INTERNATIONAL POLICY REVIEW

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Letter from our Editor-in-Chief

As we celebrate the 6th Journal and the 2nd issue of the IE International Policy Review, we also take pride in the diversity of articles, viewpoints, and opinions that this publication brings together. At a time when differing perspectives and approaches are often criticized or silenced, we choose to celebrate them.

Every article in this issue upholds the academic integrity and standards of our review. Each contribution supports its thesis with facts, data, and reputable studies. Readers will notice that the range of topics covered is broad and ambitious, but behind every piece lies the best effort of our writers and editors to challenge themselves, move beyond their own biases, and consider alternative viewpoints.

The IE International Policy Review is proud to be a space where undergraduate students can engage in academic discourse, welcome contrasting opinions, and transform them into well-balanced and thoughtful work.

With this in mind, I would like to take a moment to explain how our review stands apart. The IE International Policy Review is not merely a publication outlet, it is a shared journey we offer to our peers. Writers and editors are supported from the very beginning: from our initial meetings where we explain the process, through the stages of brainstorming, research, and editing, to the multiple submission deadlines that ensure steady progress and refinement. We believe this step-by-step process is a fundamental part of what the IE International Policy Review offers. It reflects our commitment to academic writing as a collaborative endeavor rather than an individual task. With this issue in particular, we hope to convey a clear message: great things are achieved together. In a time marked by division and violence, we stand by the value of working through our differences to achieve a shared goal, in this case, a meaningful and well-crafted paper.

As an undergraduate review, we hope that this message deeply resonates through everything we do. On behalf of the entire editorial team, I want to sincerely thank all the writers and editors who contributed to this issue. Thank you for believing in our vision, and for choosing to be part of it.

Sincerely,

Matilde Romagnoli

The IE IPR Editor-in-Chief

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This issue would not have been possible without the invaluable contributions of many individuals who devoted their time and passion to the values the IPR upholds.

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We deeply appreciate the incredible partners with whom we had the privilege to collaborate. Great achievements are never realized alone, and the IE International Policy Review is proud to work alongside so many talented and inspiring individuals. A special thank you to the team at the **Princeton Journal of Public & International Affairs**, especially **Maya** and **Justin**. We also express our gratitude to **Bocconi Advocacy & Litigation**, particularly **Giuseppe Valerio Bonanno**, **Francesco Fernando Annese**, and **Carlo Matarazzo** — we deeply admire your work and we look forward to keeping learning from you. Our thanks extend to **The Sciences Po Sundial Press**, especially **George Newcomb**, who believed in this project from the start. We are also grateful to the **NYU Shanghai Law Society** and the **Trinity College Law Review**, with special recognition to **Josh** and **Aoife**.

Although the articles produced in collaboration with the Ukrainian Working Group in Washington and the World's Youth for Climate Justice (WYCJ) will be published on the IPR Blog and are not included in this issue, we nonetheless celebrate the outstanding work done with **Oleksandra Pashina** representing the **Ukrainian Working Group**, part of the **Alexander Hamilton Society at Georgetown University** and **Theresa Amor-Jürgenssen**, on behalf of the **WYCJ**.

This semester's success would not have been possible without the dedication of our editorial team, who worked tirelessly behind the scenes, on weekends, holidays, and late evenings to ensure everything ran smoothly. We are deeply grateful to: **Alberto Alonso Inope La Rosa, Vrushab Shekhar, Vanessa Chioaru, Francesca Etienne, Lucas Phillips Sanchez, Isabella Bortolotto Rodacki, Alfredo Echeverria, Anastasia Bolkhovitina, Nikola Pantelić, Stephanie Villamor, Gabriela Vázquez-Guillén Navarro, Andreea Pascaru, Constantin Mosch, Weronika Von Lonski, Isabel Gómez Araujo,** and **Mia Leonardo.**
A special thanks also to our advisory committee members, including **Ecab Amor Vazquez, Theresa Amor-Jürgenssen, Alejandro Dib Parada, and Aurora Dell'Elce**.

Among all, two individuals stand out for their exceptional commitment and wholehearted dedication to this publication. **Aleyna Uzel** and **Alexia Dimitriou**, your tireless efforts, trust, and perseverance went above and beyond, working overtime and always with unwavering support. I genuinely do not know how we would have managed without you. Few in the life of the IPR have embodied our mission as fully as you have. We are proud to have you on this journey and look forward to continuing to grow together.

Lastly, I wish to express my personal gratitude to **Claudia Espinosa** and **Paul Prinz**, our Deputy Editors-in-Chief. Working with you has been the most rewarding part of this experience. Words cannot fully express how fortunate I feel to have shared this journey by your side.

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Corporate governance and board accountability in multinational corporations: a comparative analysis of the U.S. and the U.K./EU

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Abstract

This paper focuses on the effect that corporate governance regulations have on the accountability of multinational corporation (MNC) board members. To assess the different corporate governance regulations and enforcement mechanisms in the United States and the United Kingdom/European Union, this paper analyses the ways these systems can impact corporate leaders' accountability. Based on statutes, case law, and academic literature, I will argue that regulatory tightening (e.g. the US Sarbanes-Oxley Act) does make accountability formalized; however, it can produce unintended risk aversion in the boardroom and can also create regulatory fatigue. On the other hand, the more general, flexible, principles-based UK/EU approach does allow for flexibility but does not offer the same enforcement mechanisms. In the end, a unified approach that preserves the legal regulation of the U.S. system, combined with the institutional flexibility of the U.K./EU model, is proposed.

Keywords: corporate governance, board accountability, multinational corporations

1. Introduction

Corporate governance frameworks are valuable tools to ensure that directors of multinational corporations are accountable for their decision making, which impacts a diverse group of stakeholders (e.g. shareholders, employees, consumers and the public). Corporate failures such as Enron, WorldCom, Wirecard and Volkswagen emissions have led governments to develop legal and regulatory measures that curb potential risks of mismanagement or fraud. The question this paper explores is: how do corporate governance regulations impact the accountability of board members in multinational corporations? The analysis assesses the regulatory regimes in the U.S. and UK/EU to highlight the differences in legal architecture, enforcement philosophy and regulatory effectiveness. The three principal claims put forth are: strong legal oversight, like that in the U.S., may enhance board accountability and mitigate egregious misbehavior; excessive rigidity within the framework may deter able people from serving on boards and make them less nimble in their

decision-making; jurisdictional fragmentation provides for forum shopping and makes accountability across borders weaker. As governance failures at large firms often spill over into global financial markets and/or political institutions, these insights are especially relevant.

2. Corporate governance in the United States

The American model of corporate governance entails highly codified, litigation-prone jurisprudence. The enactment of the Sarbanes-Oxley Act of 2002 (SOX) was tightly linked to the cataclysmic collapses of Enron and WorldCom in which board disregard and accounting fraud were central to the nefarious acts.[1] SOX imposed a series of mandatory governance standards on publicly traded companies that included: CEO/CFO certifications of financial statements (Section 302); internal control audits (Section 404); auditor independence and oversight; and criminal penalties for the fraudulent certification of financial reports. These reforms were designed to alter corporate liability schemes and impose the liability squarely on senior executives and board committees. Coffee explains that the enactment of SOX altered the duty of board members from passive overseers of management to proactive gatekeepers of corporate risk.[2] The practical impact of SOX is illustrated with the case of *In re Enron Securities Litigation*, wherein board negligence was established based on the standards of SOX.[3] The court pointed to the "willful blindness" of the senior executives and the obligation to monitor not only financial conduct but ethical conduct too. SOX was criticized for imposing heavy compliance costs, even for small and mid-sized firms and contributing to a culture of risk aversion in the boardroom.[4] Concerned about liability, directors may avoid making strong strategic choices that can stifle innovation. Additionally, critics observe that enforcement from the SEC and DOJ is mostly reactive, rather than systematic, and takes place in a selective manner.[5] For instance, while SOX provisions were used reactively to prosecute executives after a scandal, there were other systemic warning signs at Lehman Brothers or Theranos, which were never proactively addressed.

3. Corporate governance in the United Kingdom and the European Union

The governance frameworks of the U.K. and EU are based on principles rather than rigid statutory laws like in the U.S. The U.K. Corporate Governance Code relies upon a "comply or explain" model, permitting companies to avoid "best practice" as long as proper reasons are provided for doing so.[6] Basic principles include: separation of the chair and CEO responsibilities, Board structure that provides for independent non-executive members, performance evaluations on an annual basis and audits on past and future risks, remuneration contingent on long-term performance. At the EU level, there are directives such as the Shareholder Rights Directive II (SRD II) that call for disclosure of remuneration for executives and support shareholder

[1] Sarbanes-Oxley Act of 2002, Pub L No 107-204, 116 Stat 745.

[2] John C Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford University Press 2006).

[3] *In re Enron Corp Securities, Derivative & ERISA Litigation* 235 F Supp 2d 549 (SD Tex 2002).

[4] Financial Reporting Council, *The UK Corporate Governance Code* (2018).

[5] Directive (EU) 2017/828 of the European Parliament and of the Council [2017] OJ L132/1.

[6] Wirecard scandal: Germany finance minister says regulators failed' *BBC News* (Berlin, 23 July 2020)

discussions.[7] Governance frameworks are both detailed and complex; nonetheless, governance failures (discussed in 2020) have pointed out those frameworks' shortcomings. In the case of Wirecard, a €1.9 billion hole in a balance sheet went undetected for several years, exposing the risks of decentralized enforcement.[8] BaFin, Germany's financial regulator, has been criticized for regulatory inaction and, potentially, conflicts of interest. It was also perceived as a failure of internal controls and external audits for members of the Board to be complicit or uninformed about the "defeat device" software used by Volkswagen in the emissions scandal.[9] These examples indicate that the flexible "comply or explain" model can create a culture of mere compliance, rather than genuine oversight. In the U.S., the SEC often resorts to public punishments, whereas in the U.K./EU enforcement tends to be administrative, obscure and non-punitive.[10] Although this soft-touch enforcement may be favorable to business, it limits the deterrent effect necessary for authentic board accountability.

4. Comparative analysis

Legal framework and enforcement mechanisms

The legal foundation in the U.S. rests firmly on federal statutory law, implemented by agencies independent of direct political influence, such as the SEC and the PCAOB. Violations of these statutes may subject individuals and organizations to civil or criminal liability, as illustrated in SEC v. WorldCom Inc., where board negligence and accounting manipulation led to extensive sanctions. Conversely, based on the experiences of the U.K./EU, reliance on voluntary codes stemming from a decentralized approach tends to dilute enforcement and consistency.[11] Although there are benefits to being less burdensome, performance and accountability may be adversely affected, as evidenced by regulatory failures in the Wirecard scandal.

Governance norms and director behavior

In the U.S., directors are exposed personally and publicly, and are subject to a tremendous degree of regulatory and shareholder scrutiny. Governance norms in Europe, by contrast, reward consensus-building and deliberative processes, sometimes at the expense of prompt action. A comparative analysis of board minutes and decisions at Fortune 500 companies and FTSE 100 companies found a greater audit trail of dissent and challenge in decisions from U.S. boards.[12] The In re Enron Securities Litigation case further demonstrated that U.S. directors have a heightened duty to monitor and intervene actively.

Chilling effect and talent pipeline

Both systems have experienced unintended consequences deterring high-quality individuals from board participation. Following SOX, surveys indicated that 46% of directors reconsidered serving on boards over fears of personal liability.[13] In Stone v. Ritter, the U.S. courts reinforced directors' oversight duties, raising liability risks. In the EU, "complaint fatigue" is particularly challenging for technology startups and family-owned businesses, who must dedicate disproportionate resources to address compliance and audit requirements.[14]

Jurisdictional arbitrage and forum shopping

[7] Securities and Exchange Commission, 'Report Pursuant to Section 704 of the Sarbanes-Oxley Act of 2002.

[8] Lucian Bebchuk and Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation*(Harvard University Press 2004).

[9] *SEC v WorldCom Inc* 273 F Supp 2d 431 (SDNY 2003).

[10] OECD, *Principles of Corporate Governance* (2023).

[11] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub L No 111-203, 124 Stat 1376.

[12] Harvard Law School Forum on Corporate Governance, 'Board Dynamics and Decision-Making' (15 February 2021).

[13] NYSE Governance Services, 'Post-SOX Director Liability Survey' (2005).

[14] OECD, *Corporate Governance in Emerging Markets* (2021).

Multinational corporations frequently structure themselves to exploit jurisdictions with lower governance standards. For instance, many technology companies are headquartered in Ireland or the Netherlands to benefit from lighter regulatory oversight.[15] In Adams v. Cape Industries, English courts recognized the legal separation between parent companies and subsidiaries, facilitating jurisdictional arbitrage and complicating transnational accountability. This dynamic contributes to a global "race to the bottom" in corporate governance standards.

5. Policy implications and recommendations

Towards global convergence in governance

There is an increasing agreement that multinational corporations need globalized governance standards. While the OECD Principles of Corporate Governance provide a baseline framework, enforcement will remain patchy.[2] Establishing a transnational regulatory agency or frameworks under the auspices of the G20 or OECD may help establish a level playing field.

Smart regulation using technology

Governments should invest in government artificial intelligence and machine learning tools to find anomalies in financial statements, board behavior and audit trails. Such a tool may identify risky behavior before it becomes scandalous, and advance regulation from ex ante enforcement to ex post identification.

Safe harbors and regulatory relief

If statutory legal "safe harbors" could be developed for directors who acted honestly as a shield to protect them from liability, it could reduce their risk aversion. In the U.S., if Section 404 of the Sarbanes-Oxley Act were amended to "scale" the requirements to the size of the firm, it may reduce risk from predictable and uncontroversial behavior. EU regulators may consider amending SRD II to allow small and medium-sized enterprises (SMEs) to comply with the same free-thought.

Whistleblower ecosystem

The availability of good and effective whistleblower protections and incentives is necessary. The U.S. Dodd-Frank Act has monetary rewards for whistleblowers and private protections for anonymity. The EU is beginning to catch up to reflect the protections provided since the 2019 Whistleblower Directive[2]. Effective enforcement mechanisms are the key to effective whistleblower protections.

Conclusion

Corporate governance is the foundation of accountability in multinational companies. The paper has compared the U.S. rule-based approach to the U.K./EU principle-based model for dealing with board misconduct. The U.S. embarks upon substantive oversight, but with compliance costs and associated legal risk. The U.K./EU approach promotes flexibility and strategic discretionary behavior but has gaps in enforcement. An ideal model brings together strong institutional enforcement with adaptable principles. As corporate action becomes increasingly global, so must the law that governs those corporate actors. The next phase of corporate accountability must also be as flexible and transnational as the corporations it seeks to regulate, in order to safeguard the overall public interest.

[15] Tax Justice Network, 'Corporate Headquarters and Regulatory Arbitrage' (2020).

Comparative Analysis of U.S. and Italian (EU) Regulations on Standard Essential Patents (SEPs) under FRAND Obligations

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Abstract

When approaching Intellectual Property, some of the most important concepts are the regulation of Standard Essential Patents (SEPs) and FRAND licensing obligations. In this paper, the fundamental concepts connected to these topics are going to be showcased and explained, with a particular focus on U.S. and EU jurisdictions and the differences between them; in particular, the analysis is going to be taken at an approach level, with the U.S. relying primarily on contract law and limited antitrust intervention, and the E.U., mainly based on Article 102 TFEU. The comparison between jurisdiction is going to show the effectiveness of protection when balancing different interests, with a particular focus on market entry barriers and competition dynamics.

1. Introduction

Intellectual property, specifically patents, is one of the most important incentives when facing market health, since it is used to ensure that crucial investments, regarding research and development (R&D), are possible, incentivizing innovation and economic growth.[16] This objective, fundamental to ensure an increase in inventions, is obtained by granting inventors temporary exclusive rights on both the usage and the monetary gain of the inventions, which makes it possible to recover the expenses made in regards to R&D.[17] However, in critical sectors, which are based on technologically advanced patents that are based on interoperability (e.g. 4G, 5G), the interaction between patents and industry standards creates unique and significant challenges.[18] These standards, which are usually crucial for technological innovation, are often developed through the collaboration of Standard

[16] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[17] Patents, Innovation and Economic Performance, OECD Conference Proceeding (2004) 13–14

[18] Robert Pocknell and Dave Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' (27 September 2022) Rutgers Law Journal (forthcoming) https://ssrn.com/abstract=4231645 accessed 26 June 2025, 977–978

Development Organizations (SDOs) such as ETSI and IEE.[19]

Today, many critical technologies incorporated in these standards are patented, which introduces a fundamental concept, called SEPs. Standard Essential Patents (SEPs) are patents used in standards, which make compliance with these standards impossible without using the patent themselves.[20]

So we can see how the inclusion of SEPs, while often necessary, introduces significant potential for market distortion and anti-competitive conduct, especially when a standard incorporating specific SEPs is widely adopted, since implementers that want to implement that specific technology become "locked-in", potentially granting SEP holders considerable market power, which usually exceed that of the patent itself.[21]

This scenario creates the risk of "patent hold-up", where SEP holders might demand excessive royalties or impose unfair terms after standardization.[22] Conversely, the system might also face risks of "patent hold-out", in which implementers might leverage the complexities of licensing and the FRAND commitment itself to unreasonably delay or avoid taking licenses on fair terms.[23]

Recognizing these dangers, in particular regarding standardization processes involving competitors that could monopolize and exclude competitors, SDOs and policymakers developed the so-called FRAND commitment (Fair, Reasonable and Non-Discriminatory).[24]

The FRAND pledge became a fundamental requirement within SDOs like ANSI and ETSI[25] , whose aim was to reach a fundamental balance, that could be described as the pivotal concept of IP law itself : guaranteeing that innovators receive appropriate compensation for their contributions while guaranteeing that implementers have access to essential technologies on fair terms, making it possible to prevent anti-competitive exclusion and ensuring a comprehensive adoption of new technologies[26].

However, despite its widespread adoption, the ambiguity of the terms "Fair, Reasonable and Non-Discriminatory" has led to many disputes over SEP

[19] See supra, pag 989

[20] Borghetti, pag 2

[21] 'Standard Essential Patents Chapter I: Introduction and Fundamental'

[22] Sadao Nagaoka, 'Licensing Standard Essential Patents: Hold-Up, Reverse Hold-Up, and Ex-Ante Negotiation' (VoxEU, [insert date]) https://cepr.org/voxeu/columns/licensing-standard-essential-patents-hold-reverse-hold-and-ex-ante-negotiation accessed 26 June 2025

[23] Brian J Love and Christian Helmers, 'Patent Hold-Out and Licensing Frictions: Evidence from Litigation of Standard Essential Patents' accessed 26 June 2025

[24] A Douglas Melamed and Carl Shapiro, 'How Antitrust Law Can Make FRAND Commitments More Effective' Yale Law Journal accessed 26 June 2025

[25] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review 986

[26] Fair Standards Alliance, 'FRAND-Compliant Patent Pools to Foster European Innovation' (6 November 2019) https://fair-standards.org/2019/11/06/frand-compliant-patent-pools-to-foster-european-innovation/ accessed 26 June 2025

licensing[27]. When approaching these cases, it's clear that many interests are at stake, which lead to many different developments in the jurisdictions across the world, in particular the United States and the European Union, which have developed distinct legal and regulatory approaches, showing the different priorities of the jurisdictions themselves[28].

In the last few years, the increasing importance of ICT standards[29] has underscored the critical need for effective and balanced SED/FRAND governance.[30]

2. **Fundamental Concepts**

To ensure a full understanding of the different approaches regarding SEPs, an introduction and explanation of the many fundamental concepts involved is required.

2.1 Definition of Patents and SEPs

A patent is something that grants its owner a temporary legal right to exclude others from making, using and selling a claimed invention, serving as the primary mechanism to incentivize investments in innovation by allowing the inventors to gain exclusive rights and returns on their R&D efforts.[31]

SEPs are specific kinds of patents that cover technology or discoveries that are necessary in order to implement a technical standard promulgated by an SDO.[32] So we can see that compliance with a standard is impossible without using the invention that is claimed using a SEP. The term "essential" is determined based on the standard's specifications at the time of standardization, so it isn't based on commercial convenience or later technological developments.[33]

Considering the importance and the consequence of a SEP, it's clear that a fundamental aspect is verifying what can be classified as a SEP. SDOs like ETSI generally rely on their members, which self-declare patents that they believe might be essential to a standard under development.[34] SDOs typically don't conduct independent technical verification of these declarations, which inevitably leads to the effect of "over-declaration", meaning that a large fraction of patents declared essential to a standard may not be, in fact, technically essential.[35] There are many reasons for these scenario, in fact experts estimate that only between 25% and 40% of the patents found in the ETSI IPR database are in fact essential to the final published standard [36] (in case of 5G, the essentiality rate can be as low as 15%).[37] Judicial findings

[27] Robert Pocknell et al., pag 981

[28] Wentong Zheng, 'Jurisdictional Competition on Standard-Essential Patents' NYU Journal of Intellectual Property and Entertainment Law https://jipel.law.nyu.edu/jurisdictional-competition-on-standard-essential-patents/ accessed 26 June 2025

[29] European Commission, 'ICT Standardisation' https://single-market-economy.ec.europa.eu/single-market/european-standards/ict-standardisation_en accessed 26 June 2025

[30] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[31] World Intellectual Property Organization, 'Patents' https://www.wipo.int/en/web/patents accessed 26 June 2025

[32] Igor Nikolic, Licensing Standard Essential Patents 28–30

[33] Sidak, the meaning of Frand Part I: Royalties, pag 949

[34] Sidak, the meaning of Frand Part I: Royalties, pag 957

[35] Robin Stitzing, Pekka Sääskilahti , Jimmy Royer , Marc Van Audenrode , Over-Declaration of Standard Essential Patents and the Determinants of Essentiality, pag 1

[36] European Commission staff working document impact assessment report, Proposal for Regulation of the European Parliament and of the Council establishing a framework for transparent licensing of standard essential patents, Brussels

[37] IPLytics

often reveal even lower rates of validity and essentially among SEPs asserted in litigation.[38]

2.2 What qualifies as SEPs?

As we seen in § 2.1, SEPs are Standard Essential Patents and, in order to qualify as an SEP, a patent must grant rights of exclusive use of an invention, that is indispensable for implementing a technical standard.[39]

We can now understand why a patent, in order to qualify as SEP, must meet three criteria[40]: i) Standard, which means that a patent must be associated with a standard of technology that is widely accepted and used in a particular industry in order to be an SEP; ii) Essential, so a patent must be an essential component or technology to perform a specific function or feature in the standard; iii) Eligible, so there must be a patent and a patent holder for the relevant technology for SEP to be considered.

2.3 Role and functioning of SDOs

SDOs are, as we previously seen, platforms where competitors and academics collaborate to coordinate the development of standards[41], which generate economic benefits by ensuring interoperability (meaning that they allow products from different vendors to work together), which improves scales of productions, reduces transaction costs and enables market entry also for smaller business (which usually aren't able to do R&D on large scales).

