggregate negative impact of services other than internet access services is unavoidable, minimal and limited to a short duration. National regulatory authorities should ensure that providers of electronic communications to the public comply with that requirement. In this respect, national regulatory authorities should assess the impact on the availability and general quality of internet access services by analysing, inter alia, quality of service parameters (such as latency, jitter, packet loss), the levels and effects of congestion in the network, actual versus advertised speeds, the performance of internet access services as compared with services other than internet access services, and quality as perceived by end-users».

circulation of a legal model[23], seems to find a new fracture point in the "counter-reform" voted in January 2018 by the *Federal Communication Commission*, with the Trump administration's approval.

The *Restoring Internet Freedom Order*[24] moves towards a market-based policy, reclassifying broadband Internet access service as an information service classification, following the U.S. Supreme Court's approach adopted in *Brand X* decision[25].

The FCC also reinstated the private mobile service classification of mobile broadband Internet access service, returning to the definition of "interconnected service" that existed prior to 2015.

The order returned to the transparency rule adopted in 2010 with certain limited modifications to promote additional transparency, eliminating the reporting requirements adopted in the 2015 *Open Internet Order*.

With regard to the "bright line rules", in January 2018, the FCC deleted the following rules that have been introduced in 2015 (the 2010 *Open Internet Order* had introduced similar rules in respect of fixed broadband only):

i) *No-Blocking*: previously § 8.5, the FCC had prohibited broadband providers from blocking lawful content, applications, services, or non-harmful devices. This "no-blocking" principle has long been a cornerstone of the Commission's policies.

ii) *No-Throttling*: previously § 8.7, the FCC had prohibited broadband providers from impairing or degrading lawful Internet traffic on the basis of content, application, service, or

[23] On the concept of "imitation" in comparative law see i.e. Sacco R., *Introduzione al diritto comparato*, Torino, 2011, 147.

[24] FCC, *In the matter of Restoring Internet Freedom*, WC Docket No. 17-108, Adopted December 14, 2017, Released: January 4, 2018.

[25] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*). In the decision, the Supreme Court therefore upheld the FCC's determination that a cable Internet provider is an "information service", and not a "telecommunications service".

use of non-harmful device.

iii) *No Paid Prioritization*: previously § 8.9, the FCC had banned all paid prioritization subject to a narrow waiver process.

iv) *'No Unreasonable Interference/Disadvantage' Standard*: previously § 8.11. In addition to these three rules, the FCC had set a 'no unreasonable interference/disadvantage' standard, under which the Commission can prohibit practices that unreasonably interfere with the ability of consumers or edge providers to select, access, and use broadband Internet access service to reach one another, thus causing harm to the open Internet. This 'no unreasonable interference/disadvantage' standard will operate on a case-by-case basis and is designed to evaluate other current or future broadband Internet access provider policies or practices—not covered by the bright-line rules— and prohibit those that harm the open Internet.

In conclusion, the FCC completely erased the strategy approved in 2015 and in particular the principle of '*no unreasonable interference or disadvantage to consumers or edge providers*', affirming that the costs of these rules to innovation and investment outweigh any benefits they may have. In conclusion, the new FCC Order finds that the conduct rules are unnecessary because the transparency requirement adopted together with ordinary antitrust and consumer protection laws, "*ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet*".

5. *Digital information as a limit to access to services and content and a discriminating factor for operators and users*

The reform now implemented by the *Federal Communication Commission* aims to restore a regulatory framework devoid of principles of general scope and mainly organised in prohibitions concerning specific conduct and corrective actions that are *ex-post* and on a case by case basis. The entire regulation of relations is therefore mainly delegated to the ordinary rules on competition and consumer protection.

By placing ourselves in the area of personal protection, ensuring a neutral Internet does not just mean allowing equal access to networks, services and content[26], but above all to promote its quality[27] in terms of freedom of choice and protection of the fundamental user rights, framed in the triple role of consumer, producer and owner of digital information[28].

In this context, the progressive concentration of market powers in favour of enterprises that operate on more than one side of the electronic communications market (so-called OTT, *Over the top*[29]), poses the problem of the effectiveness of anti-competitive remedies[30]. Already with the *Comcast*

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[26] For an in-depth critical analysis of this concept see Fachechi A., *Net neutrality e discriminazioni arbitrarie*, Napoli, 2017, 13 ss.

[27] See Bocchini R., *La centralità della qualità del servizio nel dibattito in tema di network neutrality*, *Dir. inf.*, 2017, 517.

[28] On the notion of "prosumer" see Toffler A., *The Third Way*, New York, 1980; Gorz A., *L'immatériel*, Paris, 2003, 52; Rifkin J., *La società a costo marginale zero*, Milano, 2014, 352, and 396 ss.; Dellarocas P., *The Digitization of Word-of-Mouth: Promise and Challenges of Online Feedback Mechanisms*, MIT Sloan Working Paper no. 4296-03, 2003; Ghose A., Ipeirotis P. and Sundararajan A., *The Dimensions of Reputation in Electronic Markets*, NYU Center for Digital Economy Research Working Paper no. CeDER-06-02, 2009; Strahilevitz L., *Wealth Without Markets? The Wealth of Networks: How Social Production Transforms Markets and Freedom*, *Yale L. J.*, vol. 116, 2007, 1472.

