Istituto per la Cultura dell'Innovazione

The Institute for Culture of Innovation (I.C.I.) *is a non-profit organization whose institutional aim is to promote and spread the culture of innovation to the individual and to favor their integration into civil society, as well as, creating a link between institutions, citizens and intermediate bodies, both public and private.*

The areas of interest of the Institute are: ***innovation of Italian Public Administration*** *- the Institute aims to foster innovation, modernization, digitalization of practices and procedures, together with openness and transparency towards businesses and citizens;* ***business innovation*** *- the Institute intends to defend and promote the creation, development, financing, and free enterprise and competition of startups and digital and technological companies in all sectors across the country, through a simplification of the rules;* ***digital culture*** *- the Institute aims to promote awareness of technological innovation, both among the public and in policy making of economic and strategic importance for Italy, in every field and sector; -* ***the tertiary sector, sport and disability****; the Institute aims to promote the use of innovation and technology in favor of solidarity, sport and those with disabilities.*

In order to achieve its institutional purpose, the Institute may: ***promote the debate on innovation*** *through meetings between universities, public and private research centers, companies and policy makers, also by supporting the public debate on the future of the digital agenda in Italy and in the world;* ***propose ideas and draft legislation*** *for digital regulation and innovation, and foster debate at institutional sites;* ***undertake research on the theme of innovation*** *with a multidisciplinary approach (in the legal, political, economic and social fields);* ***develop and publish*** *newsletters, multimedia material and other internal and external publications, with the aim of increasing the cultural and scientific knowledge of its members;* ***contribute to the public debate*** *with ideas and political proposals, through a series of position papers.*

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Call for contributions
Shaping competition policy in the era of digitisation

1. Coherence, transparency and predictability should be among the main drivers of an effective and robust competition policy

Nowadays, a predictable and stable regulatory environment is all the more important for firms willing to invest in the marketplace (Gerber, 2014). The existence of a solid and clear regulatory framework allows firms to better define and calibrate their strategies and objectives, reducing at the same time the risks to incur in unlawful behaviours.

In this context, competition policy certainly plays a decisive role, also in light of the increasing influence it has on global economies. Competition, it is well known, may raise consumer and societal welfare, enhance efficiency, and bring innovation into the market. In order to achieve the cited goals, a system of competition policy should rely on transparent, coherent and predictable provisions, of both regulatory and non-regulatory nature. In fact, competition rules are usually contained in a diversity of legal instruments. Especially the non-regulatory sources may be extremely useful for firms, as long as they clarify on the scope of legitimate and illegitimate conducts. In the European Union, for instance, documents such as the Guidelines on Vertical Restraints, on Technology Transfer Agreements, or on the application of those rules sanctioning the abuse of dominance may well inform the conduct of undertakings active in the marketplace. These sources, which may take various forms (from notices to guidelines and working papers, etc), are intended to explain in depth the EU Commission's policy on a number of issues, with reference to both substantive antitrust rules and to procedural matters. They may eventually provide for greater policy coherence and predictability, allowing firms to plan for compliance and to avoid the risks of sanctions.

In the context of competition enforcement, a traditional rules-based approach (or *per se* prohibition rules) may stress form and predictability. However, such approach should be properly balanced with a more dynamic effects-based approach, driven by thorough economic analysis, which instead looks at whether a conduct produces detrimental effects to welfare and competition.

2. An economic-based approach should be at the basis of sound competition enforcement

An effective enforcement approach should thoroughly evaluate the scope of the constraints that firms face due to competitors' conduct, on the basis of factual elements and data. Competition enforcement should not only be based on legal principles, but also on sound economics which may ensure a level playing field and give certainty to the market players.

In particular, economic analysis plays a central role in competition enforcement: a solid economic assessment is at the basis of any determination concerning the identification of the relevant product/geographic market and the related structure. This requires a factual analysis which employs tools such as the SSNIP ('small but significant and non-transitory increase in price') test. In some circumstances, concerning for instance the provision of free services or competition with respect to innovation, the SSNIP test can prove to be difficult to apply. This may be due to the absence of a price benchmark or to the uncertain boundaries of some innovative markets. Nevertheless, the underlying logic could hypothetically be developed and extended to also include such cases. A workable alternative could be a test based on a quantitative measurement of quality (so-called SSNDQ, 'small but significant non-transitory decrease in quality'), despite some doubts may possibly arise about the effective measurement of quality (Muscolo, 2018). A SSNDQ test could for example find application in those markets where consumers do not pay a monetary price, but 'merely pay' by allowing platforms to obtain and process their data. Hence, a reduction of privacy may become the parameter by which measuring market power, as in the case of a platform which can raise such 'non-monetary price' without facing the risk to lose platform users (Pezzoli, 2018). Regardless of the specific economic test implemented, the importance of realistic market definitions is all the more evident for those new and innovative markets where goods and services are evolving rapidly due to technological change.

In brief, an economic-based approach may provide an optimal framework to explore the way in which each particular market operates and how competitive interactions develop (DG Competition, 2010). Such a framework allows the identification of the possible consequences of the practices under review, as in case of mergers or unilateral conduct, as well as the assessment of the magnitude of any effect. In some cases, economic analysis may involve the production and assessment of voluminous sets of quantitative data, which justify a significant involvement of economic experts.