In particular sectors, mainly driven by technology, such as ICT, standardization usually relies and involves collaborative innovation, which guides the technological trajectory of an entire industry. SDOs are fundamental, since they establish Intellectual Property Rights (IPR) policies, which are used to manage the inclusion of patented technologies.[42]

Since SDOs recognize the potential problems that could arise if they left dominant players use SEPs to exclude rivals, most of them adopted IPR policies that require a commitment, imposed on their members, to license their SEPs on FRAND terms.[43] However SDOs typically refrain from defining specific FRAND royalty rates or licensing terms, since they see these as bilateral commercial matters.[44]

It's interesting to see how some SDOs (like, for example, IEEE) have experimented with more specific rules regarding royalty calculations, however these attempts have usually been unsuccessful, generating significant controversies.[45]

2.3 FRAND Obligations

We have seen the various aspects of FRAND commitment, but what is it? The FRAND commitment is a pledge, made by a SEP holder, in which the holder offers to license his patent on terms that are "Fair, Reasonable and Non-Discriminatory".[46] This idea is

[38] Sidak, pag 959
[39] 'Standard-Essential Patents and FRAND Terms' (Kılınç Law & Consulting) https://kilinclaw.com.tr/en/standard-essential-patents-and-frand-terms/ accessed 26 June 2025
[40] See supra
[41] Igor Nikolic, Licensing Standard Essential Patents: FRAND and the Internet of Things (Bloomsbury Publishing 2022) 18
[42] Jorge L Contreras, 'A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens' (2014) SSRN Electronic Journal https://doi.org/10.2139/ssrn.2374983 accessed 26 June 2025
[43] Jorge L Contreras, 'A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens' (2014) SSRN Electronic Journal https://doi.org/10.2139/ssrn.2374983 accessed 26 June 2025
[44] Sidak
[45] Jurata & Luken, 2021
[46] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting

generally considered a legally binding obligation, which is usually interpreted under contract law.

In order to properly understand the scheme that we've seen so far, it's fundamental to understand the purpose of FRAND commitment, which is actually multi-faced: on one hand, the purpose is to balance the patent holder's right of an economic return with the implementer's need for access; on another hand, it is also used to prevent anti-competitive exclusion or exploitation (hold-up effect). Furthermore, it is also used to facilitate wide adoption and diffusion of the standard, and also to support the competitive benefits of standardization.[47]

However, despite its importance, there have been many controversies caused by the ambiguity of the terms used to define the concept:

Fair: Which usually refers to procedural aspects of negotiation, requiring good faith from both parties. A pivotal case was Huawei v. ZTE[48], which heavily emphasized the procedural fairness elements as central to fulfilling FRAND obligations under EU competition law.[49]

Reasonable: A fundamental aspect of FRAND commitment is the royalty rate, one of the most contentious element. Since the ambiguity of the word "reasonable" when it comes to economic aspects of patents, many debates have been conducted, with no universally accepted approach.[50] The main aspects and key issues are:

- Valuation Basis: One of the most important debates revolves around one main distinction: should the royalty rate reflect the patent's value before standardization or its value after becoming essential to a successful standard? One pivotal case that can give a glimpse of today's approach is Microsoft v. Motorola[51], which applied the incremental value rule, which aims to prevent the value to be derives solely from the standardization (hold-up value).[52] However, some critics, notably J. Gregory Sidak, argue that this rule is economically flawed for SEPs, since it ignores their combinational value (since multiple essential patents must work together) and fails to compensate for the risks and specific investments made for standardization, which could lead to under-compensation.[53] A FRAND royalty should actually reflect the value the patented technology contributes within the context of the standard, maximizing the value of the standardization while satisfying the individual constraints of both innovator and implementer.[54] Historical ETSI documents actually suggest an intent for royalties to be reduced to reflect the

Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[47] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1 https://doi.org/10.5235/17441056.10.1.1 accessed 26 June 2025

[48] Court of Justice of the European Union, Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH (Case C-170/13) https://curia.europa.eu/juris/liste.jsf?num=C-170/13 accessed 26 June 2025

[49] Nicolas Petit and David S Leonard, accessed 26 June 2025

[50] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[51] 'A New Era of Standard Essential Patents Regulation in the EU' (Lexology, [insert date]) https://www.lexology.com/library/detail.aspx?g=66bdb67e-8d2a-4574-8caa-e860641cc07f accessed 26 June 2025

[52] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[53] Sidak

[54] Sidak

status of the market after standardization, balancing a fair return while avoiding excessive profits.[55]

- Calculation Methods: Courts and parties consider comparable licenses, Top-Down approaches (which means allocating form an aggregate standard royalty), apportionment to the SSPPU[56] (Smallest Salable Patent-Practicing Unit) and modified Georgia-Pacific factors.[57]
- Royalty Stacking: This concept enters in play when there is a potential for the cumulative burden of royalties from numerous SEPs for a single standard to become excessive, which is a persistent concern which influences reasonableness assessments.[58]

Non-Discriminatory: Which requires treating similarly situated licensees alike.[59] The main disputes arise over:

- Licensing Level: Where there is a pivotal conflict over the obligatory application of "License to All" (LTA), where the main question is whether this requires SEP holders to license any requesting party or whether is merely require non-discriminatory terms among those that SEP holder chooses to license. While current EU law and ETSI policy does not impose a strict obligation[60], an historical study shows that ETSI clearly favoured broad access for "all users".[61]
- Transparency & Comparability: One of the main problems when it comes to discriminatory royalty rates is the widespread usage of Non-Disclosure Agreements (NDAs), which makes it difficult for licensees to verify whether they are receiving non-discriminatory terms compared to others.[62] While NDAs can serve legitimate purposes, their opacity potentially masks discriminatory practices.[63] The historical ETSI record emphasizes preventing "material discrimination" , especially against SMEs (Small and Medium Enterprises).[64]

2.4 Balance between IPR and Competition law

The entire framework regarding SEPs and FRAND operates on a particular balance between IPR (granting exclusion) and competition law (preventing market abuse).[65]

The FRAND commitment itself, after all, is a mechanism born from competition concerns, since it allows patented technology in standards without enabling

[55] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[56] 'Standard and Standard-Essential Patents Platform Users (SSPPU)' (CUBIC, [insert date]) https://www.cubicibuc.com/ssppu accessed 26 June 2025

[57] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[58] Sidak

[59] Sidak

[60] Jacques de Werra, Severine Dusollier, Alain Strowel and Edoardo Celeste, eds, Borghetti et al accessed 26 June 2025

[61] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[62] Vatsal Kathuria and Alex Lai

[63] Vatsal Kathuria and Alex Lai,

[64] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[65] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

subsequent monopolistic behaviour.[66] The main challenge is avoiding, or at least mitigating, two forms of opportunistic behaviour:

Patent Hold-Up: Which happens when SEP holders exploit the implementer's lock-in to the standard to demand royalties exceeding the intrinsic value of their patented technology.[67]

Patent Hold-Out: Implementers leveraging the FRAND commitment, the complexity of SEP landscapes and the threat of costly litigation, refuse reasonable offers, or push for sub-FRAND rates.[68] Effective regulation must deter both forms of opportunism in order to maintain a balanced ecosystem that is capable of encouraging participation from both innovators and implementers.[69] However this phenomenon remains up to debate, with some arguing that it's merely theoretical.

3. U.S. Regulatory Framework and Judicial Approach

The United States employs a different approach to SEP regulation compared to the EU, since its framework is mainly shaped by its antitrust statutes, evolving agency enforcement priorities and landmark judicial decisions. Unlike the EU, which directly applies abuse of dominance rules, the U.S. mainly treats FRAND disputes as contractual matters, consequently reserving antitrust intervention for specific circumstances, capable of harming the competitive process itself.

3.1 Antitrust Statutes and Agencies

In the U.S., SEPs licensing practices, as seen above, fall under the scrutiny of antitrust law, in particular Section 1 and 2 of the Sherman Act[70], the Clayton act, and Section 5 of the Federal Trade Commission (FTC) Act.[7172] These statutes' main aim is to protect competition, not necessarily individual competitors.

The most relevant provision is Section 2 regarding monopolization, since a SEP holder might be accused of using a monopoly in order to exclude competition or gain excessive royalties. To avoid such a scenario, the two main enforcement agencies of the U.S. are the Federal Trade Commission (FTC), which can challenge "unfair methods of competition", under the Section 5 of the FTC Act, previously mentioned, and the Department of Justice (DOJ), which can bring Sherman Act cases and also issue policy guidelines. The pivotal role is given to U.S. federal courts, who ultimately adjudicate antitrust lawsuits and significantly impact the formation and the development of SEP case law.

An important aspect of the U.S. evolution regarding these matters is the historical context. Before modern FRAND commitments became standard practice in SDOs, U.S. antitrust agencies and courts addressed anti-competitive patent misconduct through decrees.[73]

[66] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[67] Alison Jones, "Standard-Essential Patents: Frand Commitments, Injunctions and the Smartphone Wars," European Competition Journal 10, no. 1 (April 15, 2014): 1–36, https://doi.org/10.5235/17441056.10.1.1.

[68] Robert D Jurata Jr and Stephen P Luken

[69] Layne-Farrar, Anne & Padilla, Jorge & Schmalensee, Richard. (2007). Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments. Documentos de Trabajo (CEMFI), Nº. 2, 2007. 74

[70] 15 USC §§ 1–2

[71] 15 USC §§ 45

[72] Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices, Federal Reserve Board, https://www.federalreserve.gov/boarddocs/supmanual/cch/200806/ftca.pdf

[73] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

Starting in the 1940s and 1950s, landmark cases against companies like Hartford-Empire, National Lead, Alcoa, GE and AT&T resulted in decrees mandating compulsory licensing of patents, often on "reasonable and non-discriminatory" (RAND) or even royalty-free terms, to remedy antitrust violations involving patent pooling, cartels or monopolization.[7475] These decrees established crucial early precedents, which would shape the future of the country's approach to these matters; in particular, the obligation to license all applicants, burden of proof allocation and, last but not least, court determination of reasonable royalties, directly influencing the later developments of SDO IPR policies.[76]

3.2 Policy Approach and shifts

In the last decade, many changes have occurred regarding the view of U.S. competition authorities over their approach to SEPs. It's possible to see that authorities mainly try to avoid treating FRAND licensing disputes as antitrust issues unless there is a clear harm to competition, with the DOJ being the most cautious authority when it comes to extending antitrust into FRAND matters. Under the Trump administration, the DOJ, lead by Assistant Attorney General Makan Delrahim, articulated a new approach. Delrahim stated that "violating a FRAND commitment, by itself, should not give rise to an antitrust claim"[77] , noting that a mere failure to honour a licensing obligation is fundamentally a contract issue, not a Sherman Act offense. That's why U.S. law does not impose a general "duty to deal" or compulsory licensing requirements on patent holders outside exceptional circumstances, imposing an additional requirement of proving that SEP conduct harmed the competitive process–and not the counterparty itself–in order to invoke antitrust liability.[78] This new perspective, sometimes referred to as "New Madison" approach, emphasizes the strong patent rights and incentives for innovation, which should not be undermined by antitrust overreach.[79] This evolution led to the DOJ withdrawal from the 2013 join statement and issue its own 2019 policy statement reflecting its stance.[80]

The FTC, meanwhile, continued to pursue enforcement actions, like the pivotal FTC v. Qualcomm, clearly showing some inter-agency divergence.[81] During the Biden administration, the DOJ withdrew the statement previously made in 2019 in 2021, while also showing concerns with it, saying that it was overly dismissive of FRAND issues and suggesting a potential return towards a more in-depth consideration of competitive harms.[82] This problematic back and forth

[74] Jorge L. Contreras, "A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens," SSRN Electronic Journal, 2014, https://doi.org/10.2139/ssrn.2374983.

[75] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[76] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[77] Department of Justice, Makan Delrahim, "Don't Stop Thinking About Tomorrow": Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property, June 6, 2019, https://www.justice.gov/archives/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-co#:~:text=In%20the%20view%20of%20the,S

[78] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm'

[79] Makan Delrahim, (US Department of Justice)

[80] Matthias Leistner

[81] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[82] Paul, Weiss

clearly shows the ongoing policy debate within the U.S. government.

3.3 Courts and FRAND

Considering what has been discussed so far about the U.S. approach, we can understand why U.S. courts typically handle FRAND disputes through contract and patent law rather than antitrust law. A breach of a FRAND promise to a standards organization can lead to a contract claim by an implementer, as seen in Microsoft v. Motorola and Apple v. Motorola. It is in these cases that courts determined FRAND royalty rates as a contract remedy, without finding antitrust liability. Courts in the U.S. also limit patent injunctions when looking at SEPs through the eBay test[83], which requires a "four-factor test" which needs to show irreparable harm and that the public interest is to be disserved by an injunction. Notably, Judge Richard Posner (sitting in Apple v. Motorola) denied an injunction for Motorola's SEP, using a brilliant argument: he reasoned that Apple's willingness to pay a court-determined FRAND royalty meant that a monetary relief was sufficient and injunction was unwarranted.[84] The Federal Circuit (one of the 13 United States courts of appeals, which has exclusive appellate jurisdiction over all U.S. federal cases involving patents and similar topics[85]) agreed that FRAND-encumbered SEPs generally do not justify injunctive relief if the licensee is willing to take a license.[86] Thus, we now understand why in the U.S. SEPs are resolved primarily via contract enforcement, leaving antitrust intervention for exceptional cases (e.g. fraud on an SSO).

3.4 Antitrust enforcement history: Landmark Cases

From what we have seen so far, it's clear that, while preferring other methods of resolution regarding SEPs, there have been notable cases in which U.S. authorities pursued some SEP related antitrust actions. An example is the FTC's Rambus case in 2005[87], in which the court argued that Rambus had illegally monopolized markets by concealing patents during a standards process; though the D.C. Circuit vacated the FTC's decision for failure to show that "but for" the deception, the standard would have been different.

A pivotal decision by the Third Circuit came in Broadcom v. Qualcomm (2007), which held that fraudulent inducement of an SSO could state an antitrust claim[88], showing that antitrust law might apply if a patent holder's deceptive conduct locked in a standard and later licensing was exploitative.

However, a problem remained: since these similar cases required high burdens of proof, caused by the alternative methods that U.S. courts preferred over antitrust. In particular, in the last decade, U.S. antitrust enforcers have become more cautious. The FTC in 2013

[83] Neal Solomon, 'Analysis of the "Four-Factor Test" in Patent Cases Post-eBay'

[84] 'Catching up on … Apple v. Motorola (ND Ill/Fed Cir)' Essential Patent Blog (29 January 2013) https://www.essentialpatentblog.com/2013/01/catching-up-on-apple-v-motorola-n-d-ill-fed-cir/ accessed 26 June 2025

[85] US Court of Appeals for the Federal Circuit, 'About the Court' https://www.cafc.uscourts.gov/home/the-court/about-the-court/ accessed 26 June 2025

[86] Apple Inc v Motorola Inc No 12-1548 (Fed Cir 2014) https://law.justia.com/cases/federal/appellate-courts/cafc/12-1548/12-1548-2014-04-25.html accessed 26 June 2025

[87] Federal Trade Commission, 'FTC Finds Rambus Unlawfully Obtained Monopoly Power' (2 August 2006) https://www.ftc.gov/news-events/news/press-releases/2006/08/ftc-finds-rambus-unlawfully-obtained-monopoly-poweraccessed 26 June 2025

[88] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

reached a consent decree with Google (Motorola Mobility), committing Google to abstain from seeking injunctions on SEPs against willing licensees.[89] This action was an administrative action under FTC Act Section 5 addressing holdup concerns without court litigation.

3.4.1 FTC v. Qualcomm (Ninth Circuit)[90][91]

This is, without a doubt, one of the most significant decision in the last years. In this sentence, the Ninth Circuit overturned the District Court's finding of antitrust liability against Qualcomm. The appellate court held that Qualcomm's controversial practices, including refusing to license rival chipmakers and conditioning chip supply on the Original Equipment Manufacturers (OEMs) taking a patent license ("no license, no chips"), did not violate Sherman Act §2. A fundamental aspect, which became a key to the ruling, was the determination that the alleged harm (which potentially inflated royalties paid by OEMs) was mainly an injury related to the price of licenses rather than an anti-competitive injury to the modern chip market itself. The court emphasised that antitrust law does not typically impose a duty to deal with competitors and that, charging high prices, even monopoly prices enabled by the patents, is not itself an antitrust violation. This ruling plays a pivotal role in understanding today's US's approach, since it solidified the separation between FRAND breach and antitrust liability.

3.4.2 Apple v. Motorola/ Microsoft v. Motorola[92]

These two cases are some of the most important in regards to the shaping of FRAND commitments, since they treated them as enforceable contracts. In Microsoft, Judge Robart conducted a bench trial in order to determine a specific RAND royalty range, which involved the traditional 15 Georgia-Pacific patent damages factors, but modified in the RAND context.[93] In particular, a crucial aspect was the application of an ex ante incremental value approach, with the objective of valuing the patent's contribution before standardization, explicitly excluding any value derived from the standard's adoption.[94] This approach has been criticized as economically unsound for SEPs, with the main argument being that it ignores their combinatorial value , while also failing to adequately compensate innovators for standardization risks and investments. The Ninth Circuit later affirmed the judge's decision, but mainly on procedural grounds, de facto limiting its precedential value on the methodology itself.[95]

3.4.3 Ericsson v. D-link/ CSIRO v. Cisco

These cases provided important clarifications on RAND royalty calculations, in particular by describing a cautious approach towards the application of Georgia-Pacific factors, requiring careful consideration of the RAND context and relevance. It mainly stressed that defences bases on patent hold-up and royalty stacking

[89] 'The Motorola Mobility Decision' Essential Patent Blog (29 April 2014) https://www.essentialpatentblog.com/2014/04/european-commission-issues-antitrust-decisions-on-standard-essential-patents-in-samsung-motorola-cases/ accessed 26 June 2025

[90] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[91] Federal Trade Commission v Qualcomm Inc No 19-16122 (9th Cir 2020) https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/11/19-16122.pdf accessed 26 June 2025

[92] Microsoft Corp v Motorola Inc No 14-35393 (9th Cir 2015) https://law.justia.com/cases/federal/appellate-courts/ca9/14-35393/14-35393-2015-07-30.html accessed 26 June 2025

[93] Sidak

[94] Sidak

[95] Layne-Farrar

require actual evidence of such effects in the specific case, so not just theoretical arguments. [96]

The court also clarified that allocation to the Smallest Salable Patent Pricing Unit (SSPPU) is a principle mainly aimed at guiding juries, not rigid requirements, especially in bench trials or negotiations.[97] Comparable licenses were also affirmed as reliable valuation method, provided they are truly comparable and not showcased as such.

3.4.5 eBay v. MercExchange

This case changed patent injunction law, establishing that the traditional four-factor equitable test applies, which requires irreparable harm, inadequate remedies at law, balance of hardships and public interest; this application ended the almost automatic grant of injunctions upon finding infringement.[98]

Since for FRAND committed SEPs the patent holder's commitment to license makes it difficult to prove irreparable harm or inadequacy of royalties, injunctions against willing licensees are generally disfavoured, while still potentially available against genuinely unwilling infringers.[99]

3.5 Impact on innovation and market dynamics under U.S. law

What can be derived from the study of U.S.'s approach? The usage of patent rights and contract enforcement, while limiting antitrust intervention on licensing terms, arguably provides strong incentives for innovation and R&D, however it potentially increases costs for SMEs, who face difficulties in challenging high royalty demands or restrictive licensing practices (e.g. refusal to license components) through antitrust channels post-Qualcomm.[100] While there are indisputable gains in this approach, the lack of predictable royalty rates contributes to continuous disputes and uncertainty.

4. Italian and EU Regulatory Framework and Judicial Approach

As seen above, the European Union's approach to regulating SEPs and FRAND commitment differs from the U.S. model, since it primarily relies on competition law, especially on Article 102 of the Treaty of Functioning of the European Union (TFEU), which prohibits the abuse of a dominant market position.[101]This approach views FRAND commitment as something that should be used to prevent and avoid anti-competitive harm, ensuring fair access to standards.[102]

4.1 Article 102 TFEU and EU competition law principles

Through the EU's approach, the ownership of SEPs necessary to comply with a standard is usually considered sufficient to confer a dominant position;[103] this is why the SEP's holder conduct in licensing and enforcing these patents is subject to a strict a throughout scrutiny of Article 102 TFEU. Some of the practices that are considered potentially abusive under Art. 102 are, for

[96] Layne-Farrar
[97] Layne-Farrar
[98] Sidak
[99] Leistner

[100] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[101] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[102] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[103] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1 https://doi.org/10.5235/17441056.10.1.1 accessed 26 June 2025

example: i) seeking injunctive relief against an alleged infringer who is willing to take a license on FRAND terms;[104] ii) imposing unfair licensing terms (e.g., excessive royalty rates, discriminatory conditions, etc.);[105] iii) refusal to license a willing licensee on FRAND terms.

It's now clear that the EU approach integrates FRAND compliance with the obligations that derive under competition law, since deviations from FRAND are not seen as merely potential contract breaches, but potential abuses of dominance that harm the competitive process.[106]

A pivotal role is given to the European Commission, whose horizontal guidelines provide specific guidance when applying competition law (art. 101 TFEU on restrictive agreements) to standardization agreements.[107] From its approach, it's clear that they recognize the pro-competitive benefits of standards, but establish conditions to mitigate risks, with regards to IPR policies. These guidelines state that SDO's IPR policies, that require irrevocable FRAND commitments, generally do not restrict competition.[108]

Their main use is emphasizing the need for transparency regarding SEPs and licensing terms. In particular, the 2010/2011 guidelines, permitted SDOs to adopt rules allowing or requiring ex ante disclosure of maximum royalty rates by SEP holder, although this practice still hasn't gotten adopted by major SDOs (e.g. ETSI).[109] The more recent guidelines, which came out in 2023, maintain the importance of FRAND commitments for ensuring compliance with article 101.[110]

4.2 Italian Competition Authority (AGCM)

The AGCM, being the national competition authority (NCA), enforces both Italian competition law and Articles 101/102 TFEU within Italy. A SEP holder is usually seen as someone holding a dominant market position, so the ACGM scrutinizes whether the SEP holder's licensing practices deviate from FRAND principles, potentially constituting an abuse. Some of the key areas of AGCM focus include the SEP holder's conduct during negotiations; The actions that can be seen as abusive are: refusal to license on FRAND terms, imposing excessive or discriminatory royalty rates or seeking injunctive relief against a willing licensee without prior good-faith negotiation. The ACGM aim's is to find a balance between the protection of incentives for innovation, while also ensuring that access to essential technologies isn't restricted.

4.3 Landmark EU cases

EU's SEPs/FRAND jurisprudence has been shaped throughout the years by pivotal decisions, both by the EC and, most importantly, the CJEU's ruling in Huawei v.

[104] Nicolas Petit
[105] Jean-Sébastien Borghetti
[106] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025
[107] Jean-Sébastien Borghetti
[108] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025
[109] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025
[110] European Parliamentary Research Service, 'Standard-Essential Patents (SEPs): EU Proposal for a New Regulation' (2023) https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754578/EPRS_BRI(2023)754578_EN.pdf accessed 26 June 2025

ZTE, whose interpretation continues to be refined by national courts.