[29] For the Italian Indipendent Authority of Communication (AGCOM), OTT are «le imprese che forniscono, attraverso la rete Internet, servizi, contenuti (soprattutto video) e applicazioni di tipo "rich media" (per esempio, le pubblicità che appaiono "sopra" la pagina di un sito web mentre lo si visita e che dopo una durata prefissata scompaiono). Esse traggono ricavo, in prevalenza, dalla vendita di contenuti e servizi agli utenti finali». AGCOM, *Indagine conoscitiva concernete lo sviluppo delle piattaforme digitali e dei servizi di comunicazioni elettronica*, delibera n. 165/16/CONS, 5.5.2016 and also see Sujata J., Sohag S., Tanu D., Chintan D., P. Shubham and Sumit G., *Impact of Over the Top (OTT) Services on Telecom Service Providers*, 8 *Indian J. of Science and Tech.* 145 (2015).

[30] See Caillaud B. and Jullien B., *Chicken & Egg: Competition among Intermediation Service Providers*, 34 *RAND J. Econ.* 309 (2003); Rochet J.C. and Tirole J., *Platform Competition in Two-Sided Markets*, 1 *J. European Econ. Assn.* 990 (2003); Evans D.S., *The Antitrust Economics of Multi-Sided Platform Markets*, 20 *Yale J. Regulation* 325 (2003); Armstrong M., *Competition in Two-Sided Markets*, 37 *RAND J. Econ.* 669 (2006).Gorkaynak G. -

case[31], that was concluded in the Court of Appeals for the District of Columbia, they emphasised the discriminatory practices implemented by the broadcaster by favouring access to applications under its management and slowing down instead the use of third-party applications such as some 'peer to peer' sharing programs.

In a market increasingly dominated by services and applications that make the collection and processing of large masses of data their strength, digital information itself can represent a limit for access to "neutral" services and content. "And a discriminating factor for other operators[32].

In other words, the net neutrality principle involves the issue of the cross-border transfer of digital information understood initially as economic goods[33], exchangeable freely between enterprises and necessary to promote the development of international commerce[34].

Durlu D. and Hagan M., *Antitrust on the Internet: a Comparative Assessment of Competition Law Enforcement in the Internet Realm*, 14 *Bus. L. Int'l* 51 (2013); Hoppner T., *Defining Markets for Multi-Sided Platforms: The Case of Search Engines*, 38 *World Competition* 349 (2015); Pardolesi R., *La concorrenza sleale nell'era di Internet*, in Pardolesi R. and Romano R. (eds.), *La concorrenza reale e la tutela dell'innovazione*, Milano, 2009, 105; Rossi G., *Cyber-antitrust, Internet e tutela della concorrenza*, *Dir. inf.*, 2003, 247-279; Riccio G.M., *Concorrenza sleale e tutela dei consumatori nelle reti telematiche*, *ivi*, 3, 2006, 307; Zeno-Zencovich V., *I rapporti tra gestori di reti e fornitori di contenuti nel contesto europeo*, *ivi*, 2004, 421; Id. *Internet e concorrenza*, *ivi*, 4/5, 2010, 697 ss.

[31] *Comcast Corp. v. FCC*, 600 F.3d 642 (2010).

[32] For a preliminary opinion about competition in the "Big Data" era see Mayer-Schönberger V., Cukier K., *Big data*, Milano, 2013; Zeno-Zencovich V., Giannone Codiglione G., *Ten Legal Perspectives on the "Big Data Revolution"*, 23 *Concorrenza e mercato* 29 (2016); Newman N., *Search, Antitrust, and the Economics of the Control of User Data*, 31 *Yale J. on Reg* 401 (2014); Jones Harbour P. and Koslov T.I., *Section 2 In A Web 2.0 World: An Expanded Vision Of Relevant Product Markets*, 76 *Antitrust L.J.* 769 (2011); Tucker C., Marthews A., *Social networks, Advertising and Antitrust*, 19 *Geo. Mason L. Rev.* 1211 (2012); Giannone Codiglione G., *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, *Dir. inf.*., 4/5, 2015, 909-938.

[33] On the notion of information as a "good" see in general Perlingieri P., *L'informazione come bene giuridico*, *Rass. dir. civ.*, 1990, 338; Zeno-Zencovich V., *Informazione (profili civilistici)*, *Dig. disc. priv.*, sez. civ., IX, Torino, 1993, 420. With regard to the economic theories of information as "common goods" Samuelson P., *The Pure Theory of Public Expediture*, 36 *The Review of Economics* and *Statistics* 387 (1954); Mackaay E., *Economics of Information and Law*, Dordrecht, Kluwer-Nijoff, 1982; Stiglitz J.E., *Information and the Change in the Paradigm in the Economics*, 92 *The American Economic Review* 460 (2002); Zeno-Zencovich V. and Sandicchi G.B., *L'economia della conoscenza e i suoi riflessi giuridici*, *Dir. inf.*, 6, 2002, 971; De Franceschi A. and Lehmann M., *Data as Tradeable Commodity and New Measures for their Protection*, 1 *The Italian Law Journal* 51 (2015).