3. The consumer harm test is still the most appropriate framework of analysis in the digital age

When looking at the test to apply in order to find a competition law infringement, several options may arise: from an ‘intent’ test, to a ‘no economic sense’ test; from an ‘as efficient competitor test’, to a ‘sacrifice test’ and a ‘consumer harm’ test. The latter, according to different antitrust experts, is sufficiently well defined to provide clear direction and allow consistency in policy application. The strength of the consumer harm test is that it focuses on the effects of conduct on price and output: conduct is anticompetitive only if it harms customers. Such a test is also consistent with the broad goals of competition law: lower prices, larger output, and better or new products are indeed at the core of long-term welfare and productivity. Theoretical research has demonstrated that the consumer harm test may force undertakings to choose more socially desirable options than, for instance, a social welfare test (Nazzini, 2011).

This being premised, the current Digital Era is characterised by markets based on digital technologies which facilitate the trade of products through e-commerce. Competition in digital markets shows certain peculiar characteristics, including a tendency toward ‘winner takes all’ models, two-sided markets, network effects and fast paced innovation. Even in this renewed context, a consumer harm doctrine may demonstrate its ability to provide a flexible framework that properly takes into account new technologies and business models. In this regard, and contrary to some claims, the consumer harm test can address a variety of concerns, including quality, efficiency and innovation. Several cases in the last years focused on the relationship between innovation and competition, and have been solved by implementing the cited test. This fact proves that no other model or rules are required to assess competition law infringements in the context of those new technological products and business models characterizing the Digital Age.

4. The digital economy does not seem to present significant barriers to entry

The existence and availability of computational resources, technology, communication tools, data and knowledge allow new entrants to limit costs and investment expenditure when approaching the digital economy. More and more firms are encouraged to invest in the digital environment in light of the existing low barriers.

When taking into account the realm of data, for instance, one should consider that data is a non-rivalrous good, which means that data can be used and processed more than once by different players. Its peculiar value arises when, following the implementation of technological resources and the use of manpower, data is turned into information and information into knowledge. Eventually, knowledge can lead to specific actions in a particular market (Varian, 2018), bringing *inter alia* new products, services, innovative processes and efficiencies to the availability of consumers and market players. From this perspective, it is clear that raw and unprocessed data does not have value in itself. Data is nowadays generated at a surprisingly increasing pace, and this process enormously benefits from the growth of the Internet of Things (IoT). In this regard, the widespread availability of sensors, mobile devices, networking, cloud computing and databases has dramatically facilitated the phases of data acquisition and management.

From a competition law standpoint, when a data market is identified, it is essential to refrain from applying to the digital ecosystem the equation according to which the specific capacity to process data automatically reflects the possession of market power. This is because data is generally seen as widely available and as a non-rival good. Yet, in the presence of certain market dynamics facilitated by the very structure of the market, the existence of exclusionary rights benefiting those parties processing the data may potentially slow down the competitive process in an excessive and unjustified manner. The general recognition of exclusive rights in data may lead to the risk of interference with the freedom to conduct a business and the freedom to compete, and may also impede business operations of other market players who depend on access to data. All this may theoretically produce detrimental effects on the development of downstream data markets due to the creation of market power and anticompetitive entry barriers. In this environment, competition authorities have the tools to explore the impact of data in the marketplace, especially when examining mergers and acquisitions. There have been different examples of competition authorities requiring companies to behave in certain ways with respect to data (as in *Microsoft – LinkedIn*). Nevertheless, control over large volumes of data is a not-sufficient factor to establish market power, as data can be easily and cheaply collected by small companies or acquired from the broker industry. Overall, data is cheap, ubiquitous, easy to obtain with near-zero marginal costs of production or distribution. This is just one of the examples proving that entry-barriers are generally low in those markets developing from the digital economy.

5. Competition law should focus on welfare and efficiency objectives, and should not look at other policy issues

Competition laws may pursue a diversity of objectives (Jones & Sufrin, 2014). Each jurisdiction may have different goals, and these goals may even change over time. Once the goals have been identified, the question is what competition provisions should be adopted and how they should be enforced in pursuit of these objectives. Generally, it has been stated that efficiency, welfare and the protection of the competitive process should be identified as the true objectives of competition law (together with market integration, especially in the European Union). Nevertheless, one may wonder whether these should be the only aims.

For instance, among the non-competition related issues, the literature has mentioned the enhancement of social and democratic values, the support to other public policy (employment, environmental or regional policies, just to mention a few), and even happiness in the sense of citizens' opportunities to increase the well-being. Nowadays, what is more, commentators wonder whether competition rules should limit the rapid expansion and development of artificial intelligence, tackling for instance the massive use of algorithms to align firms' pricing strategies (in other words, cartels). Perhaps, one may argue, some of these non-competition related concerns should not be subject to direct antitrust enforcement, but should be rather addressed by evidence-based regulations. Competition policy, in other words, should not be used to pursue policy goals that can be better addressed by other legal and policy instruments.

In the end, however, it is always a matter to decide how far competition can be isolated from other policies. The question on what concerns competition law should address and whether it should be confined to narrow economic objectives is eventually a matter of political choice.