4.3.1 Samsung and Motorola decisions (EC)

In 2014, during the peak of the smartphone war, the European Commission investigated Samsung and Motorola for seeking SEP-based injunctions against Apple, a competitor willing to negotiate a license.[111] The Commission concluded that these actions could constitute an abuse of dominance under Article 102, showing its view that injunctions are an inappropriate enforcement tool against willing licensees under FRAND.[112][113] The cases were settled with legally binding commitments from Samsung and a finding of infringement against Motorola, which paved the way for the CJEU's later ruling.[114]

4.3.2 Huawei v. ZTE (CJEU, 2015)

This landmark case addressed questions referred to by a German court, with concerns regarding the condition under which seeking an SEP injunction constitutes Article 102 Abuse.[115] The CJEU established a detailed framework with the objective of reaching a balance between SEP holder's rights with the implementer's interest in accessing standardized technologies.[116] The framework requires the SEP holder, before seeking an injunction, to: i) alert the alleged infringer, while also specifying the Sep and the alleged infringement; ii) make a specific, written offer for a license on FRAND terms, with a detailed description of royalties and calculation methods.[117]

The alleged infringer must respond and engage in good faith, and if they want to challenge the offer but wish to continue using the technology, they must: i) submit a specific, written counter-offer on FRAND terms; ii) provide appropriate security for past and future use (e.g., deposit).[118] Seeking an injunction against an implementer who follows these steps is considered abusive under Article 102; conversely, if the implementer fails to respond diligently or reject the offer without making a counter-offer and providing economic security, the SEP holder can seek an injunction. The framework also allows the alleged infringer to reserve the right to

[111] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2026

[112] European Commission, 'Antitrust Decisions on Standard Essential Patents (Samsung – Motorola)' (29 April 2014) https://ec.europa.eu/commission/presscorner/detail/en/memo_14_322 accessed 26 June 2025

[113] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1 https://doi.org/10.5235/17441056.10.1.1 accessed 26 June 2025

[114] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1 https://doi.org/10.5235/17441056.10.1.1 accessed 26 June 2025

[115] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1 https://doi.org/10.5235/17441056.10.1.1 accessed 26 June 2025

[116] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[117] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[118] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

challenge patent validity or essentiality in parallel proceeding.[119]

4.4 EU/Italian Judicial Standards

The judicial standards for injunctions and abuse of dominance in the EU is mainly shaped by the Huawei v. ZTE framework and its different interpretations,[120] with the main question is whether the implementer has demonstrated willingness according to the specified procedural conduct.

Regarding one of the most important licensing debate (LTA vs. ATA), legal analysis suggests that under prevailing EU law there is no general obligation for SEP holders to grant licenses to all applicants at any level of the value chain.[121] While implementers must have access to the standard, this can be achieved indirectly (e.g., buying licensed components) if the SEP holder chooses to license only at the end-product level; this approach however contrasts with arguments based on the historical intent of the ETSI policy favouring broad access.[122] While the Unified Patent Court (UPC) is now operational and expected to handle significant SEP litigation, applying EU law including Huawei v. ZTE, and its early decision confirm its competence to adjudicate FRAND defences and counterclaims, its substantive jurisprudence shaping FRAND interpretation is still young.

4.5 EU SEP Regulation Proposal (2023, withdrawn)

In an attempt to address the perceived inefficiencies and the lack of transparency, the EC proposed a regulation in 2023, with its main mechanism being: i) a mandatory SEP Register managed by EUIPO; ii) Mandatory but not binding Essentiality Checks on samples of registered SEPs; iii) A process for determining a non-binding Aggregate Royalty for a standard; iv) a mandatory pre-litigation FRAND Determination/conciliation procedure.[123]

The proposal faced significant criticism, with concerns regarding the feasibility and value of aggregate royalty determinations, the potential for the process to be overly bureaucratic, the competence of EUIPO, potential negative impacts on innovation and limitation on access to courts.[124] Because of the strong opposition and lack of consensus between Member States, the Commission formally withdrew the proposal in early 2025.[125]

5. Comparative Analysis

As we have seen, the regulatory and judicial landscapes governing Standard Essential Patents (SEPs) and FRAND commitments in the U.S. and the EU showcase

[119] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[120] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[121] Jean-Sébastien Borghetti

[122] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2026

[123] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[124] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[125] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

fundamental differences regarding approaches. While both of these systems have the inherent interests of balancing innovation and competitive access to standardized technologies, their main mechanisms and requirements differ in fundamental ways, in particular regarding procedural, substantive and regulatory approaches.

5.1 Procedural Differences in Enforcement

The U.S. system primarily relies on private litigation, which is initiated by SEP holders or implementers.[126] While Antitrust agencies (DOJ and FTC) may investigate and bring enforcement actions, this is less common for typical FRAND disputes, especially post-Qualcomm, unless broader anticompetitive conduct is alleged.[127] In contrast, the EU system allows for the so-called "dual enforcement track" : private litigation in national courts and potential investigation and enforcement by public authorities (European Commission or National Competition Authorities (e.g. Italy's AGCM)) under Article 102 TFEU.[128]

A pivotal procedural difference is the EU's mandatory pre-injunction negotiation framework, established by the CJEU in Huawei v. ZTE.[129] This framework imposes specific obligations on both the SEP holder (alert and FRAND offer) and implementer (response, counter-offer, security) that must be fulfilled before a SEP holder can seek injunctive relief without risking an abuse of dominance finding.[130] The U.S. system lacks any comparable mandated pre-litigation protocol specifically for FRAND disputes; while good-faith negotiation might be expected under contract law principles, there are no formal requirements for specific procedural steps, completely differing from the EU.[131]

Another important difference revolves around the dispute resolution mechanism: U.S. SEP disputes often involve extensive discovery and potentially jury trials;[132] meanwhile, EU disputes are adjudicated by national courts (who apply EU law and CJEU precedents) or the specialized Unified Patent Court (UPC), typically without juries.[133] The now-withdrawn EU SEP Regulation proposed adding mandatory pre-litigation conciliation via EUIPO, showing an EU tendency of exploring administrative/ADR solutions.[134]

Last but not least, another important aspect revolves around cost implications (rules vs. standard), since the EU's more rule-based procedural approach might, over time, lead to lover average enforcement costs per dispute

[126] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal
[127] Cap 3
[128] Cap 4
[129] Cap 4.3.2

[130] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145
[131] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74
[132] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74
[133] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145
[134] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

compared to the U.S.'s more standard-based assessment, even if the rule itself doesn't reduce the number of disputes.[135] However, the promulgation costs of establishing such rules are still significant.[136]

5.2 Substantive Difference in Evaluating SEP Abuse

The most important divergence, between the EU and the U.S. systems, revolves around the core legal doctrines. The U.S. system post-Qualcomm treats FRAND commitments and disputes under contract law.[137] Moreover, in order to invoke antitrust liability, an anti-competitive conduct must be shown to cause harm to competition in a relevant market, so it can't merely be a breach of FRAND or a high royalty rate.[138] The EU, instead, directly applies competition law, specifically Article 102 TFEU (abuse of dominance), to SEP holder conduct.[139]

Another important aspect revolves around the availability of injunctions, which differs significantly. In the U.S., the eBay standard requires a case-by-case analysis.[140] While FRAND commitment make proving irreparable harm difficult, they are not automatically barred and remain a potential remedy, especially against so-called "unwilling" infringers.[141] Meanwhile, in the EU, the Huawei v. ZTE framework creates a strong presumption against injunctions for implementers who demonstrate willingness by adhering to the mandated negotiation procedure; so seeking an injunction in such cases is generally considered abusive under Article 102.[142] This means that implementers in the EU have a considerably stronger protection against injunctive threats than in the U.S.

Another important differences are the standards for FRAND determination, since the way used by the two system to calculate "Reasonable" royalties differs. For the U.S., the controversial ex ante incremental value approach from Microsoft v. Motorola remains a reference point, despite significant criticism.[143] EU courts, in particular post-Huawei, have started focussing less on prescribing specific calculation methodologies and more on procedural fairness and assessing the parties' negotiation conduct.[144]

However, national courts still determine FRAND rates when necessary, often relying on comparable licenses (if available) or potentially top-down analyses.[145] The UK court's assertion of jurisdiction to set global FRAND

[135] Nicolas Petit and David S Leonard

[136] Nicolas Petit

[137] Chapter 3

[138] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[139] Chapter 4

[140] Jorge L Contreras, 'A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens' (2014) SSRN Electronic Journal https://doi.org/10.2139/ssrn.2374983 accessed 26 June 2025

[141] Jorge L Contreras, 'A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens' (2014) SSRN Electronic Journal https://doi.org/10.2139/ssrn.2374983 accessed 26 June 2025

[142] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[143] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[144] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[145] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

rates in Unwired Planet[146] represents a significant development, potentially influencing future practice, including at the UPC.[147]

Interpretation of Non-Discriminatory also show divergence: while both systems likely prohibit differential treatment of similarly situated licensees without objective justification[148], the main debate revolves around whether FRAND mandates "License to all" (LTA). Legal analysis suggests that current EU law/ETSI policy does not impose a general LTA obligation[149], while historical ETSI documents indicate an original intent favouring broad access for all implementers.[150] U.S. law is also unsettled on this point, with Qualcomm potentially impacting arguments based on refusal to license rivals.[151]

5.3 Differences in Regulatory Approaches

One of the main difference is the fact that the EU framework shows a stronger ex-ante approach, with procedural elements aimed at preventing disputes or structuring their resolution;[152] meanwhile the U.S. system is predominantly ex-post, since it relies on judicial resolution of disputes after they arise, primarily through contract law interpretation, with less emphasis on predefined procedural pathways.[153]

Of course another difference is the role of competition law, since the EU integrates competition law (Article 102) into FRAND analysis, while the U.S. applies antitrust law in a more cautious way, requiring harm to competition beyond the FRAND dispute itself.[154] The main difference shows the ideologies behind U.S.'s approach, which reflects how much of FRAND commitments should be regulated by competition authorities versus private law mechanism.

Last but not least, the EU's approach, especially as shown in Huawei v. ZTE, showcases a lean towards the establishment of procedural rules to govern conduct.[155] The U.S., instead, favour the application of standards of reasonableness on a case-by-case basis, especially regarding royalty determination.[156] It's important to see how theoretical analysis suggests that rules might be more efficient for frequent issues like FRAND, potentially favouring judicial rulemaking over other forms.[157]

[146] Cleary Gottlieb Steen & Hamilton LLP, 'Analysis of the UK Supreme Court's Decision in Unwired Planet v Huawei' https://www.clearygottlieb.com/news-and-insights/publication-listing/analysis-of-the-uk-supreme-courts-decision-in-unwired-planet-v-huawei accessed 26 June 2025

[147] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[148] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[149] Jean-Sébastien Borghetti

[150] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2025

[151] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[152] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[153] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[154] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[155] Nicolas Petit and David S Leonard

[156] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[157] Nicolas Petit

5.4 Roles of SSOs in the U.S. v. the EU

Both the US and the EU rely on SDOs to establish the initial FRAND commitment via their IPR policies; however SDOs usually lack enforcement mechanisms and do not define specific FRAND terms.[158] Their effectiveness actually depends on the clarity of their policies and the external legal framework which are used to interpret and enforce the commitments. In fact, attempts by some SDOs to adopt more specific rules defining FRAND substance have proven controversial, facing agency scrutiny, highlighting the difficulties that SDOs face in moving beyond the general commitment.[159] Sometimes patent pools, which can operate adjacent to SDOs, represent another form of private ordering attempting to streamline licensing, but their structure needs to undergo careful scrutiny to ensure that they won't undermine FRAND principles or competition.[160]

5.5 Evaluation of Consistency and Predictability

While there are main and key differences between these two systems, neither of them can be claimed as the optimal way to approach FRAND problems. The U.S. approach suffers from case-by-case variability in royalty determinations, ongoing debates over methodologies (in particular incremental value), and reduced predictability regarding antitrust challenges post-Qualcomm.[161]

The EU, on the other hand, benefits greatly from the procedural clarity of the Huawei v. ZTE framework regarding injunctions, however it still faces inconsistent national court interpretations, uncertainty regarding royalty determination, plus there is a great uncertainty regarding regulatory path, especially after the SEP Regulation withdrawal.[162] Both system struggle with the challenges of valuing complex patent portfolios and managing the information asymmetries which are inherent in SEP licensing.[163]

In conclusion, both the U.S. and EU represent different approaches and models for SEP/FRAND governance, which are both based on different priorities. The U.S. favours contractual resolutions and market outcomes, while limiting antitrust oversight; meanwhile the EU uses competition law in a more direct way, in order to constrain potential abuses of dominance. These different approaches both have different impacts on various aspects, especially on innovation and market entry, which create a complex and sometimes conflicting legal landscape.

6. Impact on Innovation and Market Entry

The differences between regulatory and judicial approaches to SEPs and FRAND commitments in the U.S. and Italy have significant impacts on both innovation and incentives, especially for new players and SMEs. Understanding this impact and potential effects is crucial for evaluating the effectiveness of each system.

[158] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[159] Nicolas Petit and David S Leonard

[160] Robert D Jurata Jr and Stephen P Luken

[161] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[162] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[163] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

6.1 SEP holder's incentives

One of the most important aspect of SEPs and IP in general is the incentive that they can give in regards to R&D Investments, possibility of entering in standardizations and licensing practices.

As we previously saw, the main focus of patent protection, when observing standards, is to allow innovators to recover costs and earn return, which incentivizes innovation.[164] A regulatory environment which provides strong enforcement rights, while also allowing strong royalty negotiations, might encourage greater investments in critical R&D; conversely, system that focus on restricting enforcement options (like EU's approach post-Huawei) or implementing which potentially drive down royalty rates might bring down investments in critical technology R&D.[165]

Innovators, especially in this day and age, might shift towards proprietary ecosystems (e.g. Apple's approach) or delay contributions if the expected FRAND returns seem insufficient to justify the various investments and risks.[166] The main problem remains finding a level of return that adequately rewards innovation without enabling exploitation.

SEP holders' behaviour is also heavily influenced by the perceived enforceability of their rights and potential return from different licensing models. The main debate, which is crucial is this aspect, is the difference between licensing levels (LTA vs. ATA).

6.2 Barriers for SMEs

When approaching SEPs, smaller firms usually face difficult challenges. For example, SMEs usually lack the resources and knowledge needed to effectively navigate complex SEP landscapes, identify relevant patents, address essentiality and engage in expensive licensing negotiations or litigations.[167] Lack of transparency, both on essentiality and royalty rates, only increase the difficulty when facing these problems. While regulatory efforts are made in order to increase transparency, another important aspect would be the promotion of ADR mechanism, which could effectively lower dispute resolution barriers.[168]

Another important aspect relies in the refusal by SEP holders to license component suppliers, which could create barriers for SMEs, especially for those lacking IP knowledge.[169] Policies ensuring access to licenses at different levels, or strong enforcement mechanisms against discriminatory terms targeting SMEs are crucial to let them participate in standardized markets.

6.3 Effects on innovation

An important effect of the different regulatory approaches relies in the creation of distinct incentives structures, affecting both R&D and technology diffusion.

In fact, a stronger perceived patent enforcement rights and higher royalties (U.S.'s approach) might encourage greater investments; while frameworks that limit

[164] Chapter 1

[165] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[166] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[167] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[168] Jorge L Contreras, 'A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens' (2014) SSRN Electronic Journal https://doi.org/10.2139/ssrn.2374983 accessed 26 June 2025

[169] Robert D Jurata Jr and Stephen P Luken

enforcement (EU injunction limits) could reduce these incentives.[170]

The optimal FRAND royalty should try to ensure that innovators can cover the costs, while implementers can also profit, encouraging a continuous participation from both sides.[171] In fact, historical context showcases how FRAND was actually aimed at "fair return", not excessive profits, acknowledging the benefits for the markets.[172]

An example of the consequences of this scenario is based on the so-called "smartphone wars", based around high cost and complexity of SEP litigation, with various outcomes across different jurisdictions, showing the different legal standards.[173] The FTC v. Qualcomm outcome limits antitrust challenges to licensing terms in the U.S., while the Huawei v. ZTE framework provides procedural protection against injunctions in the EU.[174] This is but an example of the many consequences that follow different legal and regulatory approaches.

7. **Policy Recommendation**

The significant differences between the U.S. and the EU's approaches to SEP and FRAND regulation necessitate careful and in-depth consideration of potential policy improvement and harmonization.

The main problem relies in the conflict between regulatory approach in the context of technological standards, which are usually used globally, therefore the main objective should be the reach of a greater international harmonization, with focus on areas such as: the development of common principles for accessing good-faith negotiation conduct, which would ensure efficiency and avoid excessive formality;[175] promoting internationally recognized best practices for transparency mechanism related to SEP declaration and ownership;[176] making dialogue easier through robust legal methodologies for determining FRAND royalties that appropriately value the patented technology within the standardization context.[177]

Some other suggestions can be found when observing best practices: to mitigate anticompetitive risks associated with SEP pools [178], specific precautions are needed, in fact pools should explicitly commit their licensing agents to abide by members' FRAND obligations; pool governance documents should avoid structures that

[170] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[171] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[172] Robert Pocknell and David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' Rutgers University Law Review https://ssrn.com/abstract=4231645 accessed 26 June 2026

[173] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars' (2014) 10(1) European Competition Journal 1 https://doi.org/10.5235/17441056.10.1.1 accessed 26 June 2025

[174] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[175] Matthias Leistner, 'Structural Aspects of SEPs and the EC Proposal on SEP Regulation' in Josef Drexl and Reto M Hilty (eds), Data Access, Consumer Interests and Public Welfare – The New Debate on Data Ownership (Springer 2022) 123–145

[176] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[177] J Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9 Journal of Competition Law and Economics 931 https://doi.org/10.1093/joclec/nht040 accessed 26 June 2025, 976

[178] Robert D Jurata Jr and Stephen P Luken

discourage individual licensing or restrict licensing to specific levels of the value chain without strong justification; independent expert processes for screening patent essentiality and validity should be mandatory, with mechanisms for rate reduction if patents are invalidated or found non-essential; greater transparency regarding pool portfolio contents, licensees, and potentially rate structures should be encouraged.

Another important change would be to move away from simplistic or economically contested methodologies, avoiding the application of Georgia-Pacific factors without proper tailoring to the FRAND context.[179] Additionally, the promotion of Alternative Dispute Resolution mechanisms like mediation and arbitration, specifically tailored to SEP/FRAND disputes, would incentivize and optimize standards adoptions.

Lastly, when looking at the individual regulatory systems, potential reforms could be applied. In particular, US courts could benefit from cleared Federal Circuit guidance or potentially legislative clarification on consistent application of RAND royalty principles post-Ericsson/CSIRO, moving beyond the contested Microsoft v. Motorola methodology. In this context, policymakers should ensure that antitrust enforcement appropriately considers potential competitive harms from particulars SEP licensing conducts, without interfering in contract disputes.[180]

Meanwhile, the EU, following the withdrawal of the SEP regulation proposal, needs a coherent strategy. This might involve different approaches, such as focusing on targeted legislative measures, relying on the UPC and national courts to further develop jurisprudence interpreting Huawei v. ZTE and FRAND principles, or even reconsider specific, less controversial elements from previous proposals.[181]

A dialogue between jurisdictions remains essential in order to foster mutual understanding and implement the best possible practices; in fact, given the rapid pace of technological advancements, regulatory framework should be adaptable and should mainly focus on durable principles, rather than overly rigid rules.[182]

8. **Conclusion**

The comparison done in this paper, especially regarding the different approaches between the U.S. and the EU, exposes the fundamental differences that shape the trajectory of technological advancements. The U.S., with a deep focus on contract law, prioritizes the incentives for innovation and the rewards of patent exclusivity. This approach, while potentially useful, especially in regards to R&D, creates risks and barriers to market entry, especially to SME.

Conversely, the EU seeks to ensure equitable access to standardized technologies and punish potential abuses of market dominance. Yet this approach, based on an excessive interventionist, which constrains SEP holder conduct and limits the scope for injunctive relief, could actually disincentivize investments in crucial technological development, potentially burdening the very innovation it tries to promote.

[179] Anne Layne-Farrar, Jorge Padilla and Richard Schmalensee, 'Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments' (2007) 2 Documentos de Trabajo (CEMFI) 74

[180] Aminta Raffalovich and Steven Schwartz, 'Antitrust Analysis of FRAND Licensing Post-FTC v Qualcomm' (2021) 31 Competition Journal

[181] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation on Standard Essential Patents' 1–5

[182] Nicolas Petit and David S Leonard

In a period of time defined by rapid technological evolution and global connections, the challenge for a cohesive framework requires an international vision that judiciously balances rewards to innovation while also fostering a competitive and accessible market. The question remains: Can policymakers construct a perfect framework capable of protecting the interests of both tech giants and SME, while also ensuring the previously mentioned balance? The answer is still uncertain, however it will determine whether innovation becomes a landscape that benefits all or a cage in which only the "giants" can have a true freedom to innovate.

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Deep Sea Mining: How does it work, and who benefits from it?

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Abstract

This article reviews the main regulations that states need to follow in the environment of international law while it also explains why nations need to collaborate with global entities such as ISA that work as a mediator by balancing between accessibility permitted and ensuring that every state has the same chance for exploring and exploiting these resources that lie in the seabed. As the article continues, we will see a comparative analysis between the different stakeholders and how these relations work. We will also delve into the CHM doctrine and why it clashes with the strongest and most technological states that usually focus on their national interests and how they apply different strategies for dodging the laws established. Lastly, the article will end up with policy recommendations that could help to restore the equality between states and the correct compliance of these principles.

Keywords: Deep-Sea Mining, Sovereignty, Common Heritage of Mankind, International Law, UNCLOS

1. Deep Sea Mining and the mechanisms behind it

The unexplored depth of the oceans holds a vast variety of minerals, estimated to be worth trillions of dollars.[183] As countries are now more capable of exploring the soil as a result of technological advancements, a fundamental ethical and legal dilemma arises. Should these resources be exploited by powerful states, or should they be preserved in order to respect the 'Common Heritage of Mankind' (CHM)? This article examines the fundamentality of the principle of how state sovereignty interacts and frequently conflicts with the Common Heritage of Mankind Doctrine. The first part of the article will be an overview of the principles of governing deep-sea law and the international regulations that apply to all the states. This will then be followed by a comparative analysis of national approaches, highlighting key differences and implementations carried out by global powers such as the United States, China, and Russia, among others. This will help us understand how competition law influences the accessibility to seabed resources outside the exclusive economic zone. This concept will be explained when analyzing the principles

[183] Isabel Feichtner and Harald Ginzky, 'The Struggle at the International Seabed Authority over Deep Sea Mineral Resources' (2024)

of the law of the sea of each state. Finally, the article will provide policy recommendations for creating a more balanced distribution and ensuring fair competition while following international obligations.