[34] See Brown W., *Economic and Trade Related Aspects of Transborder Data Flow*, 6 *Nw. J. Int'l L. & Bus.* 1 (1984). Data transfer and commerce is the principal activity of the electronic commerce. For example, the Court of Justice of the European Union in the Schrems case affirmed that: "In point 1 of Communication COM (2013) 846 final, the Commission stated that '[c]ommercial exchanges are addressed by Decision

Over the last few years, the standard use of data by providers has gone beyond that of the mere support for commercial strategies (consider the purchasing preferences that can be inferred from so-called "profiling" or personalised offers to individuals that can be made through the use of behavioural advertising)[35]: the data itself is the principal subject of the entrepreneurial activity.

This data, whether it is personal, anonymous, related to commercial or other aspects of life, is picked up, transferred, used and in most cases kept and stored, representing a different form of "capital" and an alternative to the added valued obtained from the sale of services or advertising space[36].

[2000/520]', adding that '[t]his Decision provides a legal basis for transfers of personal data from the [European Union] to companies established in the [United States] which have adhered to the Safe Harbour Privacy Principles'. In addition, the Commission underlined in point 1 the increasing relevance of personal data flows, owing in particular to the development of the digital economy which has indeed 'led to exponential growth in the quantity, quality, diversity and nature of data processing activities'(…) Whilst acknowledging, in recital 56 in its preamble, that transfers of personal data from the Member States to third countries are necessary for the expansion of international trade, Directive 95/46 lays down as a principle, in Article 25(1), that such transfers may take place only if the third country ensures an adequate level of protection". (CJEU (Grand Chamber) 6-10-2015, C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner*, *Digital ECR*, 2015, paras. 12 and 48).

[35] See for example Recital No. 18 of Directive 2000/31/EC: «Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services".

[36] For a preliminary inquiry on the matter see Floridi L., *The Fourth Revolution*, Oxford, 2014; Ross A., The Industries of the Future, New York, 2016.

There are at least three aspects of this argument that seem to be worth going into in more depth, each of which is connected to the other:

1) Where freedom of enterprise is laid down as a necessary precondition for the creation of an economic system focussed on progress and innovation[37], it is argued that it is necessary to encourage the access to the market for many companies, and at the same time, to incentivise the "natural" dynamics of competition, limiting, where possible, both regulatory intervention and/or sanctions/requests for conformity[38]. The Web, however, as also occurred in the last two centuries with most means of mass communication, encourages the formation of monopolies and oligopolies[39].
2) The existence of positions of advantage places an "information asset" in the hands of private parties that on the one hand increases their strength compared to their competitors and, on the other, corresponds to an immense portion of public power.

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[37] Following the Hayekian perspective, "Only when a great many different ways of doing things can be tried will there exist such a variety of individual experience, knowledge and skills, that a continuous selection of the most successful will lead to steady improvement" (von Hayek F., *New Studies in Philosophy, Politics, Economics and the History of Ideas*, London, 1978, 148-149).

[38] In accordance to the vision of the so-called Economic School of Chicago: see Friedman M., *Capitalism and Freedom*, Chicago, 1962, 21: "The existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the "rules of the game" and as an umpire to interpret and enforce the rules decided on. What the market does is to reduce greatly the range of issues that must be decided through political means, and thereby to minimize the extent to which government need participate directly in the game. The characteristic feature of action through political channels is that it tends to require or enforce substantial conformity. The great advantage of the market, on the other hand, is that it permits wide diversity. It is, in political terms, a system of proportional representation. Each man can vote, as it were, for the color of tie he wants and get it; he does not have to see what color the majority wants and then, if he is in the minority, submit.". See also Friedman D.D., *L'ordine del diritto*, Bologna, 2004, 459-492 and R. Cooter R., Mattei U., Monateri P.G., Pardolesi R. and Ulen T., *Il mercato delle regole*, I, 2nd ed., 2006, 26.

[39] See Thépot F., *Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets*, 36 *World Competition*, *Kluwer L. Intl.* 195 (2013); Roson R., *Two-Sided Markets: A Tentative Survey*, 4 *Rev. Network Econ.* (2005).

3) The established nature of the Internet as an essential good, not only of an economic character according to Article 36 of the EU Charter of fundamental rights[40], and the presence of principles inherent from its creation and nature (such as that of net neutrality), conflicts with the economic interest underlying the providing of services, highlighting the importance of defining the freedom of enterprise as a right which is instrumental to the protection and the fulfilment of the fundamental rights of the individual.

It is not possible therefore to look at the limit of its social utility solely as a guarantee for the lowering of "prices" (consider the paradox of the free web service) and an increase in the quality and accessibility of a product or service on the Internet, but it is perhaps opportune to concentrate our attention on the across-the-board effect that the guarantee of real competition between operators produces in a market which is only in appearance modulated by ordinary parameters.

6. *Relevant markets and protection of competition on the Internet*

In order to be able to prepare an attempt to apply the anti-monopoly rules in force in Europe and in the United States, it is advisable to carry out a survey of the general principles of the matter.

The Community competition (antitrust) legislation is linked to the objectives of promoting a free competitive and convergent internal market in results

[40] Article 36 of the EU Charter of fundamental rights "Access to services of general economic interest" affirms that «The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union».

