

Experimental competition enforcement: a complementary data regulation toolkit

Emanuele Fazio

PhD Student at Sant'Anna School of Advanced Studies
Piazza Martiri della Libertà, 33, 56127 Pisa (Italy)
emanuele.fazio@santannapisa.it

ABSTRACT

To ensure the Union's data strategy and digital transition are successfully implemented, the European institutions have established specific digital targets¹. These targets align to the four cardinal points of the Digital Compass Communication: digital skills, digital infrastructures, digitalisation of businesses and of public services². As for the digitalisation of businesses, by 2030 at least 75 per cent of European enterprises should have taken up cloud computing services, big data and artificial intelligence systems based on fair sharing of data³. Despite the digital advancement of the last years, data is only used by a small number of companies, even in several of the best performing countries⁴. Moreover, 90 per cent of the Union's data is processed by US-based companies and less than 4 per cent of the most popular online platforms that collect a substantial amount of data are European⁵. Thus, the digital transformation of EU businesses continues to face challenges in the take-up of data-driven solutions⁶.

The new data regulatory framework goes beyond competition problems, although it acknowledges the complementary application of competition rules to the regulated practices⁷. Starting from the recent national case *Autorità Garante della Concorrenza e del Mercato (AGCM)*

¹ Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 [2022] L 323/4, (Digital Decade Policy Programme 2030).

² Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2030 Digital Compass: the European way for the Digital Decade', COM (2021) 118 final, (2030 Digital Compass), 4.

³ Digital Decade Policy Programme 2030, art. 4(3). The FAIR data sharing principles require that data should be findable, accessible, interoperable, and reusable <https://www.force11.org/group/fairgroup/fairprinciples>.

⁴ See Commission, Digital Economy and Society Index (DESI 2022), 53-54.

⁵ 2030 Digital Compass, 3.

⁶ Digital Decade Policy Programme 2030 (n 1), recital 16.

⁷ See e.g. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265/1, (Digital Markets Act), recitals 9-11; Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 [2022] OJ L 152/1, (Data Governance Act), recitals 13, 15, 25, 37 and 60; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data' COM (2022) 68 final, (Data Act), recital 88. The boundaries between competition law and regulation have long been debated. A shared conclusion in Europe is that competition rules have a complementary role to *ex ante* regulations. For the evolution of the complementary role of competition law, see Joseph Drexler, Fabiana Di Porto, *Competition Law as Regulation* (Edward Elgar 2015), 153-162. Even though the complementary role of competition law is acknowledged in the regulatory initiatives, the relationship between the DMA and competition law rules is highly debated owing to overlapping objectives and legal interests. See e.g. Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022), *European Law Review*, 85; Giuseppe Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022), SSRN www.papers.ssrn.com; Pierre Larouche, Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021), *Journal of European Competition Law and Practice*, 542.

v. Google - *Ostacoli alla portabilità dei dati*⁸, and the related commitment procedure, this paper aims at analysing the “experimentalist architecture”⁹ of public competition enforcement¹⁰ in dealing with data-related disputes. In the author’s view, the commitment procedure at stake is a clear example of ‘experimental competition enforcement’ to deal with the dynamic and open-ended challenges of the data-driven economy.

This paper will investigate the extent to which the distinctive characteristics of the experimentalist architecture, namely strategic uncertainty, polyarchic distribution of powers, high degree of discretion of local agents, dynamic accountability and the participation of all stakeholders in the design, review and updating of data sharing solutions, play a role within public competition enforcement in AGCM v. Google. In conducting the analysis, the dialogue between the stakeholders within competition enforcement will be examined (internal dialogue). In addition to this, the potential for an external dialogue between competition enforcement and implementation mechanisms of data regulations will be under scrutiny.

AGCM v. Google illustrates the aforementioned five characteristics as well as the importance of a dialogue within competition enforcement. This internal dialogue seeks to provide continuous revisions to data sharing solutions and safeguards aligned to the associated risks. Furthermore, the results of the internal dialogue can be useful to ensure, design, review and possibly avoid the implementation of the data regulatory solutions. Accordingly, the external dialogue among enforcement, implementation and regulation will be examined to determine to which extent the enforcement solutions feed back into national and EU level revisions and through which mechanisms.

Some scholars have already noted that competition enforcers relying on innovative remedies blurs the distinction between *ex ante* regulation and *ex post* competition enforcement¹¹. In the author’s view, this distinction remains but the complementary role of experimental competition enforcement must be investigated thoroughly. In AGCM v. Google, the experimental competition enforcement aimed at ensuring and designing the right to data portability provided by art. 20 GDPR. Similar interactions are nowadays encouraged by the Digital Decade Policy Programme 2030 to trigger collaborative analyses among Commission, Member States and local actors to identify digital targets’ weaknesses and to propose actions for appropriate and effective remedies¹².

⁸ AGCM v. Google, A552 – Google-*Ostacoli alla portabilità dei dati*, Provvedimento n. 30215, 5.07.2022, available at: <https://www.agcm.it/competenze/tutela-della-concorrenza/intese-e-abusi/dettagli?id=e22b8764-7b50-4d86-94f4-f7b50f5c85d8&parent=Lista%20Market%20Test&parentUrl=/competenze/tutela-della-concorrenza/intese-e-abusi/impegni/lista-market-test>.

⁹ Giorgio Monti, Bernardo Rangoni, ‘Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism’ (2022), *Journal of Common Market Studies*, 1106; Charles F. Sabel, Jonathan Zeitlin, *Experimentalist Governance in the European Union – Towards a New Architecture* (Oxford University Press, 2010).

¹⁰ The paper will focus exclusively on the public enforcement although many experimental mechanisms apply consequently to the private enforcement of competition law.

¹¹ Yane Svetiev, ‘Networked Competition Governance in the EU: Delegation, Decentralization, or Experimentalist Architecture?’, in Charles F. Sabel, Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union – Towards a New Architecture* (Oxford University Press, 2010), 97.

¹² Digital Decade Policy Programme 2030 (n 1), recitals 20, 22, 24, 29, 33, 38, 39 and articles 8, 9; 2030 Digital Compass (n 2), 14-15.