Deep-sea mining presents both an economic opportunity and a legal challenge as countries and private entities compete for access to the minerals found in international waters. The main conflict regarding this topic is the law established by national entities that are mostly focused on the personal interests of the state and the law established by the United Nations Convention on the Law of the Sea (UNCLOS) that is used as a guiding framework to uphold the Principle of Sovereign Equality of States in international law.[184]

1.1 Principles of law of the sea

The UNCLOS was adopted in 1982 and entered into force in 1994 to respond to conflicts of maritime boundaries, resource exploitation, and navigational rights. As countries develop better infrastructure for boats, ships, and submarines, using the sea as a way to meet their interests, in which they could reach further distances, results in the vessels encountering conflicts with other ships owned by other states. After the resolution, they established a legal framework for ensuring that countries knew their legal limits, obligations, and jurisdiction. The most relevant international regulations were the parameters of the borderlines of the states. Beginning with the baselines, they are how maritime boundaries are measured, including the low water mark but also the elevated parts; these borders delimit a country's borders. The second element is the internal waters; they are below the baseline and include the lakes, rivers, bays, and ports that a state might have. The states have full jurisdiction over these territories, and there is no right of innocent passage for other states. This right stipulates that any ship can pass through territorial waters without interference from the coastal state to stop the foreign ship; however, the passing ship needs to have two purposes for this passage to be effective. The first one is traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters. The second purpose is proceeding to or from internal waters or a call at such roadstead or port facility. The third element is the bay, which is a well-marked indentation whose penetration is enclosed by land. According to the UNCLOS, if the width of the baseline is 24 nautical miles or less, a straight line can be drawn from the baseline to the mouth of the bay. If the bay's width is larger than 24 nautical miles, then it would follow the regulations established for territorial waters or even the exclusive economic zones. With this element, there are some exceptions regarding historical bays: if a bay is considered historical, even if it surpasses the 24 NM, the state has full sovereignty over it. The fourth element is the island and chains of islands. The recognition of an island is if it has a natural area formed of land, surrounded by water, which is above water at high tide. Islands have territorial waters and exclusive economic zones. Islands are not the same as rocks because a rock does not allow human habitation nor economic life. For these reasons, a rock only has territorial waters but does not have an exclusive economic zone, nor continental shelf (concepts that will be explained later). The sixth element is the territorial waters, an indivisible part of a territory that goes from the baseline to 12 NM. For this area, the state has full sovereignty but has to allow innocent passage. The

[184]Isabel Feichtner and Harald Ginzky, 'The Struggle at the International Seabed Authority over Deep Sea Mineral Resources' (2024)

seventh element is the contiguous zone. This zone ranges from 12 NM to 24 NM, and it allows the state to have a degree of jurisdiction, but not the same as in territorial waters. The eighth element is the exclusive economic zone (EEZ), ranging from the territorial sea to 200 NM. The coastal states do not have full sovereignty but have sovereign rights over natural resources in the EEZ, but must allow freedom of navigation and overflight for other states. The ninth element is the continental shelf, which refers to the natural extension of the country's seabed under the sea beyond territorial waters. States can use this area for building infrastructure such as artificial islands for obtaining resources from the soil. The final element to be discussed in this paper is the artificial island, which is used for obtaining resources but can only be a maximum size of 500 meters without full sovereignty and does not have territorial waters.[185]

1.2 UNCLOS and the legal framework for Deep-Sea Mining

The UNCLOS provides for several types of zones that were agreed upon in order to have a clear view on what a state can and can not do without previous agreements with other states or entities such as the International Seabed Authority (ISA). The main pillar on which the UNCLOS was established was to prevent monopolization by powerful countries. Another powerful entity is the previously mentioned ISA that is in charge of regulating and granting mining rights to the states and companies. As the UNCLOS is an international convention, it works with a horizontal structure, meaning entities subject to international law are treated equally to participate fairly in resource extraction. The convention also has a separate category called "reserved areas" for developing nations, verifying that they have access to deep-sea mining opportunities and preventing domination by technologically advanced nations. They do not only focus on the previous regulations but also on controlling the mineral market and making sure that there is no state that is extracting more minerals than another, allowing for similar prices globally.[186]

1.3 What is the origin of the term "Common Heritage of Mankind" in relation to the oceans?

It started as a response to the increasing capacity of powerful nations that were capable of having access to wider areas of the ocean and were exploiting them beyond their national jurisdiction. While UNCLOS codified this issue later in time, its politics were rooted well before 1982. It was first formally introduced in 1967 when Maltese ambassador Arvid Pardo addressed the United Nations General Assembly. He realized the real danger that new technological advancements will empower the most developed nations to be capable of monopolizing the seabed's vast resources.[187] To avoid this from happening, he called on the United Nations (UN) to declare the seabed and ocean floor beyond national borders as the "common heritage of mankind." As an ethical and legal parameter that countries need to follow for preventing unlawful appropriations and ensuring an equitable distribution of the benefits. Pardo's proposal was mostly focused on developing nations that lacked the technical capacity for exploiting the seabeds in their jurisdictions. After evaluating the idea, the General Assembly adopted Resolution 2749 in 1970. This resolution officially stated that the deep seabed and its

[185] Malcolm N Shaw, *International Law* (9th edn, Cambridge University Press 2021)

[186] UNCLOS, art 151

[187] How One Maltese Diplomat Gave the World the Law of the Sea, 2023

resources belonged to all mankind and claimed that no entity, state, or individual could claim sovereignty over them.[188] It was emphasized that the peaceful use, international management, and benefit-sharing of these resources are important elements that will be repeated as core fundamentals in the UNCLOS. This sentence was a cornerstone during the negotiations at the Third United Nations Conference on the Law of the Sea (1973–1982). It also entirely shaped Part XI of UNCLOS, which governs the international seabed. These resources were handed to the International Seabed Authority. ISA was not only given the work to regulate exploration and exploitation but also to ensure fair participation and distribute economic benefits among the states that otherwise would be excluded. However, the resolutions have not gone unchallenged; several industrialized states, especially the United States, expressed that the original framework imposed too many regulations, reducing their national freedom. Due to this situation, the 1994 agreement was adopted, allowing more freedom with more market-friendly distributions in terms of production limits and technology transfers. The agreement maintained the CHM principle but softened the original regulations and unbalanced the economic distributions that were first settled.[189]

1.4 Case study: Clarion-Clipperton Zone (CCZ)

At this point of the article, we will be explaining the harsh competition that has always existed since the most technological states were developing machines for allowing the states to exploit and have access to explore larger sea surfaces. At this point I will explain the theory and a case study: The Clarion-Clipperton Zone (CCZ). It is a vast stretch of seabed located in the Central Pacific Ocean between Hawaii and Mexico, covering around 4.5 million square kilometers. It is considered one of the most mineral-rich areas in the world; it mostly contains nickel, cobalt, manganese, and rare minerals. These resources are seeing an exponential growth in demand due to the massive production of electric vehicles, wind turbines, and batteries. Although it lies outside national jurisdiction and is under the control of ISA, it has become an epicenter of a new geopolitical and economic competition.[190]

To this day, ISA has granted more than 20 licenses for explorations for the CCZ to states and private contractors. These licenses are covered by different countries, including China, the United Kingdom, India, Japan, France, Germany, and several developing nations like Nauru and Tonga.[191]

As of now, China is the state with the most ISA-approved contracts, making it the most powerful state in the area. On the other side, the US, even though it is not a party to the UNCLOS, has promoted deep-sea mining through companies like Lockheed Martin, which sponsors operations representing the US companies working via partnerships with small Pacific Island states such as the

[188] United Nations, 'Resolution 2749 (XXV)' (n.d.)
[189] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea 1982 (the 1994 Implementation Agreement)
[190] Clarion-Clipperton Zone (CCZ) – Environmental Assessment and Protection in Mineral-Rich Seabed Areas Beyond National Jurisdiction (2023)
[191] International Seabed Authority, 'Exploration Contracts' (2025) https://www.isa.org.jm/exploration-contracts accessed 26 June 2025

Cook Islands and Nauru.[192] Another group interested in this exploitation is the small island developing states. Although they cannot afford the exploitation by themselves, they reach out to foreign companies to agree on partnerships, but they don't have much freedom and are often rule takers and not rule makers, in contrast to the two previous examples. This case is an example of how the common principles of the common heritage of mankind are being challenged by technological states. Initially, the CCZ was planned to be distributed equally between the states, but powerful nations usually find their ways to dodge these regulations.[193] ISA has been previously criticized due to the lack of transparency that the entity has, and that is why it is not very difficult to think that these licenses are being granted because of the countries facilitating the interests of the entity. Countries also have the ability to pressure these institutions, for example, in 2021, when Nauru, backed by the Canadian company, The Metals Company, triggered a "2-year rule" clause under the UNCLOS, pressuring ISA to implement mining regulations within two years or allow mining without finalized rules. This shows how legal loopholes can be used to make pressure to ease the original regulations allowing harmful industrial activities.[194]

1.5 How national interests clash with the CHM principles?

As already explained, the CHM principles were designed to ensure that the international seabed known as "the Area" was distributed equally between the states. Moreover, one of the pillars that international law is based on is the national jurisdiction of each state. Upholding the state's sovereignty means that it has control over its territory and makes independent decisions for pursuing national interests. Despite the fact that the CHM is only put in practice in international zones, the states will always seek ways to maximize their influence and economic gain even in areas beyond national jurisdiction. These interests are usually materialized in three types of outcomes. Strategic autonomy, by exploiting rare resources that can be used in very demanded sectors. Economic diversification and growth mostly applied to states that have their economies based on few resources, so by deep mining, they could offer more products and expand their portfolio. Geopolitical leverage specifically for rivalries involving domination. The theory of these principles might seem clear, but in reality they are not, and the clashes with the national jurisdictions are one of the factors that prevent the equality between the rest of the nations.[195] The clashes are produced due to the following reasons. Exploration contracts within the ISA are unevenly distributed, held mostly by technologically advanced and wealthy countries, due to this disproportion, the doctrine is being undermined. This situation has only been possible because of the constant pressure that these

[192] Vinson & Elkins LLP, 'Deep Sea Mining: One International Regime to Rule Them All?' (2025) accessed 26 June 2025
[193] Small Island Developing States and the Law of the Sea: An Ocean of Opportunity (2021)
[194] Torres et al, 'Concerns over Transparency and Access Abound at Deep-Sea Mining Negotiations' (2022)
[195] Gabert-Doyon et al, 'China and Russia Challenge US Claim to Mineral-Rich Stretches of Seabed' (2024)

nations are inflicting on the international entities, mostly on the ISA, in the sense of accelerating the transition from exploration to exploitation with methods such as the one already mentioned, the "2-year rule." There has been an increased concern because entities such as the ISA, instead of structuring their decisions based on the principles and ensuring equality, is allowing the countries that need to be more regulated to have more access to the resources, compromising the initial model.[196] Another clash is the proxy sponsorship, where states sponsor private corporations through small or developing countries, and although officially the developing country is the one asking for the permissions, behind it is the stronger state making it happen by outsourcing their operations but still controlling the revenues and output. The use of loopholes in the convention allows this kind of interaction but still does not fulfill the objective of why they were found.[197] The doctrine not only includes a fair distribution of the international seabed and economic outputs but also the transfer of marine technology to developing nations for being able to exploit and having a meaningful participation. However, in practice, the outcomes of this initiative have not been very successful and have been weakly implemented. This type of transfer has usually been avoided by the high-tech nations by stating that this trade will damage intellectual property protection, commercial confidentiality, and national security concerns. As a result, the gap that already existed when the entities adopted this regulation has only widened.[198]

1.6 National approaches to deep-sea mining: China

For the following points, I will create a comparative analysis between the key countries that are most involved in the exploration and regulation of the sea. China, as previously mentioned, is the state with the most ISA licenses in the world, and their presence is not only seen in the CCZ, it also has great influence in the Southwest Indian Ridge. In 2011 the China Ocean Mineral Resources Research and Development Association (COMRA) secured a 15-year exploration contract with the International Seabed Authority for polymetallic sulfides. This area is very rich in copper, zinc, gold, and silver that are very valuable in today's economies. Another important site where China's involvement is also considerable is in the Western Pacific Ocean, mainly for the abundance of cobalt-rich ferromanganese crusts. In 2014, COMRA entered into an agreement with ISA to explore these crusts.[199] China's strategy also benefits from its Belt and Road Initiative (BRI), allowing it to protect and control other maritime areas that extend their national boundaries. Opposed to Western approaches that depend heavily on private corporations, China maintains state ownership and direction of their sea mining activities, ensuring that national interests are met and they have enough resources

[196] Two-Year Countdown for Deep Seabed Mining (2022)
[197] Ramírez, 'Deep-Sea Mining, a Murky Business for the Global South' (2024)
[198] United Nations Convention on the Law of the Sea 1982 (entered into force 16 November 1994)
[199] F P et al, 'Metallogenic Information Extraction and Quantitative Prediction Process of Seafloor Massive Sulfide Resources in the Southwest Indian Ocean' (2016)

for keeping up the massive production while shifting to green supply chains. China, although it supports the UNCLOS, in reality keeps their marine technology inside a vault—meaning that they keep the information to themselves and are not contributing to the multilateral capacity that the CHM proposes.[200]

1.7 The US

The US is a special case because of its paradox. It has not signed the UNCLOS but remains a powerful actor in deep-sea mining due to the diplomatic and corporate leverage. US companies are pioneers in technology, able to explore and exploit resources in the deep sea. Woods Hole Oceanographic Institution[201] and the Scripps Institution of Oceanography are world leaders in marine exploration.[202] Apart from the interest explained by Lockheed Martin, the US has also supported the dual use of military scientific missions that help in terms of seabed mapping. The US Geological Survey (USGS) has been in charge of conducting assessments in international waters for analyzing the seabed distribution and key areas for exploitation resources and geopolitical strategies. Despite the fact that they haven't ratified the UNCLOS, the US is still an observer at the ISA and has indirect influence through allied partnerships with states that do sponsor ISA contractors. The US's constant refusal to ratify the UNCLOS is related mainly to concepts related to sovereignty limitations and requirements for sharing the revenues of technological transfers to less developed nations.[203]

1.8 Russia

Russia's approach is based on its resource nationalism and has increasingly shown interest in the Arctic for geopolitical reasons. While it is not as active as China with the ISA, they also have exploration licenses, usually through state-supported entities such as the Polar Marine Geosurvey Expedition and Yuzhmorgeologiya. Since 2001, Moscow has been claiming extended continental shelf areas, especially in the Arctic Ocean, by using legal and geopolitical arguments under the UNCLOS Article 76 for expanding their seabed zone. In negotiations with ISA, Russia's posture supports the CHM principles, but regarding the implementation of new regulations related to the control of deep-sea mining, alongside with China and even some Western private entities collaborate to reject them. They would usually reject any type of regulation that would limit the area, production, and time when exploring or exploiting a zone. In terms of technological trade, they are as reluctant as China and the US to aid less developed nations.[204]

[200] Shijun Zhang et al, 'China's Belt and Road Initiative (BRI) under the Vision of "Maritime Community with a Shared Future" and Its Impacts on Global Fisheries Governance' (2023)
[201] 'U.S. Navy Gives Woods Hole Oceanographic Institution Deep Diving Submarine' (1998)
[202] Scripps Institution of Oceanography (2023)
[203] *Deep-Sea Mining and Potential Impacts on Marine Ecosystems: New Study Highlights Geochemical Implications* (2024)
[204]

1.9 Small island developing states (SIDS)

Their participation in this issue shows the asymmetries within the CHM regime; the disparities, instead of getting smaller, are increasing. Due to the challenges that SIDS are facing, going beyond technological dependency and structural issues. Although SIDS are the official sponsors, they usually lack supervision of the companies that they endorse. Due to this situation, while they have formal responsibility under international law, operational and environmental decisions are made mostly by private contractors, not only are they not the ones taking the decisions, but also if there is any type of violation, the ones that are affected by ISA sanctions are not the private entities but the sponsoring states. Many of these sponsorship agreements are signed under conditions of economic urgency, which limits the bargaining power of the SIDS. As a result, these contracts create limitations for the sponsors while giving more power to the contractor and embedding long-term dependency. SIDS not only have the previously mentioned inequalities but also are the most affected by climate change and marine degradation. These economies rely heavily on healthy ecosystems for fishing and attracting tourists, but deep-sea mining brings a lot of damage to these environments. In several cases, local communities have expressed concerns over this kind of action and raised questions about consent and national accountability. Another factor to take into account is that SIDS don't work like one bloc; this has led to different opinions on certain aspects. For example, Nauru and Tonga have embraced deep-sea mining; others, such as Fiji, Palau, and the Federated States of Micronesia, have supported a moratorium due to uneasiness regarding environmental consequences and lack of scientific data. This situation brings up the question about the long-term value and viability of seabed exploration.[205]

1.10 Geopolitical tensions and Strategic implications

As deep-sea mining is progressively transitioning from exploration to exploitation, creating an industrialized sector, its implications are now related to geopolitical matters. The governance of extraterritorial seabed resources has become a strategic battleground for control over rare minerals, specific locations, and economic influence. This section examines the geopolitical tensions between the main parties that are taking control over these resources and sequentially marginalizing CHM principles. The extraction of minerals such as cobalt, nickel, and precious stones has converted the deep-sea mining area into a high-stakes competition. China and the United States, in particular, are competing for long-term access to these areas, viewing them as crucial for their futures in energy transitions, defense sectors, and green industrial areas. As already mentioned, the CHM doctrine emphasized equal distribution, shared access, and peaceful use. Yet, as national security and interests are becoming priorities, these resources are being seen as strategic assets, not as global commons. In such a climate, the CHM framework is seen as an obstacle to rapid national advancement. Requests for environmental protection and shared

[205] Daniel Wilde et al, 'Equitable Sharing of Deep-Sea Mining Benefits: More Questions than Answers' (2023)

distributions are frequently sidelined in favor of industrial policies. This situation has led to regulatory fragmentation where parties have different interpretations of ISA rules, sabotaging consistency and inclusivity. Discussions about reforming ISA are mainly shaped by geopolitical interests. While developing states are asking for transparency, environmental safeguards, and stronger trade mechanisms, powerful states and corporate entities are resisting changes that might constrain their freedom. This risks form a paradox that an international organization like the ISA is more driven to support the stronger states rather than its founding principles. The advanced states often employ strategies for applying their interests with techniques such as voting blocks, opaque negotiations, and pressure to fast-track mining, which are symptoms of a shift from CHM principles. A concern has emerged relating to the ISA's new conduct, which may not only set global precedents for deep-sea mining but also for other common goods like outer space, polar regions, and even cyberspace. The failure to uphold CHM in this context could lead to a regression in international legal order where access is dictated by power and not the principles.[206]

2. Policy Recommendations

As this article has demonstrated, the current political decisions taken by different states and international organizations are undermining the CHM principles. The growing dominance of national interests, technological asymmetries, and geopolitical rivalries threatens to forget about the goals of equitable access and environmental protection. To counter these trends, this section proposes specific policy recommendations to ensure that deep-sea exploitation is distributed equally and allows every state to participate. First of all, strengthen ISA enforcement and application. ISA should shift their operational procedures in multiple ways, such as allowing public access to all their contract details that they have with states and private corporations. Fund an independent entity that is in charge of the oversight of ISA's performance and strategies for preventing any type of misconduct. Grant participation in the decisions to citizens, local communities, and scientists that could measure the consequences of signing certain agreements. With these implementations, ISA would have no other choice than acting on the basis of the CHM principles. Limit proxy sponsorships and eradicate loophole abuse. As I previously explained, many of these contracts are agreed between a stronger state/private corporation and developing nations such as SIDS so that the SIDS ask for licenses, but in reality the ones that are controlling those licenses are the powerful nations, and that due to economic problems, the smaller nations need to accept them. The ISA should implement stricter regulations for allowing these sponsorships to happen and analyze the benefits that both sides would gain. For this to be done with honesty, both parties would have to be transparent and expose all the factors that will be influenced by the agreement. Changing the rules so that if an illegal act occurs, instead of blaming the country that

[206] L Odot, 'Seabed Mining: A New Geopolitical Divide?' (2024)

asked for the license, the blame should fall on the sponsoring state For tackling the issue related to technological transfer, a viable proposal would be to modify the actual structure of only focusing on national interests and try to create some kind of incentive to the state that will give their technological advancements to the developing state so that each country has something in return. Another option could be a centralized platform for sharing mining techniques and equipment so that all the countries can have access to these materials. For sustainability concerns, I would map out the international seabed and identify the hotspots of marine life and environmental development and protect those areas so that any country can have access to them, or at least for mining reasons. I would also add buffer zones in the zones that surround the exploiting places. Lastly, the International Tribunal for the Law of the Sea should also take some actions, like expediting legal pathways for small states and affected communities to be able to file claims. Refine the jurisdiction of UNCLOS part XI related to the Area and ISA regulations. For the states that don't follow or commit any kind of illegal performance, establish severe sanctions.

3. Conclusion

Deep-sea mining is one of the biggest interests involved in international law, national governance, and geopolitical power. As this article has demonstrated, the CHM doctrine is progressively being eroded by national interests, corporate influence, and inequality in technological and political power. While the UNCLOS and ISA were funded for ensuring equitable access and distribution of this good, instead of being a way for cooperating with other countries, it has turned into a competition to see who gets the most territories and who is able to extract more resources from the seabed, causing enormous disasters. Powerful states are reshaping the original structure of these international organizations according to their national objectives. Proxy sponsorships, fragmented enforcement, and lack of technological transfers have exposed limitations in the CHM original model. Meanwhile, smaller and developing countries, such as the Cook Islands and Nauru, remain vulnerable, subjected to sign agreements where the state takes environmental and legal risks without meaningful participation in decision-making. This raises a profound question: Should the concept of sovereignty be reshaped in the aspect of governance of global commons? The understanding of sovereignty has been outdated in situations that go beyond national territories, and a new way of thinking should be established. Instead of only looking for a country's own interests, states should serve collective human interests. The seabed, outer space, and other global goods make us consider models of shared sovereignty, global stewardship, and equitable management. Alternatively, having a zero-sum game of interests of access and extraction, international seabed governance could shift to a model in which states act as custodians of a common future, balancing the states' own goals with ethics and always considering the future. The seabed is not just a place of untapped wealth; it works as a test of whether international law can uphold the interest in

where it was built upon. How we tackle this matter will not only determine the ocean's seabeds but also the future cooperation among states.

Private Enforcement of Competition Law: Legal Principles, Procedural Complexities, and the Tension Between EU Harmonization and National Autonomy

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Abstract

The enforcement of competition law is not solely a matter for public authorities. Private parties, whether individuals or companies, must also be able to respond when anticompetitive conduct causes them harm. In such cases, the ability to claim damages plays a crucial role. It isn't just a formal right on paper; it ensures that consumers and smaller businesses have a real path to obtain redress and to defend their interests within the legal system.

Keywords: private enforcement, antitrust damages, EU procedural autonomy, Directive 2014/104/EU

1. Introduction

The growing relevance of private antitrust enforcement reflects a fundamental principle of competition law: ensuring that those who have suffered harm due to anticompetitive conduct have the right to seek redress through judicial means. The current legal setup allows anyone harmed by antitrust violations to seek compensation directly from those responsible. This wasn't always the case. For a long time, rules in this field were scattered and unpredictable. Gradually, though, especially under the influence of EU law, things have started to take shape. National governments followed up with their own measures, and courts, both national and European, have played a major role in clarifying how the system should work.

What makes private enforcement in competition law stand out today is a mix of tools that go beyond traditional court procedures. For instance, if a competition authority has already ruled on a case, injured parties can build on those findings without having to prove everything again from scratch. These so-called follow-on actions have become central. Also, courts now accept more complex economic evidence, and rules on disclosure let claimants get access to documents they wouldn't otherwise see. One recent change that's making a difference is the growing role of litigation funding: outside investors help pay for legal actions in return for a

share of any eventual award. On top of all this, decisions made in one EU country can be enforced across others, thanks to mutual recognition. That makes the whole system work more smoothly across borders.[207]

Still, even with the EU's push to harmonize the field, the way private enforcement actually works in practice varies a lot from one country to another. That's mostly because each Member State applies these rules through the lens of its own legal culture, shaped by national procedures and institutional setups. This article looks at those differences, focusing in particular on Italy, Spain, and the EU as a whole. The goal is to understand how private enforcement is evolving and what role it plays within the broader framework of competition law.