(Article 2 TEU[41]) and integrates the adjustment tools *ex ante* and counteracting market imbalances with sectoral legislation aimed at ensuring cross consumer protection, attentive to their needs, not only in terms of price reduction or variety of products[42].

Such a two-part strategy is deducible from the Treaty on the Functioning of the EU itself, which in Articles 101-109 establishes the general rules of competition, expanded in detail by specific regulations (for example, see Council Regulations No. 1/2003 on procedures and No. 139/2004 on mergers), while Article 169 dedicates an entire (although succinct) section to consumer protection: another piece of evidence in this sense is represented by Directive 2005/29/EU on unfair commercial practices between businesses and consumers.

The harmonisation effort of the Community legislator affects the relationship between supranational and municipal law and promotes a coordinated vision between the individual protection sectors (competition, consumption ratio, general contract theory, typical contracts)[43]: in this dialectical perspective, fundamental rights play a prominent role, in terms of declamation and with regard to the control and the jurisprudential application of the rules.

The enforcement of the competition rules is ensured by the Commission, the Court of Justice and the Court and, on a different level, by the competent national administrative authorities (without forgetting the role of

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[41] «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

[42] For a first recognition see Vigliar S., *Antitrust*, in Colucci M. and Sica S., *L'Unione Europea*, Bologna, 2005, 297; Ghidini G., *La concorrenza sleale*, Torino, 2001; Frignani A. and Pardolesi R., *La concorrenza*, in Ajani G. and Benacchio A, *Tratt. dir. priv. U.E.*, VII, Torino, 2006.

[43] See i.e. Alpa G. and Mazzamuto S., *Il diritto contrattuale di fonte comunitaria*, in Castronovo C. and Mazzamuto S. (eds.), *Manuale di diritto privato europe*, cit., vol. II, 249; Hesselink W., *European contract law: a matter of consumer protection, citizenship, or justice?*, in Vettori G. (ed.), *Remedies in contract*, Padova, 2008, 107.

the ordinary judge), if entrepreneurial practices are detected that affect trade between Member States or between companies operating in the same state, preventing, restricting or distorting "the game of competition"[44].

The Treaty on the Functioning of the Union recognises three typical but sufficiently "open" types of competitive offences: *a*) agreements or concerted practices (Article 101 TFEU), *b*) abuse of a dominant position on the market (Article 102 TFEU)[45], *c*) Member State aid to enterprises (Article 107 TFEU)[46].

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[44] See Article 101 TFEU: «1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question».

[45] «Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts».

[46] « 1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain

On the other side of the ocean, the more mature US antitrust rules are based on the *Sherman Act* of 1890[47] and the *Clayton Act* of 1914[48] in the field of mergers, to the *Federal Trade Commission Act* (1914)[49] and to the *Robinson Patman Act* (1936)[50], which applies in the event of discrimination on the selling price of products of the same grade and type of quality on American soil: the relevant authorities at a federal level are the Antitrust Division of the *Department of Justice* (DOJ), and the Bureau of Competition of the *Federal Trade Commission* (FTC)[51].

Specifically, § 1 of the *Sherman Act* prohibits any agreement that unreasonably limits free trade, for example by agreeing on the prices of a product, by agreeing to reduce production, by dividing markets or by

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undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.».

[47] 15 U.S.C. §§ 1-7.

[48] 15 U.S.C. §§ 12-27; 29 U.S.C. §§ 52-53.

[49] 15 U.S.C §§ 41-58.

[50] 15 U.S.C. § 13.

[51] In argument see Kovacic W., Mavroidis P. and Neven D., *Merger control procedures and institutions: a comparison of the EU and US practice*, Robert Schuman Centre for Advanced Studies, 2014; Cengiz F., *Antitrust federalism in the EU and the US*, London, 2012; Fox E.M. , *US and EU Competition law. A Comparison*, in Graham E.M. and Richardson J.D. (eds.), *Global Competition Policy*, Washington, 1997, 339.

refusing to contract with third parties not involved in the agreement. § 2, on the other hand, prohibits the formation of monopolies in general and extends to the conduct of individual natural or legal persons aimed at controlling the market or conducting negotiations and agreements designed for this purpose.

Equipped with a value of general clause is the § 5 (a) (1) of the FTC *Act*[52] (cited in the body of the Schrems sentence) whereby any improper method of competition and any improper or deceptive action or practice is illegal. Because it is so wide, it can embrace the cases described in the remaining regulations of the sector, ensuring in principle that the *Federal Trade Commission* has competence in relation to all distorting practices.

A determining factor for the assessment of a company's anticompetitive behaviour is the definition of the "relevant market" in which it operates. This concept is strictly connected to that of "product": it is, therefore, necessary to identify those products that, due to their properties, use or price are not easily considered interchangeable by the consumer.

The *relevant product market* is built on the basis of material, spatial and temporal parameters, embracing every type of relationship that is created around the same product[53] and enhances the subjective perception of the consumer. Market analysis is in fact based on demand and aims more broadly to verify the impact of a given behaviour on the benefits obtained from the consumer.