2. Foundational Principles: Between Public and Private Enforcement

Unfair commercial practices play a predominant role within the public enforcement of consumer rights. However, the repressive action undertaken by administrative authorities alone is insufficient to ensure effective consumer protection. It is now widely acknowledged that an optimal legal system must foresee a duly coordinated coexistence of both public and private enforcement mechanisms.[208] One key point is that private action plays a crucial role in making sure sanctions are both proportionate and capable of deterring future violations. Administrative fines alone often fall short, they usually don't reflect the full harm caused, nor do they make the wrongdoer bear the full consequences of their actions. This phenomenon is known in antitrust doctrine as that of the so-called judgment-proof wrongdoers.[209]

The issue, however, is not solely one of quantification and full compensation of damages: private individuals can resort to remedies that qualitatively differ from the sanctions imposed by regulatory authorities. For instance, the corrective effects on contractual agreements stemming from the contractualization of pre-contractual information can serve as a powerful deterrent in ways that monetary fines, no matter how substantial, cannot.

It is therefore crucial to analyze the legal framework governing the private enforcement of unfair commercial practices. In this regard, it is well established that the European legislator tends to leave this competence to national authorities. Under the traditional approach, the EU is responsible for defining the substantive legal situations that give concrete content to consumer protection, the so-called "rights", while Member States are entrusted with decisions concerning enforcement, which entails not only procedural norms and mechanisms (so-called "procedures") but also specific remedies available in case of violations of substantive rights ("remedie").[210] Therefore, with few exceptions, EU directives delegate to Member States the task of identifying the applicable remedies in cases of consumer rights violations. This state of affairs derives from the principle of procedural autonomy, developed by the Court of Justice of the European Union (CJEU) in the early 1970s, according to which, "in the absence of Community rules [...], it is for the domestic legal system of each Member State to designate the courts having

[207] Studio Legale PedersoliGattai, 'Private Enforcement Antitrust: uno strumento concreto di tutela e risarcimento' (8 March 2025)

[208] F. Weber e M. Faure, "The Interplay Between Public and Private Enforcement in European Private Law: Law and Economics Perspective," *European Review of Contract Law*, 2015, 539.

[209] Ibidem.

[210] S Grundmann, 'The Structure of European Contract Law' (2001) *European Review of Private Law* 505

jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature."[211]

That said, the procedural autonomy of Member States isn't without limits. Since the Rewe decision, the Court of Justice of the European Union has made clear that two principles must always be respected: equivalence, meaning national rules can't be less favorable than those for similar domestic claims, and effectiveness, meaning they must not make it practically impossible to exercise EU rights. More precisely, the Court has held that judicial remedies intended to safeguard rights conferred by EU law "cannot be less favourable than those relating to similar actions of a domestic nature (principle of equivalence)" nor make it "impossible in practice to exercise rights which the national courts have a duty to protect (principle of effectiveness)."[212] This principle, as developed, assigns national courts the delicate task of ensuring, within their jurisdiction, the full effectiveness of EU law.

These principles, initially established by CJEU case law, have now been explicitly incorporated into European consumer legislation.[213] Along with the principles of proportionality and deterrence, they constitute the fundamental tenets that must characterize the remedies and sanctions applicable in cases of consumer rights violations.

One of the first aspects affected by the principle of effectiveness is the choice of the enforcement system itself. Economic analysis of law has extensively demonstrated that no enforcement system is perfect or self-sufficient. Both private and public enforcement mechanisms have limitations and deficiencies that hinder their full effectiveness. Thus, a well-functioning legal system must provide for the coordinated coexistence of both forms of enforcement.[214] A notable example is found in a recent Italian case concerning the "Dieselgate" scandal, which involved the Volkswagen Group's misrepresentation of vehicle emissions during type approval procedures. The administrative fine imposed by the Italian Competition Authority, even though set at the maximum statutory penalty (5,000,000 euros), was manifestly inadequate given the financial scale of the companies involved.[215] Indeed, the Authority itself noted that the fine amounted to "significantly less than 1% of the total revenues of the entities concerned."[216]

Thus, in order for a legal system to offer a truly effective remedial framework, it's not enough to rely solely on public enforcement through administrative sanctions. There also needs to be a functioning system of private enforcement, one that allows all consumers, without distinction, to bring their claims before a court and seek redress for the harm caused by unlawful conduct.

When it comes specifically to damage compensation, the principle of effectiveness carries an important implication: harm resulting from breaches of consumer

[211] Case 33/76, *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1997
[212] See Case 33/76, *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1997, 1998; and Case 45/76, *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2053, para 16
[213] Directive 2014/104/EU on antitrust damages actions, art 4 ('Principles of Effectiveness and Equivalence')

[214] See, generally, A P Komninos, *EC Private Antitrust Enforcement* (n [insert footnote number]) passim; WPJ Wouter, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (n [insert footnote number]) 3
[215] AGCM, Provv n 10211 del 04/12/2016, in *Bollettino* (n 12/2017)
[216] AGMC

protection law must be fully addressed and compensated in its entirety.[217] This entails, first, that every category of affected individuals should be able to access suitable legal remedies. Second, it requires that each person actually harmed is entitled to recover compensation for all the losses they've genuinely suffered: no matter how minor or complex those damages may be. A legal remedy can be called effective only when it holds the wrongdoer liable for the full extent of the harm caused, without exceptions or loopholes.

Yet, in practice, it's not uncommon for a harmed individual to opt out of pursuing legal action, even when their chances of winning are quite high. This behavior, which part of the legal literature refers to as conscious inertia, tends to occur when the financial loss involved is small compared to the cost and effort required to litigate.[218] The problem becomes especially acute in situations involving so-called small claims, where initiating proceedings simply doesn't seem worth it to many potential claimants. For this reason, legal systems must find ways to accommodate these cases, creating mechanisms that ensure all injured parties can realistically enforce their rights and obtain meaningful protection.

Moreover, when it comes to compensation claims, also the burden of proof may undermine the effectiveness of consumer protection, both in terms of quantifying the damage and establishing the causal link between the conduct of the responsible professional and the harm suffered. In fact, legal systems usually include specific procedural rules designed to overcome all obstacles that hinder the effective exercise of the right to compensation. For example, in the European Union, the Directive 2014/104 on actions for damages for infringements of competition law provides, at Article 17(1), that national courts should have the power to "estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available".[219]

Similarly, the principle of effectiveness underlies Article 9(1) of the previously mentioned Directive, which aims to ensure that consumers, at least in follow-on actions, can benefit as much as possible from the decisions of national competition authorities. In this regard, the provision requires Member States to ensure that "an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts[...]."[220]

This brief overview of the core principles that shape both European and national frameworks in the areas of consumer and competition law highlights, overall, a fairly coherent legal landscape. That coherence largely stems from the broader measures adopted at the EU level, along with the interpretative guidance provided by the European Court of Justice. Thanks to the obligation placed on national courts to interpret domestic provisions in line with EU law, a significant degree of uniformity has been achieved across jurisdictions.

That said, national procedural autonomy still plays a notable role for the actual implementation of these

[217] Case C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España SA* [2015] ECR I-456, para 37; see also Directive 2014/104/EU, art 3 (recognizing the right of consumers who are victims of antitrust infringements to "full compensation")

[218] M De Cristofaro, 'Innovazioni e prospettive nella dimensione processuale che sta al cuore del private antitrust enforcement' (2018) 2 *Nuove Leggi Civili Commentate* 523;
M Casoria and R Pardolesi, 'Disciplina della concorrenza, private enforcement e attivismo giudiziale' (2015) I *Foro Italiano* 2752

[219] Directive 2014/104/EU, art 14(1)

[220] Ibidem, Article 9(1).

principles. Although its scope has been somewhat narrowed or qualitatively reframed over time, it continues to influence how Member States put these rules into practice. This can result in minor, but sometimes meaningful, differences from one jurisdiction to another. Within the boundaries set by EU framework legislation, each Member State retains the discretion to choose how best to incorporate these rules into its own legal system.

These variations become especially visible in the area of compensatory mechanisms. Whether we're talking about individual claims or collective redress procedures, such mechanisms operate in parallel to administrative enforcement. And it's here, in the practical enforcement of rights, that national legal systems may diverge the most, reflecting different legal traditions, procedural tools, and policy preferences.

Since, as mentioned, the legal framework for the protection of competition and consumers is largely similar across European countries due to the harmonization process implemented through binding provisions, either in content or result, the Italian system will first be analyzed in greater detail and as an illustrative example. Subsequently, the Spanish system will be examined by contrast, highlighting its formal differences and practical applications.

3. The Legal Framework of Competition Protection in Italy

Today, the protection of competition, in the Italian legal system, revolves around several pillars, each characterized by distinct scopes of application.

Law No. 287/1990, which sets out provisions on the protection of competition and the market, defines three categories of conduct sanctioned by the legal system, over which administrative authorities also have enforcement powers.

First and foremost, restrictive agreements, which include "agreements and/or concerted practices between undertakings, as well as decisions, even if adopted pursuant to statutory or regulatory provisions, of consortia, associations of undertakings, and other similar bodies" (Art. 2(1)).[221] These agreements are not per se unlawful, as undertakings are free to coordinate their market behavior; however, they become illicit when they have "as their object or effect the prevention, restriction, or significant distortion of competition within the national market or a substantial part thereof" (Art. 2(2)).[222] These kinds of agreements are considered null and void in every respect. Although companies aren't required to notify the Italian Competition Authority (AGCM) in advance, the authority still has the right to examine such agreements within a specific timeframe. If it determines that the arrangement violates competition rules, the AGCM has two options: it can grant a temporary authorization, on the condition that the companies involved adopt certain corrective measures and that the agreement provides significant benefits to consumers, or it can deny authorization altogether, effectively blocking the agreement from being carried out.

Additionally, the law prohibits "the abuse by one or more undertakings of a dominant position within the national market or a substantial part thereof" (Art. 3).[223] Simply being dominant (or even monopolistic) isn't illegal in itself, especially in sectors where that may be the natural outcome of market conditions. What's problematic is when this dominance is used in a way that

[221] Law No 287/1990, art 2(1)
[222] Ibidem, Article 2(2).
[223] Ibidem, Article 3.

goes against economic freedom or harms the public interest. That's where enforcement becomes necessary. It's not the dominant position that's the issue, but the way it's used. And unlike restrictive agreements, abusive behavior can't be authorized by the AGCM under any circumstance.

Lastly, the law also closely monitors concentrations, which occur "(a) when two or more undertakings merge; (b) when one or more entities already controlling at least one undertaking, or one or more undertakings, acquire directly or indirectly, whether through the purchase of shares or assets, contractual arrangements, or any other means, control over the entirety or parts of one or more undertakings; (c) when two or more undertakings establish a joint venture that performs on a lasting basis all the functions of an autonomous economic entity" (Art. 5).[224] Concentrations exceeding certain turnover thresholds must be notified in advance to the AGCM for review. The authority may then authorize the transaction, remain silent (thus allowing it to proceed), or prohibit it outright. Generally, the effects of prohibited concentrations, once implemented, are preserved in order to protect third-party reliance. However, the AGCM has the power to order the dissolution of the transaction through equivalent and opposing measures aimed at restoring the market status quo ante.

A major development in the area of private damages claims for antitrust violations came with Legislative Decree No. 3/2017, which brought Directive 2014/104/EU into Italian law. The decree made it clear that any party (whether a natural person, a company, or even an entity that doesn't have legal personality) can seek compensation for harm caused by a violation of Italian or EU competition laws.[225] This includes the possibility of bringing claims through class actions.[226] This principle aligns with the framework established by Italian law and jurisprudence. Indeed, following the landmark Courage ruling of the Court of Justice, the Italian Supreme Court in 2005 recognized a similarly broad standing to sue. [227]

Victims of antitrust violations may seek compensation exclusively for actual loss (damnum emergens) and loss of profit (lucrum cessans), as well as interest payments. The compensatory mechanism, however, precludes overcompensation or multiple damages, in line with the general principle of Italian legal order and jurisprudence, which dictate that compensation should restore the injured party to the position they would have occupied had the damage not occurred.[228]

That said, as mentioned earlier, claimants in antitrust cases, especially those dealing with cartels, often face serious challenges when it comes to proving their case. Cartels, by their very nature, operate in secrecy, which makes it difficult to gather the necessary evidence. To help address this imbalance, the decree allows courts to order the disclosure of specific documents or even broader categories of evidence held by the opposing party or by third parties, so long as the requesting party presents a sufficiently reasoned request and meets certain legal criteria.[229]

[224] Ibidem, Article 5

[225] Italy, Legislative Decree No 3 of 19 January 2017, implementing Directive 2014/104/EU, *Official Gazette* No 15 of 19 January 2017, art 2(1)(c)

[226] Ibid., art. 1(1)

[227] Case C-453/99, *Courage Ltd v Bernard Crehan* [2001] ECLI:EU:C:2001:465 (CJEU Grand Chamber, 20 September 2001); and Corte di Cassazione, n. 2207/2005

[228] Legislative Decree No 3 of 19 January 2017, art 1(2), transposing Directive 2014/104/EU, arts 3(2)–(3)

[229] Legislative Decree No 3 of 19 January 2017, art 3, transposing Directive 2014/104/EU, art 5

Italian law wasn't entirely new to this idea. Article 210 of the Code of Civil Procedure had already allowed judges to require a party (or even a third party) to produce documents or other items considered essential to resolving the case. But in practice, especially in antitrust litigation, courts have been fairly cautious in exercising this power. The real innovation brought in by the 2017 decree lies in its wider scope: rather than being limited to individual documents, it authorizes disclosure of entire categories of evidence. This potentially makes it easier for claimants to obtain the information they need to support their case.

The decree also regulates the so-called *passing-on of overcharges*, whereby the damage, calculated as the difference between the price actually paid and the price that would have been paid in the absence of the competition infringement, is, in whole or in part, transferred by the injured party to its purchasers.[230] In such instances, the burden of proving the existence and extent of such a transfer falls on the claimant; however, a rebuttable presumption applies where the claimant has established specific, substantiated conduct on the part of the defendant, thus easing the position of the former.

Perhaps even more significant is the introduction of a rebuttable presumption (*iuris tantum*) concerning the existence of harm in the case of cartels.[231] While this presumption does not extend to the quantification of damages, it applies solely to restrictive agreements, whose intrinsic secrecy exacerbates information asymmetries and renders it more arduous for claimants to gather the necessary evidence to substantiate their losses.

On a separate plane, the Civil Code's provisions on unfair competition, enshrined in Article 2598 ff., penalize acts of confusion (Art. 2598(1)), such as the unauthorized use of another's distinctive signs or slavish imitation of a competitor's products, where such conduct is likely to create confusion with the products or activities of a rival. It further prohibits acts of disparagement or misappropriation of another's merits (Art. 2598(2)). More broadly, an entrepreneur engages in unfair competition when "*employing any other means contrary to the principles of professional fairness and likely to harm a competitor's business.*"[232] (Art. 2598(3)) Hoewer, the subjective prerequisite for the application of these rules is the qualification as an entrepreneur, under Article 2082 of the Italian Civil Code, hence excluding consumers.

In the realm of private enforcement, a distinctive aspect of unfair competition cases lies in the fact that while the perpetrator is liable for damages only when acting with intent or negligence, once an act of unfair competition is established, negligence is presumed under Article 2600 of the Civil Code. This presumption spares the claimant the often onerous burden of proving the subjective element required for non-contractual liability. Furthermore, where acts of unfair competition prejudice the interests of a professional category, the law expressly grants standing to the associations representing that category, allowing them to bring an action in defense of the businesses they represent when an act of unfair

[230] Legislative Decree No 3 of 19 January 2017, arts 11–12, transposing Directive 2014/104/EU, arts 13–14
[231] Legislative Decree No 3 of 19 January 2017, art 14(2), transposing Directive 2014/104/EU, art 17(2)
[232] Italian Civil Code, art 2598(3)

competition has harmed an entire class of homogeneous entrepreneurs.

A final mention is warranted of the legal framework specifically governing consumer protection in transactions with professionals (B2C), codified in Legislative Decree No. 206 of 2005.[233] Article 20 prohibits unfair commercial practices, i.e. those contrary to professional diligence and false or otherwise capable of significantly distorting the economic behavior of the average consumer with regard to a product. Specifically, misleading commercial practices are those capable of deceiving the average consumer, while aggressive commercial practices seek to unduly influence consumer choices through harassment or coercion, whether physical or moral.[234] The professional, in accordance with both Italian and European legal principles, bears a general duty of information towards the consumer, arising from the advantage inherent in their position in contractual negotiations. The authority tasked with intervening in cases of unfair commercial practices between professionals and consumers is the Italian Competition Authority, which may, either ex officio or upon request by any interested party or organization, order the cessation of such practices, eliminate their effects, and impose the prescribed sanctions.[235] Nonetheless, the jurisdiction of the ordinary courts over acts of unfair competition remains intact pursuant to Article 2598 of the Civil Code. Moreover, consumers harmed by unfair commercial practices may also bring an action before the ordinary courts "to obtain proportionate and effective remedies, including compensation for damages suffered, a price reduction, or contract termination, taking into account the severity and nature of the unfair practice, the damage incurred, and other relevant circumstances".[236]

The Italian regulatory landscape is thus intricate and multifaceted, the result of a legal framework that initially developed autonomously before being progressively harmonized with the foundational principles of the European Union. What emerges, however, is a general legislative favor for those who suffer from unfair or unlawful competition, whether private citizens or consumers, entrepreneurs or businesses. This substantive and procedural bias finds its ultimate justification and synthesis in Article 41 of the Italian Constitution, which, while affirming the freedom of private economic initiative, unequivocally asserts that such freedom must not be "exercised in conflict with the common good or in a manner detrimental to health, the environment, security, liberty, or human dignity".[237]

4. Spanish Legal Framework

Spanish competition law is primarily governed by Law 15/2007 on the Defence of Competition (LDC), which establishes a framework for sanctioning anticompetitive conduct, regulating merger control, and facilitating private enforcement. A discipline which is, overall, very similar to the Italian one, considering the process of European harmonisation.

Article 1 LDC prohibits cartels which may restrict or distort the competition within the market. These agreements are considered invalid unless they meet the conditions for exemption under Article 101(3) TFEU, a provision that Spanish law directly incorporates. The

[233] Legislative Decree No. 206 of 2005, Article 1.
[234] Ibidem, Articles 21, 22, 23, 24, 25, 26.
[235] Ibidem, Article 27
[236] Ibidem, Article 27(15)-(15-bis).
[237] Italian Constitution, Article 41.

Comisión Nacional de los Mercados y la Competencia (CNMC) is in charge of investigating and imposing sanctions on such agreements, which could result in fines reaching up to 10% of the total turnover of the company involved in the infringement.[238] Unlike in some jurisdictions, Spanish law does not require prior notification of agreements for exemption but places the burden on undertakings to self-assess compliance.

Article 2 LDC prohibits the abuse of a dominant position, in line with Article 102 TFEU. Conduct that may constitute an abuse includes unfair pricing, predatory strategies, refusal to supply, and discriminatory practices. Sanctions for abuse mirror those applicable to restrictive agreements. Additionally, Article 3 LDC extends competition law enforcement to certain unfair commercial practices when they significantly distort market competition, a provision that expands the scope of antitrust intervention beyond EU requirements.

The regulation of concentrations is governed by Articles 7-10 LDC. Mergers must be notified to the CNMC if they meet specific thresholds. The CNMC may authorise, conditionally approve, or prohibit a transaction.[239] Where concentrations fail to meet these thresholds but may still pose significant risks, the CNMC may review them ex officio within a year of implementation.

Therefore, generally replicating the Italian (hence, the European) discipline.

Private enforcement has been substantially reformed by Royal Decree-Law 9/2017, which transposed Directive 2014/104/EU into Spanish law. Article 72 LDC establishes the right to full compensation for harm caused by competition law infringements. Joint and several liability applies to infringers (Article 73 LDC), with an exception for leniency applicants, whose liability is limited to harm suffered by their direct and indirect purchasers. A rebuttable presumption of harm applies in cartel cases, simplifying the burden of proof for claimants.[240] The passing-on defence is permitted under Article 78 LDC, requiring defendants to prove that the overcharge was transferred down the supply chain. Conversely, indirect purchasers seeking compensation must establish that they bore the cost of the overcharge, benefiting from a rebuttable presumption in cases where a cartel's existence and its capacity to generate overcharges have been proven.

Procedural rules governing access to evidence are set out in Articles 283-bis et seq. of the Civil Procedure Act, granting courts the power to order disclosure of specific documents or categories of evidence held by the opposing party or third parties. These provisions align with Directive 2014/104/EU but maintain safeguards to prevent fishing expeditions: courts assess proportionality before granting disclosure orders and may impose confidentiality measures where necessary.

Consumer protection, though formally distinct from competition law, intersects with it in certain respects. The General Law for the Defence of Consumers and Users (Royal Legislative Decree 1/2007) prohibits unfair commercial practices, including misleading and aggressive practices, which may also constitute antitrust infringements when they affect market competition. The CNMC has jurisdiction to intervene in such cases where there is a broader economic impact, while individual claims for damages or contract nullity fall within the competence of civil courts.

[238] *Ley 15/2007, de 3 de julio, de Defensa de la Competencia*. BOE n. 159, 4 luglio 2007, article 62
[239] Ibidem, Article 10
[240] Ibidem, Article 76

5. Two Paths to Justice: A Comparative Reflection on Private Enforcement in Italy and Spain

Although Italy and Spain have both followed the lead of EU legislation, especially Directive 2014/104/EU, when it comes to competition law, the way each country puts these rules into practice is shaped by its own legal and procedural traditions. The directive laid down a shared foundation, giving people the right to seek damages for antitrust breaches. But in reality, the tools and procedures used to enforce that right can look quite different.

Italy, for instance, took steps with Legislative Decree No. 3/2017 to make private enforcement more open and approachable. It widened access to standing and made it somewhat easier to bring evidence, especially in cases where the claimant lacks inside information. Courts have done much of the work in figuring out what full compensation really means, treating antitrust claims as part of the broader civil liability system. That said, the Italian competition authority (AGCM) doesn't tend to get too involved in private lawsuits. Its role is mostly confined to public enforcement.

In contrast, Spain's Royal Decree-Law 9/2017 took a more detailed route. It introduced clearer procedures and even presumptions of harm in cartel cases, which helps claimants skip some of the hardest steps in proving their case. The Spanish authority, CNMC, is also more active when it comes to private enforcement. It doesn't just investigate and fine; it also issues guidance and helps coordinate with the courts.

There's another notable difference in how disclosure works. In Spain, the rules are spelled out directly in the Civil Procedure Act, which gives parties a clear legal channel to request evidence. Italy, while it has made improvements too, still bases its disclosure process mostly on general procedural norms. That can make things feel a bit less tailored for antitrust disputes.

Another point of divergence lies in the treatment of passing-on, a doctrine that governs the extent to which overcharges are absorbed or transferred down the commercial chain. While both Italy and Spain recognize the passing-on defense, Spanish law has formalized a rebuttable presumption in favor of indirect purchasers, thereby easing their path to recovery. The Italian system, while aligned with European principles, has historically approached this issue with greater judicial caution, relying on case law to delineate its boundaries.

Ultimately, while both legal systems uphold the fundamental right to full compensation, their trajectories in private enforcement differ. Spain seems to have adopted a more detailed and structured approach when it comes to procedural rules, making it easier for individuals to bring their claims. Italy, on the other hand, while moving in the same direction in line with European goals, still operates within the broader flexibility of its civil liability tradition, which offers a bit more room for adaptation in how enforcement is handled.

6. Bridging the Gap: A Pragmatic Take on Private Competition Law Enforcement

Despite the harmonization brought by Directive 2014/104/EU, putting private enforcement into practice remains far from straightforward. It's not just about having legal tools on paper: claimants still face uphill battles, especially when it comes to gathering sufficient evidence and navigating lengthy court proceedings.

One area where real progress could be made is in collective redress. Class actions often look promising in theory, but in practice, they're underused and, at times, ineffective. Turning them into practical avenues for compensation, ones that both consumers and businesses can actually rely on, should be a priority.

Another point worth stressing is the need for better synergy between competition authorities and civil courts. If administrative decisions on antitrust matters had clearer legal weight in private cases, much of the groundwork would already be laid, saving time and effort. At the same time, evidence disclosure rules still need work. When secret cartels are involved, information tends to be heavily one-sided, and current mechanisms don't always help level things out.

Italy and Spain, although broadly in step with EU norms, could benefit from a more grounded approach, one that goes beyond formal alignment and focuses on how enforcement plays out in real-world scenarios.

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Out Of Time: Why Competition Enforcers And Policymakers Need To Rethink Antitrust Frameworks.

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Abstract

The rapid evolution of the digital economy, particularly within the social media sector, has called traditional antitrust frameworks into question. Central to this transformation is the role of data collection and retention practices as crucial elements in establishing and maintaining market dominance. This paper examines how conventional antitrust approaches are becoming increasingly inadequate in addressing the dynamics of data-driven platforms: through an analysis of the implications of data accumulation on competition, this paper aims to inform the development of more effective antitrust policies in the digital era.

Keywords: antitrust, Big Tech, data.

1. Introduction

The roots of antitrust law rest on the assumption that markets have a tendency towards concentration, that society is better off if firms are brought to compete for market share, and, so long as firms do not ascend to dominance due to anticompetitive practices, antitrust enforcers will not punish success. Over the last two decades, antitrust enforcers have focused more intensely on potentially anti competitive conducts in multiple jurisdictions: however, recent history has shown that some criteria by which enforcers analyse businesses' conducts proved themselves to be outdated. [241]

The group of firms which have raised the most attention by enforcers and policymakers (and the general public) is Facebook (now META), Apple, Amazon, Netflix and Google (through its parent company, Alphabet). Their practices have undergone increasingly close scrutiny, especially their data collection, retention and utilisation practices. Within the jurisdictions of the European Union, United Kingdom, United States of America and various others, the term "Big Tech" is used to address a handful of firms, including but not limited to the previously mentioned firms, operating within the tech sector, providing services like hosting social media.

[241] Lina M Khan, 'Amazon's Antitrust Paradox' (2017) *Yale Law Journal* https://www.yalelawjournal.org/note/amazons-antitrust-paradox accessed 30 May 2025

e-commerce or cloud platforms, as well as both hardware and software products; while there is no exhaustive list of companies falling under the Big Tech umbrella, the term is used in conjunction with Amazon, Meta, Alphabet, Apple and Microsoft, currently the highest in market capitalization and overall influence over the market.[242] A number of countries, jurisdictions, and international institutions, a result of the growing concerns about Big Tech undermining markets and competition, have been reforming and updating their competition policies precisely because they see a major shift in the way that markets and competition are functioning as a result of the emerging impacts of the mass collection and use of digital personal data as the key resource or asset of Big Tech firms.[243]

How is Big Tech's control over data collection, retention and processing impacting competition? How did policymakers react and review their current competition policies in light of these developments?

2. Why competition matters

Concerns about market concentration are not new, but they were largely marginalized for decades. Both market operators and legislators believed that the best course of action was to let the newborn digital market regulate itself, so as to avoid stifling innovation and burdening businesses with strict regulatory compliance requirements. The topic gained new life among scholars and they have identified two primary dimensions of Big Tech's market power: structural and techno-economic.[244]

II.I The structural dimension of Big Tech's power.

Mazzucato et al. [245] argue that major digital platforms function both as core infrastructure and as active market participants. That is, Big Tech provides the essential digital systems—search engines, marketplaces, social networks, and operating systems—upon which economic and social life increasingly depends, while simultaneously shaping these systems as market actors through various means such as platform design.

The structural aspect of market power concerns how industry structure impacts market dynamics and thus competition. Economies of scale are a clear example: larger firms benefit from declining average costs, giving them a persistent edge over new entrants. Big Tech's dominance is reinforced by high capital requirements, the ability to absorb regulatory costs, and the predisposition of users to stick with a firm's services due to switching costs .[246]

The digital economy has turbo-charged the effects of these scale economies, primarily because personal data undermine the epistemic basis of market definitions in competition policy. This is because prevailing assumptions underpinning competition policy rely on price theory to define markets and anticompetitive effects, which cannot adequately address the provision of

[242] K Birch and K Bronson, 'Big Tech' [2022] *SaC* 1, 14
[243] K Birch, D Cochrane and C Ward, 'Data as Asset? The Measurement, Governance, and Valuation of Digital Personal Data' [2021] *BD&S* 1, 1
[244] K Birch and D Adediji, 'Undermining Competition, Undermining Markets? Implications of Big Tech and Digital Personal Data for Competition Policy' [2025] *BD&S* [page number if available]
[245] M Mazzucato, I Strauss, T O'Reilly and J Ryan-Collins, 'Regulating Big Tech: The Role of Enhanced Discourse' [2023] *Ox Rev Econ Policy* 47, 69
[246] R Fay, 'A Model for Global Governance of Platforms' in M Moore and D Tambini (eds), *Regulating Big Tech: Policy Responses to Digital Dominance* (1st edn, Oxford University Press 2021)

notionally 'free' goods (e.g., a search), or the exchange of such goods for personal data.[247]

Big Tech's structural dominance introduces three novel market dynamics: first, these companies serve as the infrastructural backbone of modern digital economies; second, they influence innovation trajectories, both through internal research and development (R&D) and their impact on startups that innovate with acquisition—not competition—as a goal; and third, their dominance shapes investor behavior and expectations. Investors anticipate these firms will remain dominant, boosting their valuations and allowing them to secure financing more easily. This, in turn, exacerbates market concentration by making it harder for smaller firms to compete[248].

II.II The techno-economic dimension of Big Tech's power.

This aspect relates to the configuration of devices and platforms as an extension of technological, political and economic relations to enroll actors into Big Tech's platform, a practice scholars have referred to as "platformization". Digital platforms extend their boundaries through a range of technologies (Application Programming Interfaces, plugins and Software Development Kits), called "boundary assets" or "boundary resources", which allow organizations to slot into platform infrastructure and, crucially, access data collected by the platforms themselves.[249]

Since platforms retain ownership or control of these boundary assets, they are able to control the data assets. Moreover, Big Tech's ecosystems are endowed with a series of complementary resources which further amplify benefits for users as well as other market actors: for example, app developers can access the vast quantity of personal data of users or customers acquired by Big Tech, without the need to allocate significant capital into building the necessary infrastructure from the ground up.

A growing consensus within scholars seems to view the two dimensions as necessarily entangled, where "the structural scale of digital infrastructures provides a competitive advantage to market actors that strategically and reflexively design and build them with the achievement of scale as their goal: that is, strategizing for monopoly."[250]

Building platforms in which users and other market actors are locked in as long as possible, due to the non-transferrable nature of the benefits afforded by said platforms, will result in the creation of "data enclaves". These enclaves will, in turn, enable Big Tech to develop their own proprietary technology at a significant competitive advantage, while leaving smaller competitors and startups without access to critical data assets, resulting in an inability to compete or to break down barriers to entry, leading to an even greater degree of concentration within the industry.

3. Gates, walls and enclaves: the exclusive nature of Big Tech's services.

III.I The playing field

Big Tech's dominance is established and retained thanks to its positioning as intermediaries which enable the construction of multi sided market platforms that sit

[247] Birch, K. & Adediji, '.D, 'Undermining competition, undermining markets? Implication of Big Tech and digital personal data for competition policy' [2025] BD&S

[248] Birch, K. & Cochrane, D.T., 'Big tech: Four emerging forms of digital rentiership. ' [2022] SaC 44, 58

[249] K Birch and K Bronson, 'Big Tech' [2022] *SaC* 1, 14

[250] K Birch and D Adediji, 'Undermining Competition, Undermining Markets? Implications of Big Tech and Digital Personal Data for Competition Policy' [2025] *BD&S* [page number if available]

between two or more users; for example, users can access a product or a service for free, while businesses have to pay to access the consumers.

The concept of these multi-sided platforms challenge traditional assumptions about relevant market assessment, as stated by a 2016 report from OECD: "Identifying the relevant markets inside the Big Data ecosystem can be a particularly daunting task, as a result of the many different players involved that may take multiple roles, as well as the complex relations that link them (p. 15).[251]"

As such, it becomes challenging to assess the impact of business activities on the market, since it is possible that a given activity (e.g. an acquisition) may impact one side of the market, when viewed in isolation.

Another considerable headache for policymakers has been the study of network effects and economies of scale and their implications on user retention. The two are strictly linked, as Big Tech have grown quickly and consolidated their market power and have thus brought the market into a state in which 1) barriers to entry are so significant, thanks to first-mover-advantage (i.e. user base size) that competitors are unable to clear them, 2) there is very meaningful information disparity, i.e. access to data, which leads to 3) disparities in the ability to adjust prices based on a either a lack or outdated information.

Policymakers and scholars alike have identified the peculiar nature of Big Tech's dominant position as that of a "gatekeeper", with the term having varying definitions according to the jurisdiction: the underlying features of a "gatekeeper" is centred around the control of digital infrastructure (social media, internet search, e-commerce, mobile devices and cloud computing) as well as APIs and SDKs which enable different software systems to interoperate with one another.

This control architecture is structured in such a way that it supports distributed usage, therefore giving Big Tech firms access to a large pool of users from which they collect data, but they centralise its storage and processing. This results in data integration into the system, allowing for the owner of the platform to analyse data faster and more efficiently, while making access to said data for business users (businesses whose content of services are hosted by the platform) contingent on the acceptance of whatever terms or conditions the owners (in this case, Big Tech) set.

4. The heart of the issue: personal data and competition.

The analysis will now take a closer look at the challenges that data collection, retention and processing poses for competition policy, which has turned enforcers and policymakers increasingly concerned over the last decade. In 2019, the German Competition Agency brought an abuse of dominance case against Meta concerning its position in collecting personal data beyond the specific terms of service users agree to when they join Facebook. [252]

At its core, the case raised the issue of the competitive advantage Big Tech firms have in collecting data via cookies, i.e. identifiers which third party market actors or

[251] OECD, 'Big Data: Bringing Competition Policy to the Digital Era: Background Note by the Secretariat' No DAF/COMP[2016]14, 15

[252] 'Bundeskartellamt prohibits Facebook from combining user data from different sources' (Bundeskartellamt 2019) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=295782 accessed 30 May 2025

browsers use to re-identify a user when they leave a website and browse across other websites.

Because Big Tech firms have such an extensive network of businesses, organisations and websites using their software or applications, they are able to collect data much better, on a much larger scale and process them much more efficiently, giving them the edge in data-driven business decisions. [253] Currently, Big Tech has reached a sort of "critical mass" of users and has established robust data collection and leverage infrastructure that is impossible for competitors and startups to replicate without prohibitively large investments.

Scholars and policymakers are comfortable in considering data, for all intents and purposes, as an asset: it seems to fit the definition of the International Accounting Standard as "a resource that is controlled by the entity as a result of past events and from which future economic benefits are expected"[254], and various jurisdictions have identified data as a rare input that contributes to market power.

Even though data *prima facie* looks like a "non-rivalrous good" (one that multiple entities can use at once), its true economic value lies in limiting and controlling access to it. Furthermore, while it is true that data can be generated by any firm, not all data is created equal, or has equal economic or technical value: large data holdings are instrumental inferential analysis, i.e. making predictions about user behaviour, target individual consumers or set prices based on specific user features.

In short, large data holdings are the most precious resource Big Tech firms have and the source of their competitive advantage, as they contain data collected from users not only while they actively use the platform's services (I.e. a user navigating on their Facebook page), but also data which is passively collected from online browsing behaviour and even device specification or location data[255]. Furthermore, after collection, Big Tech firms have large discretion in user data utilisation, which results in building detailed segment user profiles which advertisers can rely on for more accurate targeting.

Large data holdings' true value can then be unlocked only via access to the entire holding, as inferential analysis cannot happen using only one or more individual components, which means that Big Tech can prevent any market actor or business user from accessing this wealth of information and therefore relegating them to a niche of the market or even kicking them out altogether.

5. Policy responses: the EU Digital Markets Act.

Policymakers have tried to address the issues previously analysed in different ways.

In 2022, the European Union adopted the Digital Markets Act (herein, DMA), one of the first pieces of legislation to regulate Big Tech firms, through a combination of disclosure and conduct obligations. More specifically, the

[253] D Srinivasan, 'Why Google Dominates Advertising Markets' [2020] *Stan Tech L Rev* 24, 55

[254] Deloitte, 'IAS-38. Intangible Assets' (Iasplus.com 2023) https://www.iasplus.com/en/standards/ias/ias38 accessed 30 May 2025

[255] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (2019)

Act identifies these firms as "gatekeepers" i.e. "large digital platforms providing so-called core platform services, such as online search engines, app stores, messenger services"[256] and introduces a series of positive and negative obligations.

Concerning positive obligations, a non-exhaustive list includes allowing their business users access to the data that they generate in their use of the platform as well as allowing third parties to interoperate with the gatekeeper's own services.

On the other hand, gatekeepers are forbidden from preventing users from linking up to businesses outside the platform and from tracking "end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted".

The DMA addresses several of the issues that were analysed in previous chapters, as they force gatekeepers to share data that has been collected on their platforms with the business users that generated it; moreover, limiting tracking and data collecting capabilities to only include activities carried out within the bounds of "core platform services" will more than meaningfully impact gatekeepers' ability to build comprehensive, detailed profiles for advertisers to use in targeted advertising campaigns, putting a dent in their massive competitive advantage.

The DMA focuses on interoperability as an instrument to protect competition and ensure that users are not locked-in platform services: as can be read in article 7:

"Where a gatekeeper provides number-independent interpersonal communications services that are listed in the designation decision pursuant to Article 3(9), it shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider offering or intending to offer such services in the Union, by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge.[257]"

This line of reasoning finds scholarly and institutional support[258], and tries to use the modular approach in building platforms as a way to protect competition, not to restrict it: as this paper previously argued, modularity in building platforms can enhance competition where gatekeepers are not allowed to arbitrarily restrict access to software links between platforms and outside market actors willing to use platform services.

The Digital Markets Act does however raise some concerns, particularly with its interplay with the General Data Protection Regulation (GDPR), as the two regulatory acts are tasked with protecting two public interests which can clash: privacy and competition.

Although the Act introduces limits on how far from activities on core platform services can tracking and data collecting happen, business users who wish to access the data they generate pursuant to the DMA need to also make

[256] Digital Markets Act 2022, art 3(1)–(3)

[257] Digital Markets Act 2022, art 7(1)

[258] See, inter alia, OECD, *Handbook on Competition Policy in the Digital Age* (2022); Competition and Markets Authority, *Compendium of Approaches to Improving Competition in Digital Markets* (2021)

sure they comply with data retention, processing and transfer provisions dictated by GDPR, and should also keep in mind that cross-border data transfer is subject to the requirements provided under Chapter IV of the GDPR.

Gatekeepers, scholars and courts will have to explore the boundaries of this double layer of compliance, to make sure user data is appropriately protected in the process of making the digital economy more competitive.

6. Conclusions

There is no doubt as to the impact that Big Tech firms had on the global economy, society and political life: some argue, with good reason, that they have been the most significant event to happen during the early twenty first century, while the jury is still out on the developments of artificial intelligence. Their development was so fast-paced, competition policy makers first did not believe they were needed to set the ground rules of a system that was better off regulating itself. They were proven wrong.

Traditional antitrust frameworks—rooted in price theory and market definitions—struggle to account for the dynamics of data-driven digital platforms. The structural and techno-economic dimensions of Big Tech's power, which rest on economies of scale, network effects, and the control of boundary resources, have created highly asymmetrical market conditions. These conditions not only entrench incumbents but also systematically inhibit the entry and growth of competitors by limiting access to essential assets.

Data has emerged as both the principal input and output of platform dominance, transforming it into a strategic asset that reinforces market concentration. The ability to collect, retain, and leverage vast quantities of personal data —especially if done passively and across interconnected services— has given Big Tech firms an unparalleled advantage in shaping consumer behavior, pricing strategies, and innovation trajectories. In doing so, these firms have become gatekeepers of the digital economy, endowed with the power to decide who gets access to data, the oil of the twenty-first century, and who doesn't.

Regulatory efforts such as the European Union's Digital Markets Act represent a meaningful yet initial, attempt to recalibrate the competitive landscape. By imposing interoperability mandates and restricting certain data practices, the DMA tackles key aspects of digital market power; however, the need to uphold data protection, particularly under the GDPR, introduces a complex dual compliance framework that will require further judicial, scholarly, and institutional refinement.

Ultimately, the digital economy has forced a rethinking of competition policy—one that goes beyond conventional market analysis and embraces the centrality of data governance. Only by addressing the structural and infrastructural mechanisms of dominance can policymakers hope to foster a competitive digital environment without stifling innovation.

Patentability of pharmaceutical products: a boost for innovation or a risk for the consumer?

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Abstract

In a world where innovation is in constant growth, the pharmaceutical industry continues to be the leading one. The unceasing need for up-to-date drugs or technologies to cure old and new diseases is the reason why this sector needs an unbelievable amount of resources to invest in R&D (research and development). Even if these investments are made for a public interest, that is to cure diseases and promote collective wellbeing, legal systems need to find a reasonable protection of the investors' economic interests. The answer relies on the institution of the patent, available for drugs and vaccines as well as many other discoveries in the field of medicine (medical treatments, second medical use…). Not only patents have the purpose to protect the investment, but by doing that they also make the company more competitive on the market. In fact, the pharmaceutical company will have exclusive rights of production and distribution on the patented medicine for a limited amount of time, granting a de facto monopoly on the product itself.

This paper will focus on the patentability of pharmaceutical products in the E.U. and U.S. legal systems, highlighting the peculiarities of each jurisdiction concerning the application filing. Moreover, the article will underline the possible risks that patents could create during a health crisis by analysing the impact of patenting of Covid-19 vaccines.

Keywords: patents, pharmaceutical products, pharmaceutical industry, competitivity on the market, Covid-19

1. Introduction

In today's economy, the pharmaceutical market is one of the most dynamic and growing sectors in the world. Thanks to it, many people now have access to medicines for diseases that just a few years ago were considered deadly. Moreover, it's important to remark that the sector is not just about drugs to cure illnesses, but a relevant part of it deals with the prevention of such diseases by developing vaccines and, thanks to it, many bacteria or viruses are now eradicated: polio, smallpox, meningitis, just to mention a few. These great steps forward are possible thanks to investors and, obviously, public authorities.

As much as people like to think, the pharmaceutical industry is hardly concerned about the quality of people's lives. In fact, what really drives this sector is the economic

power that comes from it. Not to mention that in 2023, the pharmaceutical market was expected to exceed 1.5 trillion USD, with an expected CAGR growth of 3-6% in the next five years.[259] [260] This leads to understanding that what really drives the innovation in this sector is the economic exploitation that results from it.

Since medical research requires many resources, mainly money, qualified professionals and time, legal systems need to find a way to "protect" these investments and keep the pharmaceutical industry, as much as many others, active and alive. Otherwise, without granting a protection to whoever decides to risk money and resources to improve and create medicines or vaccines, the innovating process would significantly slow down (or worse, stop), resulting in a harm to the public health needs, as not all treatments have yet been found.

The solution provided by legal systems is given by a bundle of rights, collected in a single peculiar juridical institution: the patent. Generically, a patent gives its holder exclusive patrimonial rights over an industrial find. Patents for pharmaceuticals can cover three aspects: the product, the process and the medical use.

This article will explore more in depth the patentability of pharmaceutical products, providing insights on their impact on the pharmaceutical market, passing through a comparison between the E.U. and the U.S. jurisdictions, and finishing up with an understanding of the possible problems that may arise from this kind of patent. Moreover, a few practical examples are provided to better illustrate the arguments advanced throughout the article.

1.1 Why do patents intersect with competition law?

Patent law and competition law serve two antithetic purposes. The first one seeks to grant inventors the exclusive rights over an industrial find, concerning its production, trade and import, leading to a de facto monopoly over the good.[261]

No jurisdiction fails to mention the intrinsic function of patents: 35 U.S. code §154, Article 64 EPC (European Patent Convention), but also in the U.K. the Patents Act 1977 Section 60, or in China under the Patent Law of the People's Republic of China Article 11. The patent holder is said to have a property right over the patented product, as they can preclude its economic exploitation by third parties. In this sense, the patent holder has an exclusive right over the industrial find, as they can exclude others from the possibility to capitalize on the product. The monopoly allowed by this discipline, however, is not unlimited. Legal systems provide a time limit (usually 20 years from the date of filing the patent application), to find a right balance between the private and the public interest.[262] In fact, after the patent expires, everyone can benefit from the progress achieved, spurring the cultural and technological development of society.

The second one aims at safeguarding the competition regime that governs each market dynamic,[263] trying to protect the functioning of the market theorized by

[259] Compound Annual Growth Rate (CAGR). It indicates the annualized average rate of revenue growth over a given time interval

[260] Rosanna Magnano, 'Nel 2023 mercato farmaceutico globale a quota 1,5 trilioni di dollari' *Il Sole 24 Ore* (31 January 2019) https://www.ilsole24ore.com/art/nel-2023-mercato-farmaceutico-globale-quota-15-trilioni-dollari-AF9RkHDaccessed 26 June 2025

[261] M Maggiolino and L Zoboli, *The Intersection Between Intellectual Property and Antitrust Law* (Oxford Academic 2021) 121–23

[262] GF Campobasso, *Diritto Commerciale 1 – Diritto dell'Impresa* (Utet Giuridica 2022) 198–201

[263] M Maggiolino and L Zoboli, *The Intersection Between Intellectual Property and Antitrust Law* (Oxford Academic 2021) 3

economists, namely that of perfect competition. The latter occurs when many sellers provide identical products to consumers, the market can be easily entered or exited by firms and companies are said to be "price-takers", which means that they accept the market price and, if they raise it, they would lose sales. Moreover, supply and demand are in equilibrium (they balance perfectly) and consumers are fully informed about the market and products.[264] Nevertheless, this is just a theoretical goal. The more practical objective of competition law is to shield consumers, as well as the economy as a whole, from possible misbehavior put in place by companies. Moreover, competition allows companies to be more innovative and efficient, granting a constant development in each industrial sector. Therefore, it's paramount for authorities to control that companies keep a fair demeanor, by supervising their overall performance on the market.

Thus, the problem does not consist in the fact that companies may obtain a controlling position on the market. In fact, complications arise when a company's performance comprises an abuse of its dominant position on the market, and therefore it configures a potential harm to consumers and companies operating on the same (or similar) market.

Naturally, the intersection between the two is quite clear: patents give their holders a legally authorized monopoly over an industrial product, making them acquire a dominant position in the respective market for a limited amount of time, while competition law strives to grant a fair rivalry between companies, aiming at protecting and promoting the consumers' welfare and the open access to markets for new companies.