Once the reference market has been defined, it will be necessary to calculate its shares and the power attributable to any given company (*market power*), adopting on a case-by-case basis specific and functional parameters,

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[52] 15 U.S.C. § 45(a)(1): «Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. (…)».

[53] It is the case of a multi-sided market: see Granieri M., *Two-sided markets and the credit card industry: are antitrust authorities missing the big picture?*, *Law & Economics Working Paper*, 2011; Colangelo M. and Zeno-Zencovich V., *La intermediazione on-line e la disciplina della concorrenza*, *Dir. inf.*, 2014, 53.

varying according to the type of consumer (elderly, child, adult) or product, and also with respect to each single hypothesis of antitrust prohibition (abuse of dominant position, concentration, restrictive understanding).

According to the European Commission, the increase in market power consists "(in) the possibility for one or more companies to increase prices, reduce production, the choice or quality of goods and services, decrease innovation or alternatively influence the competition parameters to gain an advantage"[54].

Cases relating to the Internet services market are characterised by the long duration of the proceedings, the simultaneous involvement of the EU and US authorities and by results that are often favourable to the companies under investigation.

In *Google-Doubleclick*[55], the acquisition by the general search engine of a company that provides technologies for placing advertising messages through tracking services (e.g. with so-called *Cookies*), was approved by both the FTC and the Commission on the basis of merger legislation.

In the European context, Regulation No. 139/2004 applies to all concentrations with an EU dimension[56] producing a lasting change in

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[54] See EU Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, *OJ* C 31, 5.2.2004, 5-18.

[55] FTC, *Google-DoubleClick*, FTC File No. 071-0170 (Dec. 20, 2007); EU Commission, decision 11.3.2008, Case COMP/M.4731 — *Google/DoubleClick*, C(2008) 927 final.

[56] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Article 1(2) and (3): « 2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

control on the single market, "in terms of their effect on the structure of competition in the Community" (Recital no. 6).

The anti-competitive impact of the merger must also be verified by looking at the general principles on the abuse of a dominant position pursuant to Article 102 TFEU and therefore with respect to the ability of a given company to determine prices and control production in a specific market, by means of: *i*) behaviour aimed at excluding competitors by means other than competition based on the merits of the products or services provided (exclusive agreements, bundling or aggregate sales, predatory behaviour, refusal to supply)[57] or *ii*) anti-competitive closures leading to the detriment of consumers, such as any unjustified increase in prices.

The reference market has been identified with that of *online advertising* (supply of advertising space for *Google* and placement of listings for *Doubleclick*) and segmented according to the type of commercial communication conveyed (for *Google*) and the type of contractor (the distinction between advertisers or publishers for *Doubleclick*). However, the definition of a relevant market has not been absolutely established but is open to future[58] discussion.

With respect to these indices, the acquisition of *Doubleclick* was approved both from a horizontal (competition between the two operators) and vertical viewpoint (competition between the two distinct operators on the markets in

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(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State».

[57] See EU Commission, *Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009/C 45/02, *OJ* C 45/7, 24.2.2009.

[58] FTC, *Google-DoubleClick*, cit., 13: «The markets within the online advertising space continue to quickly evolve, and predicting their future course is not a simple task. Accounting for the dynamic nature of an industry requires solid grounding in facts and the careful application of tested antitrust analysis».

which they operate, that is the insertion of *Doubleclick* ads and advertising related to research and advertising brokerage services for *Google*).

Furthermore, the FTC and the Commission focused on the possible anti-competitive effect of combining the databases of the two companies. Because of the contractual obligations between *Doubleclick* and its customers, the data-set would not have lent themselves to a "cross-use", being usable only by the advertiser who proposed the advertisement to the user visiting the web page[59].

In any case, as a result of the merger, this data-set would not have been a decisive input capable of determining an advantage on the reference market[60], also given that all *Google* competitors had already integrated the technologies in question into their portals.

The reasoning put forward by the two authorities - dating back to almost ten years ago - hide some limitations: the relevant market is framed only in terms of advertising sales and the justifications put forward to downgrade the market power connected to the merger of data sets are challenged by contractual practices involving the user and lender.

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[59] Cfr. FTC, *Google-DoubleClick*, cit., 12: «However, the customer and competitor information that DoubleClick collects currently belongs to publishers, not DoubleClick. Restrictions in DoubleClick's contracts with its customers, which those customers insisted on, protect that information from disclosure, and we understand that Google has committed to the sanctity of those contracts. Furthermore, if, post-transaction, Google were to change or breach those contracts, the evidence does not support the conclusion that the aggregation of consumer or competitive information accessible to Google as a result of its acquisition of DoubleClick is likely to confer market power. The evidence, for instance, does not support the suggestion that Google would be able to use competitively sensitive information in DFP – particularly pricing information – to disadvantage its ad intermediation competitors»; EU Commission, *Google-DoubleClick*, cit., par. 361:«The notifying party submitted that DoubleClick's current contracts with advertisers do not allow the use of data regarding which web pages a user visited, in order to better target ads from other advertisers than those that were instrumental in bringing this data into existence, that is to say, the advertiser that had served an ad to the user when the user was visiting the web page. By extension, the merged entity would also be contractually prevented from using that part of its enlarged database originating from DoubleClick to improve, for example, targeting of search ads on Google's sites or contextual ads in the AdSense network».

[60] FTC, *Google-DoubleClick*, cit., 12: «Yet, the evidence indicates that neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product. (…)»; Commissione europea, *Google-DoubleClick*, cit., par. 365.

The clauses in the terms and conditions prepared by the major social media explicitly recognise, alternative and cross-platform use of the data entered by registered users accessing the platform.

Moreover, the perspective adopted by the Commission is exclusively qualitative: it assesses the "data" being processed as precise information that can only be used by the individual advertiser to modulate a given offer[61], without taking into consideration that the new processing systems derive fundamental indications (and relative surplus value) even from the quantity of data collected and processed.

In the later case *TomTom-Tele Atlas*[62], the Commission explored the vertical integration between a company that produces *software* and *hardware* for GPS navigation with another digital map provider. The results of the investigation showed the importance of protecting the degree of "confidentiality" of the information produced by the users of *Tele Atlas* maps and subject to acquisition.

The prospect of a migration of users to a competing company has attributed to the expectation of privacy a value that directly influences the market power of the company that is likely to be taken over, with effects comparable to those of degradation of the product[63].

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[61] EU Commission, *Google-DoubleClick*, cit., par. 362:«advertisers have no interest in other advertisers having access to their data and thus getting insight into competitively important information such as information about the pricing of ads across different websites. Given this probable lack of *ability* to force a change in contractual relations, it is also doubtful whether DoubleClick would have an *incentive* to try to do so since stopping to be a neutral service provider might prompt customers to switch over».

[62] EU Commission, decision 14.5.2008, Caso COMP-M.4854 — *TomTom-Tele Atlas*, C(2008) 1859.

[63] EU Commission, *TomTom-Tele Atlas*, cit., par. 273: «Therefore it has to be examined whether the incentive to protect its customers' confidential information would change post-merger, should the merged company be in a position to obtain confidential information from its customers. The Commission's analysis reveals that Tele Atlas would have incentives to keep its current customers from switching to NAVTEQ, since losing a customer would not be compensated by sufficient additional gains downstream independently of whether NAVTEQ significantly raised its prices. The market investigation showed that in this case confidentiality concerns can be considered as similar to product degradation in that the perceived value of the map for PND manufacturers would be lower if they feared that their confidential information could be revealed to TomTom. As a consequence, Tele Atlas's map database could be

In the *Microsoft-Yahoo*[64]case, both the Commission and the DOJ deemed that sharing information between the research and advertising services offered to advertisers by both companies to be admissible. The possibility of being able to compete with *Google* in both markets justified the merger.

The procompetitive factor was identified precisely in the acquisition of a vast data-set pertaining to *queries*[65], which would have favoured the two search engines (*Bing!* and *Yahoo*) in terms of innovation[66].

More recently, the competent authorities have measured themselves against some acquisitions performed by *social networks*.

In the *Facebook-Whatsapp* case[67], the Commission considered three relevant markets: communication services between consumers, those of *social networking* and *online advertising*.

With reference to the latter market, it was found that at that time it was not a practice adopted by *Facebook* to transfer the data collected to advertisers or to third parties as a "new and different product", distinct from the service of *advertising*[68]. On the other hand, *Whatsapp* did not keep the data of the

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perceived as relatively less valuable than NAVTEQ's map database. Confidentiality concerns could thus lead Tele Atlas's customers to consider switching to NAVTEQ».

[64] U.S. Department of Justice, *Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.*, 18 febbraio 2010; EU Commission, decision 18.2.2010, Caso COMP-M.5727 – *Microsoft- Yahoo-Search Business*, C(2010) 1077.

[65] U.S. Department of Justice, *Statement*, cit.: «because it will have access to a larger set of queries, which should accelerate the automated learning of Microsoft's search and paid search algorithms and enhance Microsoft's ability to serve more relevant search results and paid search listings, particularly with respect to rare or "tail" queries. The increased queries received by the combined operation will further provide Microsoft with a much larger pool of data than it currently has or is likely to obtain without this transaction. This larger data pool may enable more effective testing and thus more rapid innovation of potential new search-related products, changes in the presentation of search results and paid search listings, other changes in the user interface, and changes in the search or paid search algorithms. This enhanced performance, if realized, should exert correspondingly greater competitive pressure in the marketplace».

[66] EU Commission, *Microsoft- Yahoo-Search Business*, cit., par. 223: «Furthermore, as submitted by the notifying party and as analysed above, the effects of scale are likely to allow the merged entity to run more tests and experiments on the algorithm in order to improve its relevance».

[67] EU Commission, decision 3.10.2014, Case COMP/M.7217 – *Facebook-Whatsapp*, C(2014) 7239 final.

[68] Similarly in relation to the *Google-Doubleclick* case.

conversations (not fungible for purposes of *advertising*) on their servers, as they are stored solely on users' mobile devices or in the *cloud* related thereto[69].

In any case, the merger would have implied *Facebook* 's collection of Whatsapp users' personal data: this consequence has been considered in the abstract as inconvenient for the controlled company, implicitly recognising the weight of consumers' expectation of *privacy* for the choice of using any given multi-platform communication service[70]. The power of gathering data on the advertising market resulting from the merger would not have increased in a way detrimental to competition, given the presence of a significant number of companies in the reference sector: the percentage of data controlled by *Facebook* would have crossed the threshold of 9% overall recorded in 2013, still leaving a significant portion in the hands of third parties[71].