[264] N Gregory Mankiw and Mark P Taylor, *Principi di Economia* (Zanichelli 2022) 33–34

1.2 Why (or not) choose to patent a pharmaceutical product

As well as all the other industries, the pharmaceutical one allows for the patentability of its industrial finds, namely medicines and vaccines. In fact, this possibility is granted under the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement signed in 1994, which sets minimum standards for the protection of intellectual property rights. Drugs are therefore granted patent protection if the new product meets the criteria fixed in Article 27(1) of the TRIPS Agreement.

Why would drug companies be interested in patents? The answer is quite simple and resides in the fact that the economic return is really high. In fact, patents allow pharmaceutical companies the initial monopoly over the fabrication and distribution of a drug, creating a so-called brand-name drug. A leading example is given by the American drug company Pfizer which, in 1997, patented and released on the market one of its most successful products (if not the most successful of all times): Lipitor, a cholesterol-lowering statin drug. After the end of the patent's lifetime, many generic drugs containing the same active ingredient (atorvastatin) debuted on the market. Despite the large quantity of options given to consumers, many of them would still choose Lipitor. Not to mention that for consumers it is difficult to switch from one medicine to another, considering the fear of buying a lower quality drug. In fact, many people still have the perception that a cheaper product is of an inferior quality.

Even nowadays, despite the higher price, many people all over the world would prefer to buy a brand-name drug instead of its generic version, even if they share the same active ingredient. To take up the previous example, Lipitor still generates billions in sales for Pfizer, despite

its patent protection expired roughly eight years ago.[265] This helps to understand that, not only the patent grants a dominant position to the product on the market, but it helps industrial finds to stand out even after the expiration of its protection.

However, drug companies could also decide to undertake another path and not take advantage of the protection given by patents. This choice is mainly rooted on the fact that, to patent an industrial find, companies need to file an application describing what exactly is going to be the object of the patent, by disclosing the details of the innovation. Therefore, competitors could potentially learn from it and develop an even better product that will compete on the market. Companies can therefore rely on trade secrets, which have the benefit of not having a limited duration but grant a lower degree of protection. In fact, competitors can legally appropriate the product by means of independent discovery and, potentially, patent it.

2. Jurisdictions in analysis

The pharmaceutical market can be geographically broken down to better understand its distribution all over the world. In 2024 the U.S.A. (United States of America) is the leader, holding 67.1% of sales of new medicines launched during the period 2018-2023, followed by Europe with a significantly lower percentage, 15.8%. Nevertheless, the U.S.A. and Europe are the front runners concerning the pharmaceutical Research and Development (R&D) expenditure.[266] In truth, it is no coincidence that the major pharmaceutical companies are located in the U.S. and the European Union (EU). However, it's important to mention that other countries are climbing the rankings, for example China, Japan and India.

For the purposes of this article, the jurisdictions that are going to be analyzed are the U.S. one, at a federal level, and the E.U. one, at a communitarian level. These two legal systems do indeed share many commonalities even though, through a detailed analysis, it's possible to grasp all the differences, hidden in their nuances.

2.1 The U.S. and E.U. patentability approaches concerning pharmaceutical products

The fundamental principles that drive the patentability process are quite the same in both the U.S. and E.U. legal systems. The reason behind this resides in many attempts to harmonize some aspects of patent law throughout the world. Noteworthy is indeed the Patent Cooperation Treaty (PCT, 1970),[267] which allows an inventor to seek patent protection in different countries by filing an international patent application. The benefit is quite clear: procedural costs and time are reduced as the inventor who seeks patent protection for its invention in different countries just needs to start a single application procedure instead of multiple ones. In addition, the E.U. provides a way to obtain patent protection in each Member State by filing an application under Article 2(2) EPC. The peculiarity of this procedure is that, once the application gets approved, it transforms into multiple patents valid in each Member State and governed by its domestic law. This grants the patent holder the possibility to be more competitive in multiple markets throughout the entire

[265] Bob Herman, 'Lipitor Is Still Churning Out Billions of Dollars' *Axios* (30 October 2019) https://www.axios.com/2019/10/30/lipitor-pfizer-drug-patent-sales-2019 accessed 26 June 2025

[266] EFPIA, *The Pharmaceutical Industry in Figures: Key Data 2024*

[267] World Intellectual Property Organization, 'Patent Cooperation Treaty (PCT)' https://www.wipo.int/treaties/en/registration/pct/ accessed 26 June 2025

European continent. Inventors can additionally file national patent applications in those countries which have not signed the Treaty or are not part of the E.U.

Anyone who seeks patent protection for its invention has rights but also obligations, as clearly stated by the U.S. Patent Act, Section 101.[268] Moreover, it's important to remark that IPRs are granted by legal systems to stimulate innovation therefore, as stated in Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 1966, a patent application that aims at restricting existing knowledge of public domain shall be discarded. This is an attempt to reconcile the fact that inventors can indeed seek patent protection to be more competitive on the market, but the public interest takes precedence.

The basic requirements for any product object of a patent are three: the novelty of the invention, its inventive step and industrial applicability (Patent Act, Sections 101-103; ECP Articles 52-54, 56-57). In simple words, the novelty requirement calls for the necessity of the product not to be disclosed to the public before the filing of the patent application. The inventive step (non-obviousness) refers to the need for the invention not to be obvious to whoever operates in that area, based on previous knowledge. To finish, the utility of the find refers to its industrial applicability. The latter, related to pharmaceutical products, means that each drug or vaccine has to concern a specific medical application.

Pharmaceutical companies have the duty to clearly and completely disclose the invention of the office where the application is filed (United States Patent and Trademark Office, European Patent Office), and each application must contain only one invention, otherwise it will be discarded.[269] And on this matter it is relevant to mention that the Supreme Court, in Amgen Inc. v. Sanofi (598 U.S. 594, 2023), ruled that a patent application containing broad claims on a class of antibodies is invalid as in contrast to §112. These requirements are further stated in both jurisdictions in analysis, more precisely under 37 CFR §1.56 in the U.S.,[270] and under Chapter II Rule 42 of the EPC.[271]

However, when it comes to drug patentability, these legal systems show critical differences, starting with what may constitute a patent. Generally speaking, the object of patents is regulated in the US jurisdiction under 35 U.S.C. §101, while, concerning the European profile, articles 52-57 of the European Patent Convention (EPC) apply. By interpreting the US provision, it's clear that the scope is quite wide, and it includes methods of treatment, meaning the application of a new drug to specifically treat an illness, as well as naturally occurring compounds (if isolated or purified, and have new use). The contrary holds true for the communitarian discipline. As a matter of fact, article 53 EPC lists three exceptions to patentability, and the third one specifically refers to the impossibility to patent methods of treatment of the human or animal body by surgery or therapy. Moreover, for what concerns naturally occurring compounds, to qualify as patent eligible they need to be modified in a way that results novel and non-obvious. Therefore, it's possible to say that the EU discipline takes a more

[268] 35 USC § 101 ('Whoever invents or discovers any new and useful process [...] may obtain a patent therefor, subject to the conditions and requirements of this title')

[269] 35 USC § 112 (Specification)

[270] *Duty to disclose information material to patentability*

[271] Content of the description

restrictive point of view especially with reference to the inventive step when it comes to evaluate the requirements of patent eligibility.

Despite not being possible to patent a method of treatment in the EU, a knotty matter is the possibility to file a second medical use patent. In fact, the EPO clarifies that it's admissible to file an application to patent a known substance or composition for any second or further use in a method.[272] Even if it may seem an exception to the requirement of novelty, the latter is satisfied by the fact that what's new is not the substance, but its use and application. The reason behind this exception could probably be the fact that the legal system tries to find new uses for existing drugs that can be medically and commercially valuable, spurring scientific evolution. In the US, this matter was never an uncertainty as the Patent Act intelligibly states that methods of treatment (and therefore second medical use) are patentable.

Another significant difference concerns the extendibility of the patent. Under 35 U.S.C. § 156, patents for drugs can be extended for a maximum of five years, provided that it does not result in a total remaining patent term of more than fourteen years. This latter term refers to the time incurred between the date of the drug's regulatory approval (by the FDA) and the patent's expiration date (including the term extension).[273] The extension can apply only if the patent has not expired and has never been extended, and if the drug underwent a regulatory review period before its commercial marketing or use. To solve the same issue, meaning the long period of time needed to obtain regulatory approval (by the EMA) for the marketing of medicines, the E.U. discipline provides a similar tool: a supplementary protection certificate (SPC).[274] The latter comes into play when the general patent expires. However, it lasts five years (five years and a half for pediatric medicinal products), and the combined market exclusivity cannot exceed the term of fifteen years.

3. A world-wide health crisis: Covid-19

Between the end of 2019 and the beginning of 2020, a new virus strain rapidly spread globally. What at the beginning looked like a simple fever and a bit of sore throat, swiftly brought many countries to their knees. Covid-19 (SARS-CoV-2) escalated in such a short time that governments were not prepared to handle the situation. In fact, the initial consequences were drastic, as nobody really knew what was going on.

A significantly impacted sector during this time was certainly the healthcare one. Starting from clinical analysis laboratories, with molecular or rapid swabs and blood tests to check the presence of antibodies to the virus, to hospitals. More precisely, the latter were found unprepared by the large influx of patients in intensive care. This resulted in a massive difficulty faced by the healthcare system, not only because the premises were not large enough for Covid patients, but because of a general shortage of healthcare professionals and supplies.

The need for a more definite solution began to become pressing, especially because it was found, after much research, that the virus could mutate into many variants.

[272] European Patent Convention (EPC) art 54(5) (as amended 2007)

[273] Hatch-Waxman Act 1984 (Drug Price Competition and Patent Term Restoration Act), Patent Term Extension (1998)

[274] Council Regulation (EEC) No 1768/92, introduced 1992, in force since 1993

3.1 The quick response from pharmaceutical companies

The existence of coronaviruses is not a recent discovery. In fact, it was identified in humans in the early '60s. However, new variants could always appear, as it happened with Covid-19. That's why it should not be a surprise that pharmaceutical companies were able to market a new vaccine, ready to challenge the new rising virus.

Not only did each pharmaceutical company create their own covid vaccine, but they also patented it to make it more competitive on the pharmaceutical market. Nonetheless, problems arose from these medications, which shared very similar principles. Just to mention one, the American company Moderna sued the company Pfizer and its German partner BioNTech by claiming that the defendant, when developing a covid vaccine, "copied" their technology (concerning the messenger mRNA) which had been patented even before the beginning of the pandemic.

However, the global emergency did not influence the pharmaceutical companies' right to patent their innovations. In fact, the bundle of rights that is the patent, granted these companies to market their vaccines at a world-wide competition level.

Many doubts arose from the public opinion but, pushed by the emergency, governments started to encourage people to get vaccinated with many vaccination campaigns. These operations required significant investments in order to achieve global immunization.

3.2 Ethical concerns

The fact that pharmaceutical companies use patents to be more competitive on the market is nothing new. In fact, by patenting their products, drug companies can easily charge a higher price for the medicine than its actual marginal cost of production. The importance of this bundle of rights was emphasized by the EFPIA (European Federation of Pharmaceutical Industries and Associations).[275]

But is it always fair? Are there any situations in which governments should limit patent protection on pharmaceuticals for a greater good?

As analysed on paragraph 1.1, competition law aims at protecting a public interest, that is the position of the consumer. By means of that, legal systems strive to preserve a fair game between companies on the market,[276] so that the consumer can freely decide which good or service best fits its needs. The consumer, in its choice, can be influenced by several factors, such as the cost of the product or service. The fact that patents give their holders a market exclusivity on the patented product, aims to narrow the competition, and therefore the possibilities of choice for the consumer. This is the reason why competition law seeks to suppress and sanction abusive behaviors put in place by companies.[277] However, recognizing an abusive conduct is not always an easy task. A particular practice that legal systems aim to suppress is the abuse of dominant position, sanctioned by both the U.S. and E.U. jurisdictions. In fact, what configures an abuse is specified in Sherman Antitrust Act §2 and Article 102 TFUE.[278] These statutory provisions

[275] European Commission, *Pharmaceutical Sector Inquiry: Final Report* (8 July 2009) [quote] 'Given the clear disparity between the high cost and risk of innovation in the pharmaceutical sector and the low cost and risk of imitation, it is self-evident that exclusivity and thus protection from imitation is needed if there is to be innovation.'

[276] Treaty on the Functioning of the European Union (TFEU) arts 101(1), 102; Sherman Antitrust Act 1890, §§ 1, 2

[277] *Hoffmann-La Roche v Commission* (1979) Case 85/76 [1979] ECR 461 (ECJ)

[278] Examples of abusive behaviors are predatory pricing, leveraging dominance and refusal to deal, put in place by

treat the matter with different terminology, but what they have in common is the fact that they both sanction predatory pricing and refusal to deal. These aspects are of interest for the purposes of this article as it may seem that pharmaceutical companies adopted illicit behaviors during the vaccination campaign against Covid-19.[279]

The main concern that emerged at the beginning of the Covid-19 vaccination campaigns was to understand who had primary access to these vaccines. This was not only a matter of age or occupation (the hospital personnel were one of the first categories to be subjected to the vaccine), but also a matter of equal opportunities between States. As a matter of fact, many developed countries have made agreements with pharmaceutical companies to get even more doses than the actual population that would be vaccinated.[280] Moreover, as pharmaceutical companies had a sort of de facto monopoly over their patented vaccines, they were free to decide with which countries to make a deal for the distribution of these products. This led to a sort of shortage of vaccines, as many countries (especially developing countries) started to be left out, or have had to implement certain types of policies that exclude entire categories of citizens.

To make a few examples, no citizens have received the Covid vaccine in 67 States in the world. Among these States it's possible to find Papua Nuova Guinea and Haiti. In many more States, for example Kenya and South Korea, older people were the last to receive the vaccine. due to low dose availability. Or again, in India, only wealthy people could access the website to register in order to get vaccinated. Again, the supplies received by developing countries were financed by developed countries: this aspect should alarm not only the citizens, but also governments, as a clear disparity among States is once again affirmed. The matter has been repeatedly brought up by Amnesty International, not only respectively to the pandemic.[281]

The question therefore arises spontaneously, how to balance the rights of pharmaceutical companies (obtained thanks to patents) with the need to protect the public interest (global immunization) during health emergencies?

At a later stage, when pharmaceutical companies already patented their vaccines, the U.S. administration showed a willingness to liberalize intellectual property concerning these vaccines, as the latter, in a state of emergency, had become a sort of "common good".[282] The suspension of patents[283] would have been indeed a step forward to global immunization, as it would have

companies in order to gain an unfair advantage by restricting competition on the market, often resulting in damage to the consumer.

[279] E R Gold, 'What the COVID-19 Pandemic Revealed About Intellectual Property' (2022) *Nature Biotechnology*https://www.nature.com/articles/s41587-022-01485-x accessed 26 June 2025

[280] A McCann and L Gamio, 'Vaccini anti-Covid, nel mondo c'è chi può e chi no' *La Repubblica* (23 March 2021) https://www.repubblica.it/esteri/2021/03/23/news/vaccinazioni_nel_mondo_chi_puo_e_chi_non_puo_-293389083/accessed 26 June 2025

[281] Amnesty International, 'Covid-19, mancato uguale accesso ai vaccini' (31 December 2021) https://www.amnesty.it/covid-19-mancato-uguale-accesso-ai-vaccini-un-fallimento-catastrofico-degli-stati-ricchi-e-delle-aziende-farmaceutiche/accessed 26 June 2025

[282] M Nioli and PE Napoli, 'The Waiver of Patent Protections for COVID-19 Vaccines During the Ongoing Pandemic and the Conspiracy Theories: Lights and Shadows of an Issue on the Ground' (2021) *National Library of Medicine*https://pmc.ncbi.nlm.nih.gov/articles/PMC8599977/ accessed 26 June 2025

[283] Marrakesh Agreement Establishing the World Trade Organization (1995)

reduced the cost of production in lower-income counties, but it certainly limited the business model of pharmaceutical companies.[284]

Another solution had been put forward by the UN, namely the COVAX. The program has seen many subjects put into their effort to make global access to vaccines equitable. Among these it's relevant to mention the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the United Nations International Children's Emergency Fund (UNICEF).[285] WHO played a central role in providing guidance on vaccine policy, regulation, research and development, as well as country readiness and delivery.

These circumstances should have made a bell ring in people's minds, as the same problems were faced world-wide in the late '80s, and still persist today[286], when the Human Immunodeficiency Virus (HIV) started to be cured with medications patented by pharmaceutical companies. As always, history repeats itself, and the only thing that humanity can do is to learn from it. Nonetheless, it appears that, for now, not much has been assimilated and learned.

4. Conclusion

To conclude, this paper highlighted the key aspects of the patents' discipline applied to pharmaceutical products and its intersection with competition law, more precisely by focusing on the (economic and legislative) reasons behind the choice to patent a drug. Moreover, the comparison between the European and the American jurisdictions allowed a deeper understanding of the ratio legis behind the protection granted to patent holders by these legislations. Patents which protect products developed for medical purposes became a matter at the center of a heated debate during the health crisis of Covid-19, followed by multiple interventions by the government Authorities from around the world. This article aimed at providing a variegated understanding of the limits that patents encountered, during the pandemic, within the area of competition law, especially in the light of one of the latter's primary objectives, namely the protection of the consumer.

A further reasoning on this topic could be the long-term economic and societal advantages, for consumers, of patented brand-name drugs and all the investments made for their development.[287] However, this subject slightly deviates from the scope of competition law and flows into a more economic reasoning.

So the question still remains, do patents in the pharmaceutical industry play an innovating role, or do they represent a risk for the weakest consumer.

[284] Ashley DaBiere, 'Covid Vaccines and Intellectual Property Rights: Evaluating the Potential for National Legislation Implementing Global Patent Waivers' (Duke University School of Law) 75–76

[285] World Health Organization, 'COVAX: Working for Global Equitable Access to COVID-19 Vaccines' https://www.who.int/initiatives/act-accelerator/covax accessed 26 June 2025

[286] Frontline AIDS, 'How Patents Affect Access to HIV Treatment' (2 October 2019) https://frontlineaids.org/how-patents-affect-access-to-hiv-treatment/ accessed 26 June 2025

[287] N Economides and WN Hebert, 'Patents and Antitrust: Application to Adjacent Markets' (2008) 6 *Journal on Telecommunication & High Technology Law* 457, 457: 'At least in theory, the grant of a patent trades a reduction in allocative and possibly productive static efficiency for an increase in innovative activity. Under the assumption that innovative activity is underprovided without patents, some increase in innovative activity will increase dynamic efficiency.'

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Japan's Anti-Monopoly Act and South Korea's Monopoly Regulation and Fair Trade Act Effectiveness in Reinforcing Fair Trade within Digital Markets

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Abstract

As digital markets become more predominant in the world economy, policymakers have become increasingly interested in being able to target and tackle challenges that become obstacles to the promotion of free and fair trade. While the European Union and the US have already adopted new regulations, Asian countries, such as Japan and South Korea are just beginning to. Therefore, their existing competitive laws have the role to identify, prevent anti competitive behavior and reinforce fairness in trade in the area of digital economy. This paper aims to examine to what extent current laws in Japan and South Korea differ in effectively reinforcing fair trade in the context of digital markets by establishing the scope of their specific regulations, the Anti-Monopoly Act and the Monopoly Regulation and Fair Trade Act, and by analyzing how they are enforced when fair competition is challenged: either limited and voluntary or austere and strict.

Keywords: fair trade, digital markets, competition law, Japan, South Korea, algorithms, search engines

1. Introduction

With the rise of digital markets and their implications in fair trade, it increasingly becomes pivotal for existing regulations to adapt and expand their purposes to tackle unfair practices in digital platforms, search engines and e-commerce. In the West, new regulations have been introduced, such as the Digital Markets Act of 2022 by the European Union with the objective of "ensuring fair competition and protecting the consumer in the digital economy" [288] as an addition to their existing competition laws and as a response towards the growing dominance

[288] European Union, 'The Digital Markets Act: Fair and Competitive Digital Markets | Data.europa.eu' (Europa.eu, 25 March 2024) https://data.europa.eu/en/news-events/news/digital-markets-act-fair-and-competitive-digital-markets accessed 26 June 2025

of US tech companies.[289] However, in the Eastern part of the world, new regulations have not yet come into force, such as in Japan. Some are in the process of expanding their already existing regulations, such as South Korea. For the purposes of the paper, the focus will be on Japan and South Korea due to their undeniable presence and influence in the global economy.

On the one hand, Japan's newly proposed Act on Promotion of Competition for Specified Smartphone Software is yet to enter into force as an initiative to tackle the digital sphere in similar ways to Europe.[290] Enacted in June 2024, this Act aims to oversee tech firms, especially Google and Apple to impose restrictions on limited practices in search engines and app stores once it enters in force by the end of 2025. Meanwhile, South Korea's one-sided proposals for separate regulations have been withdrawn due to a negative public reaction and the lack of coordination between agencies, thus the initiatives for amendmending their central legislation for competition law instead.[291] As a matter of fact, this decision has been praised by some authors, such as Professor Sangyun Lee from Kyoto University, arguing that this demonstrates that following the EU's steps is not always appropriate for their country but rather should assess and balance if their markets actually need to be more regulated.

Nonetheless, both countries share a similar position where their core legal framework for the regulation of digital market is their anti-monopoly acts : Japan's Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (独占禁止法) and South Korea's Monopoly Regulation and Fair Trade Act (독점규제 및 공정거래에 관한 법률). As of today, since there is a lack of specific acts for the digital economy, both legislations play an essential role in the implementation and supervision of antitrust policies to ensure competition's adherence to fairness and transparency. Throughout this paper, their antitrust acts will be examined to compare and assess to what extent are their legal frameworks effectively reinforcing fair trade within digital markets to later propose suggestions to their policies in order to further strengthen their application.