The cases analysed show how often the notion of relevant market has been prepared favouring the activity of *advertising*, source of the largest profits declared. The perception of the importance of the data collected has

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[69] EU Commission, *Facebook-Whatsapp*, cit., par. 70.

[70] EU Commission, *Facebook-Whatsap*, cit., par. 186: «As regards the incentive of the merged entity to start collecting data from WhatsApp users (for example, age, gender, country, message content), a number of respondents pointed out that, if the merged entity were to do so, this may prompt some users to switch to different consumer communications apps that they perceive as less intrusive.106 Moreover, the Commission notes that, as explained above (174), the need to abandon WhatsApp's plan for […] may reduce Facebook's incentive to start collecting data from WhatsApp messages».

[71] EU Commission, *Facebook-Whatsap*, cit., par. 186: « In this regard, the Commission refers to the results of the market investigation presented above (paragraph (177)), which indicate that, post-Transaction, there will remain a sufficient number of alternative providers of online advertising services. In addition, the Commission notes that there are currently a significant number of market participants that collect user data alongside Facebook. These include, first of all Google, which accounts for a significant portion of the Internet user data and, in addition, companies such as Apple, Amazon, eBay, Microsoft, AOL, Yahoo!, Twitter, IAC, LinkedIn, Adobe and Yelp, among others. The graph below provides an overview of the estimated share of data collection across the web».

gradually grown in interpretations, sometimes disconnecting from the mere logic of use for advertising purposes[72].

A confirmation of this trend comes from developments in the Facebook-Whatsapp *case*. In May 2017, EU Commission fined Facebook €110 million for providing incorrect or misleading information during the 2014 investigation. In particular, when Facebook notified the acquisition of WhatsApp in 2014, it informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. It stated this both in the notification form and in a reply to a request of information from the Commission.

As is well known, in 2016 WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities[73].

7. *Quality of services and protection of users' rights: the search for a regulatory principle*

In light of the elements gathered hitherto, the notion of "relevant market" in relation to the new services offered by the web 2.0 providers can refer to three different sectors:

a) the service rendered to the user, in its many forms;

b) types of *advertising* sold to commercial operators;

c) the data processing activity, which involves and can influence the previous two sectors, but above all asserts itself as an independent "product"[74].

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[72] See Giannone Codiglione G., *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, cit., 928.

[73] See EU Commission, *Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover*, 18.5.2017, IP/17/1369.

[74] See Jones Harbour P. and Koslov T.I., *Section 2 In A Web 2.0 World*, cit., 774; Ohlhausen M.K. and Okuliar A.P., *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 *Antitrust L. J.* 121 (2015).

For example, reflect on the opportunity that users could choose similar services but are more attentive to the profile of personal data protection (in the sense of the possibility of access to a qualitatively better service); on the commercial activities of *profiling* and *behavioural advertising* fed by data collection; on the intrinsic value of the data stored and stored by the lender. From this latter point of view, these activities are a precondition for new and undefined processing, representing a different activity from that for which consent was given and configuring a different relevant market whose object is a non-replaceable service.

It is no accident that the new EU legislation on the protection of personal data includes processing activities carried out for purposes other than those for which the data were collected. In such cases, in the absence of consent of the data subject or other legislation that establishes the lawfulness of the activity, the data controller is required to assess whether such processing is abstractly compliant with the principles of necessity and proportionality as per Article 23 of the GDPR[75], with particular regard to the aims pursued by the main processing. As specified by Article 6 (4), this prior compatibility check must, by way of example, take into account every possible connection between the different purposes, the context in which the personal data were

[75] In accordance to Article 23 of the GDPR, Recital no. 73) affirms that «Restrictions concerning specific principles and the rights of information, access to and rectification or erasure of personal data, the right to data portability, the right to object, decisions based on profiling, as well as the communication of a personal data breach to a data subject and certain related obligations of the controllers may be imposed by Union or Member State law, as far as necessary and proportionate in a democratic society to safeguard public security, including the protection of human life especially in response to natural or manmade disasters, the prevention, investigation and prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, or of breaches of ethics for regulated professions, other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, the keeping of public registers kept for reasons of general public interest, further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes or the protection of the data subject or the rights and freedoms of others, including social protection, public health and humanitarian purposes. Those restrictions should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms».

collected, their nature, the possible consequences of the further processing and the existence of adequate safeguards to minimise the underlying risks, such as encryption or pseudonymisation.

Wanting to adopt a broad notion of relevant market, the present and future availability of agglomerations of personal and anonymous data could be evaluated in at least three ways.

Firstly, the user's inability to migrate from one service to another, for example in terms of exporting the set of contents connected to the virtual friendship links on a social media platform.

These constraints would act as barriers to access for consumers and competitors in the market for the services of *social networking* and of *advertising*, with an effect that is close, on a conceptual level, to the refusal of *Microsoft* to provide indispensable information for interoperability between *Windows* and other operating systems, criticised on several occasions by the Commission and the Court of First Instance[76].

In the *Microsoft* case - as in the case of *Google*[77] search - the need to ensure interoperability was affirmed on the basis of the *essential facility doctrine*.

The entry barrier would be equivalent to a denial of access to an essential infrastructure: this excessive extension of the concept of *essential facility*, first circumscribed to ports, airports, electricity or communication networks, is criticised by some specialist scholars[78].

However, in this case what was at stake was not a source code or a piece of *software* or, more generally, a peculiarity of the platform which confirmed the essence of the service in terms of innovation, as well as its diversity and

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[76] EU Commission, decision 24.3.2004 no. 2007/53/CE, case COMP/C-3/37.792 – *Microsoft*, *OJ*, L 32, 2007, 23; GCEU, 17.11.2007, case *Microsoft-Commission* (case T-201/04), *Foro it.*, 2008, IV, 114; GCEU, 27.6.2012, *Microsoft-Commission* (case T-167/08), *ECR*, 2012, 3232; *United States v. Microsoft Corp.,* 84 F. Supp. 2d 9, 20 (D.D.C. 1999); *Massachusetts v. Microsoft Corp*., 373 F.3d 1199, 1226 (D.C. Cir. 2004).

[77] FTC, *In the manner of Motorola Mobility LLC, and Google Inc*., Docket No. C-4410 (14/07/2013).

[78] See Lao M., *"Neutral" Search As A Basis for Antitrust Action?*, *Harv. J. of L. & Tech.Occasional Paper Series — July 2013.*

attractiveness, but was the simple individual information learned by the provider, be it personal or anonymous.

We must also bear in mind that Article 8 of Directive 96/9/EC recognises a *sui generis* right on a pro-competitive nature, aimed at protecting the information contained in a database as the result of a significant investment by the producer in qualitative and quantitative terms[79].

Ownership of property rights on the contents recognised to the user by the conditions of use and by the laws confirms the genuineness of a claim for interoperability and control of information, also for the purpose of rescinding the platform itself.

In this context, Article 20 (1) of the GDPR affirms a new right to the portability of personal data, understood as "*the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided*".

In a second instance as, that the transfer and concentration of digital information would deprive competitors of access to essential content

[79] See Article 8, dir. 96/9/EC (Rights and obligations of lawful users): «1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.
2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.
3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database». U.S. Copyright, unlike EU rules, allows the protection of databases that have an original character, but not the *sui generis* right. This type of protection is achieved i.e. through contractual clauses or trade secret. In argument see the leading case *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) and in doctrine Astone F., *Le banche dati*, in Valentino D., *Manuale di diritto dell'informatica*, cit., 177; Leaffer M., *Database Protection in the United States is Alive and Well: Comments on Davison* 57 *Cas. W. Res. L. Rev.* 855 (2007).

(consider the user data for *Whatsapp*), similar to the sale of a large archive of songs.

In the *AOL-Time Warner* case[80], the Commission argued that control of a large music archive can guarantee 'substantial market power', consisting, for example, in refusing to grant its rights or the threat of not granting them, or the imposition of high or discriminatory prices, or other unfair commercial conditions to its customers wishing to acquire these rights.

Finally, if a user's privacy claim is framed as a legitimate aspiration to improve the service, the analysis moves to the competition between the protection of personal data and consumer law in terms of consent, express acceptance and content of the clauses of the terms and conditions of use[81].

In the continuous dialogue between the different levels of network management (infrastructure, access, services, user), it is therefore essential to guarantee a flexible and articulated protection of the data circulating in a market without geographical borders and processing, both in a protective and qualitative sense and also in terms of competition (impact of data collection, interoperability) and user protection (information, transparency)[82].

These considerations apparently have a common denominator in the broad notion of net neutrality, understood as "*the right that the data he/she transmits and receives over the Internet be not subject to discrimination, restrictions or interference based upon the sender, recipient, type or content of the data, the device used, applications or, in general, the legitimate choices of individuals*"[83].

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[80] EU Commission, decision 11.10.2000, case no. 2001/718/CE – *AOL-Time Warner*, *OJ* L 268, 28.

[81] Recently, the Italian Antitrust Authority (AGCOM) verified the alleged unfairness of a set of clauses included in the terms of use of WhatsApp, submitted to the user's attention in a block and without the possibility of negotiating them on an individual basis (Article 3(1), Dir. 93/13/EC): See AGCOM, 12.05.2017, case no. PS10601, *WhatsApp*, *Dir. inf.*, 2017, 390. In argument see Minervini E. and Bartolomucci F., *La tutela del consumatore telematico*, in Valentino D., *Manuale di diritto dell'informatica*, cit., 347.

[82] See Fachechi A., *Net neutrality e discriminazioni arbitrarie*, in Perlingieri C. and Ruggeri L. (eds.), Internet e diritto civile, cit., 257.

[83] Article 4(1) from the text of the Internet Bill of Rights, approved in 2015 by the Italian Parliament.

In this context, it is therefore essential to consolidate and promote the validity of general principles that guide the standards of protection of human interests in the context of incessant technological development, without necessarily having to face difficult and often ineffective exercises of strict adaptation of legislation to a specific case (consider the notion of a relevant market) that is fluid and difficult to frame.