2. Scope of Legal Framework

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of 1947 (hereinafter "Anti-Monopoly Act") serves as the main legal framework for competition law in Japan with its purpose primarily being to promote and ensure fair and free competition through the outline of three prohibited acts: private monopolization, unreasonable trade restraints, and unfair trade practices.[292] Specifically, it is of paramount importance to clearly state how unfair trade practice is defined as it may vary from Article 2, paragraph (9) recognizes several actions as unfair trade including: the

[289] Meredith Broadbent, 'Implications of the Digital Markets Act for Transatlantic Cooperation' (*Center for Strategic and International Studies*15 September 2021) <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>

[290] Simon Vande Walle, 'Is the EU's Digital Markets Act Going Global? How Japan Is Crafting Its Own Version of Digital Regulation with the Smartphone Act – EU RENEW' (*EU RENEW*, 20 March 2025) https://eu-renew.eu/is-the-eus-digital-markets-act-going-global-how-japan-is-crafting-its-own-version-of-digital-regulation-with-the-smartphone-act/ accessed 18 March 2025

[291] Jung Min-hee, 'FTC Abandons Pre-Designation System, Amending Fair Trade Act to Regulate Platform Monopolies' (*Business Korea*, 9 September 2024) https://www.businesskorea.co.kr/news/articleView.html?idxno=224798&utm_source=chatgpt.com accessed 18 March 2025

[292] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, art 1.

refusal to trade, discriminatory treatment, consumer deception, and overuse of superior bargaining position,[293] falling under the application on vertical agreements, those between two or more parties from different stages of the supply chain, through its prohibition. On the contrary, horizontal agreements, meaning between competitors, are under the prohibition of unreasonable restraints of trade such as price-fixing, market allocation and bid-rigging.[294]

Moreover, despite the lack of a specific legislation targeting digital markets, the Anti-Monopoly Act remains the main legal framework overseeing competition in Japan's digital economy, and as such, it is the central focus of this analysis. Particularly in the field of digital markets, the aforementioned law doesn't have a separate section, but it does say, for example, entrepreneurs are forbidden of private monopolization that otherwise can lead to anti-competitive behavior and the prohibition of enterprises to practice unfair trade, which both can be applied in the context of digital markets.[295]

In the case of South Korea, conduct relating to competition law, such as illegal cartels conduct, abuse of market-dominance conducts, or unfair trade practices are laid down and regulated in the Monopoly Regulation and Fair Trade Act (hereinafter 'MRFTA'). In force since 1981, the MRFTA essentially aims to preempt abuse of market dominance and excessive concentration of power to promote fair and free competition.[296] Like Japan, South Korea's legal system does not have a separate legislation that regulates competition in digital markets. In fact, there have been several times when an act is proposed and drafted but is later abandoned. This was the case of the Platform Competition Promotion Act,[297]which was announced in December 2023 to be later postponed in February 2024 due to "insufficient dialogue with the industry"[298] and officially withdrawn in September. Alternatively, they have decided to amend the existing competition law legal framework. However, Professor Lee states that this does not showcase the legislature's failure to uphold their promises but it rather represents a wise choice not to rush to implement an over-influenced and with no grounds policy.[299]

Different from Japan, the application of the MRFTA is not clearly divided between vertical and horizontal anti-competitive agreements, making it more general.[300] Historically, ever since its creation, the main focus for the MRFTA was to tackle horizontal agreements between conglomerates, known as chaebols and therefore focused more on regulating arrangements between them. Yet, the existing MRFTA does include certain provisions that are applied in the context of digital markets, especially the abuse of market-dominant positions as unfair trade practices. Moreover, Article 45 defines any act that may impede fair trade, including unfairly rejecting, discriminating against another party, or excluding a

[293] Herbert Smith Freehills. *Asia-Pacific Competition Law Guide 2025*. (Published PDF, Herbert Smith Freehills 2025) 55
[294] Ibid
[295] Anti-Monopoly Act art 3 and 19.
[296] Monopoly Regulation and Fair Trade Act , art 1.
[297] Sangyun Lee, 'Lessons from Korea's Roller-Coaster Ride toward Platform (Non)Regulation' (*Truth on the Market* 25 September 2024) <https://truthonthemarket.com/2024/09/25/lessons-from-koreas-roller-coaster-ride-toward-platform-nonregulation/> accessed 18 March 2025.
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[299] Sangyun Lee, 'Main Developments in Competition Law and Policy 2024 - Korea' [2025] Kluwer Competition Law Blog.
[300] Herbert Smith Freehills (n 6) 88

competitor, fall under this category and thus are subject to sanction.[301]

3. Limited Enforcement Mechanisms

In the field of digital economy, Japan has become keener in assessing competition law since 2018 with their publication of principles regarding digital platforms firms and later established the Headquarters for Digital Market Competition (HDMC) as an external organization that influences competition law legislations.[302] Nevertheless, the main body responsible for the enforcement of the Anti-Monopoly Act is the Japan Fair Trade Commission (hereinafter 'JFTC'), established in 1947.[303] As of 2024, the JFTC has actively enforced the Anti-Monopoly Act, for instance against cartels of Chubu Electric Power, an electric power distributor company, and their acceptance of Google's voluntary 'commitment plan' to further avoid private monopolization.[304]

Beyond its role of enforcing, the JFTC is involved in investigating, imposing administrative penalties, such as orders of cease-and-desist, monitoring and requiring the submission of reports or information when deemed necessary if and when there are reasonable grounds of any violation of the Act.[305] This highlights the limited position of the JFTC due to its lack of enforcing methods, which according to Law Professor Vande Walle of Tokyo University, it becomes a target of criticism for its 'soft law' approach and their lack of court precedents to support its interpretation.[306] For example, the Kakaku.com case of manipulation of algorithms showcases their limited ability to reinforce fair trade and anti-monopolistic behavior through its agency as the case was not brought by the JFTC but by a private party claiming for compensation of damages. In 2022, the Tokyo District Court of Appeal ruled it as an abuse of superior bargaining position, making it the first judicial decision to set a precedent on algorithms' ability to violate the Act although not explicitly written. As a result, the Court of Appeal took a cautious sanction and ordered the website company to pay around 38.4 million Japanese Yen[307] to the plaintiffs with no other methods to avoid future breaches. Even so, in 2024, the decision was overturned by the Tokyo High Court, which ruled that it did not constitute a violation leading to the plaintiffs' appeal to the Supreme Court.[308] This ongoing appeal may complicate future cases, as there is no clear judicial stance on emerging technologies, underlying the courts' inability to reach a similar verdict due to the absence of specific regulations in the digital area. In fact, the Anti-Monopoly

[301] Monopoly Regulation and Fair Trade Act, art 45
[302] Masafumi Shikakura, 'New Japanese Law Promotes Competition in the Smartphone App Market | Clifford Chance' (*Clifford Chance*22 July 2024) <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2024/07/japan-opens-up-competition-on-mobile-platforms.html?utm_source=chatgpt.com> accessed 18 March 2025.
[303] Anti-Monopoly Act art 27.
[304] Sei Shishido, 'Main Developments in Competition Law and Policy 2024 – Japan - Kluwer Competition Law Blog' [2025] Kluwer Competition Law Blog <https://competitionlawblog.kluwercompetitionlaw.com/2025/03/03/main-developments-in-competition-law-and-policy-2024-japan/>.
[305] Anti-Monopoly Act art 49.
[306] Simon Vande Walle, 'Merger Control in Japan: "in Informal Remedies We Trust"' (2023) 18 SSRN Electronic Journal 172.
[307] Machiko Ishii, 'Algorithms Breach the Anti-Monopoly Act – Court Decision in Japan' (*Clifford Chance*2022) <https://www.cliffordchance.com/insights/resources/blogs/antitrust-fdi-insights/2022/12/algorithms-breach-the-anti-monopoly-act-court-decision-in-japan.html> accessed 26 February 2025.
[308] Toko Sekiguchi, 'Japan Restaurant Review Website Wins Algorithm Antitrust Case, Appellate Court Rules | MLex | Specialist News and Analysis on Legal Risk and Regulation' (*Mlex.com*2024) <https://www.mlex.com/mlex/articles/2041795/japan-restaurant-review-website-wins-algorithm-antitrust-case-appellate-court-rules> accessed 20 March 2025.

Act has not undergone major amendments since its implementation in 1947, reducing its ability to tackle the rising challenges of the digital economy and has rather shifted its administrative actions to relying on firms' voluntary commitment.[309] Nonetheless, despite the fact that it may had not have short-term impact, it has set the basis for further cases for tech companies as it could lead to setting stricter limitations, particularly for algorithms,[310] yet the future is blurry.

4. Overregulated Enforcement Mechanism

As for South Korea, the Economic Planning Board created the Korea Fair Trade Commission (hereinafter 'KFTC') and appointed it as the central administrative body functioning as a "quasi-judicial body"[311] with the authority to conduct investigations, administer competition policies, impose penalties to enforce not only MRFTA but other laws concerning competition and consumer protections,[312] allowing for more freedom to promote free and fair competition and preventing anti-monopolistic behavior. Contrary to JFTC, the KFTC has been more proactive in interfering more and more in different enforcement cases, complying with their 2024 initiatives including "establishing fair trade order to promote a dynamic economy".[313] As pointed out by Professor Hong from Sogang University Law School, the KFTC has been active in trying to follow the EU's steps to regulate online platforms and mobile-game developers by intervening and conducting investigations more often[314]. This can be notably seen in the Naver case of 2020. Through its investigations, the KFTC found the company had been altering search algorithms to prefer their own products and was ruled as an abuse of market-dominant position and unfair trade practice,[315] both forbidden under Article 5 and 45, respectively. Consequently, a corrective order and a penalty were ordered to which Naver later appealed to the Seoul High Court, who rejected it and agreed with KFTC's decision by stating that Naver had "leveraged its dominant position in the comparison shopping service market to create anti-competitive effects in the open market,"[316] leading to a final pending appeal to the Supreme Court.[317] Furthermore, the MRFTA provides a clear procedure for an investigation with the steps laid down and within the

[309] Teruhisa Ishii, Yoshihiro Sakano and Hiroaki Matsunaga, 'Japan: Concerns Raised over the JFTC's Shift from Enforcement to Advocacy' (*Globalcompetitionreview.com*19 September 2024) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2024/article/japan-concerns-raised-over-the-jftcs-shift-enforcement-advocacy> accessed 22 March 2025.

[310] Ben Wodecki, 'Japan Court Ruling on Algorithms Poses Risks for Big Tech | AI Business' (*AI Business*2022) <https://aibusiness.com/verticals/japan-court-ruling-on-algorithms-poses-risks-for-big-tech> accessed 20 March 2025.

[311] Korea Fair Trade Commission, 'Welcome to Fair Trade Commission' (*Korea Fair Trade Commission*) <https://www.ftc.go.kr/eng/index.do>.

[312] Herbert Smith Freehills (n 6) 87

[313] Kim & Chang, 'KFTC Announces Key Initiatives for 2024 - Kim & Chang' (*Kim & Chang*2024) <https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=28932> accessed 22 March 2025; Herbert Smith Freehills (n 6) 90.

[314] Dae Sik Hong, 'The View from Korea: A TOTM Q&a with Dae Sik Hong' (Truth on the Market11 December 2024) <https://truthonthemarket.com/2024/12/11/the-view-from-korea-a-totm-qa-with-dae-sik-hong/> accessed 20 April 2025.

[315] 'KFTC Decision on Naver - Kim & Chang' (*Kim & Chang*2019) <https://www.kimchang.com/en/insights/detail.kc?idx=22288&sch_section=4> accessed 26 February 2025.

[316] Sang Oh Jeon and others, 'Antitrust Litigation 2024 - South Korea | Global Practice Guides | Chambers and Partners' (*Chambers and Partners*19 September 2024) <https://practiceguides.chambers.com/practice-guides/antitrust-litigation-2024/south-korea/trends-and-developments>.

[317] Seoul High Court Decision No. 2021Nu36129.

KFTC's powers, allowing clarity and transparency. Nevertheless, compared to Japan, instead of lacking regulations, the already existing ones are being excessively used, mostly cases under the name of abuse of market-dominant position.[318] Throughout the years, it has become evident that their intervention in any competition case is undeniable that instead of being under-enforcing, it is over enforcing: from aggressive investigations to its excessive administrative fines, for instance, the 25.7 billion won on Kakao Mobility, and still have plans to intensify their regulations scrutiny that may guarantee fairness but drive away certain businesses. While their intentions of applying strict fines to avoid further unfair trade practices can be deemed necessary, it has also jeopardized their reputation as many fines have been ruled as void by the courts. To illustrate, in early 2024, some overwhelming fines imposed by the KFTC were ruled as void by the Seoul High Court as they reasoned that KFTC's actions were unfair, namely the 64.7 billion won imposed on SPC Group. As a result, they were ordered to return it, turning into criticism towards the agency for imposing reckless and unnecessary fines.[319] The ruling was appealed to the Supreme Court, who agreed to annul the fines yet sustained the corrective order for SPC Group's excessive reduction of prices to benefit one of the affiliated groups, showcasing that even though KFTC's claims were partially correct, the penalties imposed were extreme.[320]

5. Scope of Application: Pragmatic v. Punitive

If the sanctions imposed were to be considered when assessing their effectiveness there are two perspectives: a limited and voluntary or strict and hefty. On the one hand, the JFTC may impose administrative sanctions: fines, cease-and-desist orders or ask the District Court in Tokyo for an interim injunction and therefore, criminal offences and sanctions are not considered when breaching the prohibition of unfair trade practices. Even if there is any infringement to the Anti-Monopoly Act, it does not automatically mean an agreement will be nullified only on the basis of the breach of said act as stated in the Supreme Court ruling on case 1994 (O) 2415.[321] Furthermore, as mentioned above, there are several times when the JFTC addresses the reinforcement of fair trade practices by accepting the voluntary commitments and measures business, who are under investigation, promise to implement. It is a fact that their approach is known to be done through promises and voluntary measures with continuous monitoring (around three years), which have resulted in both successes and setbacks. On the one hand, the 2020 Amazon investigation by the JFTC of alleged abuse of superior bargaining position was resolved through Amazon's commitments to cease their abuse, which they did and even repaid to their vendors and suppliers. On the other

[318] Youngsoog Na, 'Is the Korea Fair Trade Commission Abusing the Provision for Abuse of Superior Trading Position?: A Critical Analysis of the Act on Fair Intermediary Trade of Online Platforms' (2024) 15 Asian Journal of Law and Economics <https://www.researchgate.net/publication/383339343_Is_the_Korea_Fair_Trade_Commission_Abusing_the_Provision_for_Abuse_of_Superior_Trading_Position_A_Critical_Analysis_of_the_Act_on_Fair_Intermediary_Trade_of_Online_Platforms>

[319] Park Jae-hyuk, 'Antitrust Regulator's Losing Streak Continues amid Unfavorable Legal Decisions' (*The Korea Times* 4 February 2024) <https://www.koreatimes.co.kr/www/tech/2024/02/129_368203.html>

[320] Kim Hae-yeon, 'SPC Group Cleared of W64.7b Antitrust Fine - the Korea Herald' (*The Korea Herald* 19 June 2024) <https://www.koreaherald.com/article/3419280>

[321] Case to seek declaratory judgment of status (1994) 2415 (Japan Supreme Court)

hand, the case of Apple's investigation that was closed with their initiative and commitment, they were unable to fulfill it and found a way to circumvent it, leading to doubts of the effectiveness of their 'soft' approach.[322]

JFTC's sanctions fall short compared to all the penalties the KFTC may impose. Apart from having the authority to investigate, they are also given the power to impose sanctions depending on the gravity of the action, each one is expressly laid down under Chapter XV of Penalty Provisions of the MRFTA. For example, a 200 million won fine is permitted if they allegedly violate Article 45 (1) of unfair trade practices. Besides the administrative fines, it also has another layer of sanctions: criminal charges filed by the KFTC to the prosecution. Even though it is not common in other countries, some Korean cases have often been submitted to the prosecutor's office, granting them to intervene and investigate and thus relying on criminal reinforcement of the MRFTA. As explained in the previous section, the KFTC's main criticism revolves around their excessive fines imposed on business when they are still under investigation or are only allegedly violating the MRFTA, leading to numerous appeal court hearings that have often resulted against them, hence undermining their credibility. Still, their strong approach of enforcement is yet to be determined whether it is the correct method but, in the meantime, it has cost KFTC's reliability.

In other words, while the JFTC takes on a case-by-case basis where sanctions are not imposed unless there is beyond reasonable doubt but limited to the broad provisions of the Anti-Monopoly Act, the KFTC aims for a more proactive intervention in fair trade cases by molding them into the existing provisions under the MRFTA and applying heavy sanctions.

6. Policy Recommendations

Both jurisdictions share a similar position as to their legal uncertainties and therefore would benefit if their ambiguities were reduced. While the JFTC's approach is seen as pragmatic and can avoid unnecessary confrontation, relying on voluntary commitments without actual sanctions of breaching said agreement can turn to be more impractical. However, implementing strict penalties, as their counterpart, could also result in ineffectiveness and therefore, it would be beneficial to have legal clarity as to their enforcement methods when the existing ones are inefficient. Their proposed Smartphone Software Competition Promotion Act is a step to safeguard fairness in the digital economy, yet it is important to revise their central legal framework as to their stance on the new challenges faced, possibly by providing a more structured process as to how to tackle them and strengthen the requirements. As for South Korea, the overregulation and aggressiveness of business may cause more negative than positive consequences, leading to uncertainty of the admissible business strategies firms implement. Even though the MRFTA provides a step by step process, it would be necessary to outline to what extent an alleged violation is equal to an actual violation by specifying the criteria that is considered. Therefore, the most appropriate recommendation is to have a more balanced approach to the different cases and have a specific process depending on the gravity to the impediment of fair trade and impose heavy sanctions when they are deemed necessary.

[322] Simon Walle, 'What Has the JFTC Accomplished in Digital Cases Using the Antimonopoly Act?' (The University of Tokyo 2023) https://simonvandewalle.eu/JFTC_enforcement_digital.pdf accessed 26 June 2025

7. Conclusions

As notably expressed by Markus Muller, the biggest challenge for antitrust policy makers are the boundaries to be drawn for these digital markets as they are quite different and difficult to tackle compared to traditional markets as it transcends boundaries. Both Japan and South Korea have become keener in adapting their policies.[323] Fair trade in the digital economy, it has become harder to implement the traditional methods of application due to the complexities of all the developing technologies. Both the Anti-Monopoly Act and the MRFTA have found a way to adapt their existing provisions to the uprising digital economy yet not sufficient to continue reinforcing fair trade. Throughout 2023 and 2024, JFTC was able to complete 131 out of 152 cases of alleged violations of the Anti-Monopoly Act, in which five legal measures against unfair trades practices were taken,[324] although not exclusively in the digital market. Despite the success with their existing legislation, their adaptability is taken longer than the rapid development of technologies, leading to a lack of strong reinforcement methods. Yet their position has not caused major setbacks as initiatives, such as the Smartphone Software Competition Promotion Act, are to come into force with expectations to continue reinforcing fair trade in the digital domain. Contrarily, the KFTC's approach is adapting well to the new developments through their intervention before any more breaches of the prohibited practices and their constant efforts to sanction businesses for any abuse of market dominance, particularly in 2023 with the fines imposed on large businesses such as Kakao Mobility, Google and JW Pharmaceutical.[325] As a response to their criticisms, the KFTC is committed to continue assessing and improving the regulations under the MRFTA but is still unclear to what extent it can effectively reinforce fair trade in the digital competition. In reality, it is still challenging to assess the effectiveness of both jurisdictions in reinforcing fair trade in this particular scenario as they are in the process of responding, whether through new regulations or amendments to the existing ones, to the rapid technological developments, which can be both unpredictable and demanding.

[323] Markus Mueller, 'Antitrust Regulation in Japan and South Korea – What Influence Does Chicago School of Antitrust Exercise on Competition Policy and Digital Economy' [2020] SSRN Electronic Journal.

[324] Japan Fair Trade Commission, 'Summary of Annual Report of the Japan Fair Trade Commission (April 2023-March 2024)' <https://www.jftc.go.jp/file/summary2023-2024.pdf>.

[325] South Korea, 'Annual Report on Competition Policy Developments in Korea -- 2023 --' (2024) <https://one.oecd.org/document/DAF/COMP/AR(2024)21/en/pdf>.

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The US and EU's Approach to Extraterritorial Jurisdiction in Competition Law: How Can We Balance Protection of Domestic Markets and International Comity?

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Abstract

This paper will compare the methods which the United States (US) and the European Union (EU) utilise to apply their competition law extraterritorially. Through examination, we can observe that the EU applies its domestic law to foreign companies more aggressively. Although both the EU and the US utilise the effects doctrine, the EU additionally utilises the implementation doctrine to further expand its jurisdiction. The US' Foreign Trade Antitrust Improvements Act (FTAIA) further places restrictions on the effects doctrine, and cases such as In re Vitamin C demonstrate the US' relative reluctance to apply its domestic law extraterritorially. The paper further explores the criticisms of extraterritorial jurisdiction in competition law, such as legal uncertainty for multinational corporations (MNCs) and infringements of state sovereignty. It ultimately evaluates solutions for growing concerns over jurisdictional conflicts, such as increasing legal intelligence amongst companies, enhancing international cooperation mechanisms and independent international courts.

Keywords: extraterritorial jurisdiction, multinational corporations (MNCs), effects doctrine, implementation doctrine

1. Introduction

Extraterritorial jurisdiction has become an increasingly relevant topic recently. A familiar example can easily be found in the United States' (US) recent investigations and short-lived ban of Tiktok, a social media platform owned by Chinese company ByteDance with billions of users worldwide. US lawmakers' decision to prohibit its use nationally was quickly reckoned with users' disappointment, and the app was quickly reinstated. The Chinese government also responded negatively to the ban, claiming it was one of many attempts by the US to restrain Chinese technological advancements and

undermine fair competition.[326] This episode was likely a reflection of the ongoing economic and technological rivalry between the two nations.

Extraterritorial jurisdiction involves states judging and sanctioning the actions of foreign actors according to their own legal standards. This implies that States have the ability to apply their own competition laws to companies that are headquartered in other States but operate within their borders. This phenomenon often manifests through competition law, this involves imposing domestic legal antitrust laws on foreign companies. This has generated certain discourse regarding its contrast with respect for other jurisdictions and their authority over their own national private actors. The extent to which each jurisdiction imposes its legal standards upon foreign actors varies, and largely does so due to states' differing concern for international comity, a non-binding form of courtesy and respect for another state and its jurisdiction.

Two of the most developed and prominent bodies of competition law can be found in the European Union (EU) and the United States (US). Although they share the aim of protecting their own markets' condition and often do so quite similarly, they differ somewhat in the extent to which they impose their authority over foreign companies. Through analysis of either jurisdiction's use of principles allowing the establishment of extraterritorial jurisdiction, we find that the EU has a more expansive approach to regulating foreign conduct that allows it to control its internal market more rigidly. This may be due to the EU's foundational goal of creating a harmonious, single internal market, which may require a stricter approach to foreign conduct that may disturb competition patterns. Although both the EU and the US utilise the effects doctrine most often, the US has implemented certain restrictions on its use that encourage a limitation of its legal influence overseas. The EU's use of the implementation doctrine, which allows the establishment of jurisdiction over practices that are merely implemented in the EU, gives it further authority to sanction foreign companies, which the US lacks. Overall, in terms of preserving its market, the EU carries out a more efficient form of protection.

However, this does not necessarily make the EU's approach inherently superior. The US' limitations stem largely from a desire to prevent conflicts with other states. I will argue that the current form of balancing the protection of domestic markets and international comity are largely insufficient, and should be regulated differently to ensure that future geopolitical conflicts are neither reflected in or escalated by extraterritorial jurisdiction matters.

2. The Use of the Effects Doctrine

Both extend their jurisdiction largely through the use of the effects doctrine, also denoted the qualified effects doctrine in the EU. This doctrine generally establishes a court's jurisdiction over the conduct of a company if it creates effects on national competition. One of the most significant cases demonstrating the doctrine's use within the EU is A. Ahlström Osakeyhtiö and others v Commission of the European Communities, in which the United Kingdom (which was yet to leave the EU at the time) attempted to apply domestic competition laws to the conduct of a British company's conduct outside the

[326] Michael Keating, 'What Does the TikTok Saga Reveal About China-US Relations?' (Brookings Institution, 4 March 2024) https://www.brookings.edu/articles/what-does-the-tiktok-saga-reveal-about-china-us-relations/ accessed 26 June 2025

EU.[327] Often referred to as the Wood Pulp case, it established that the European Commission could take actions against conduct that would have a foreseeable and direct effect on the EU even if the conduct occurred outside the union or involved foreign parties. Furthermore, in Intel Corp. Inc. v. European Commission, the Court of Justice of the European Union defined it as a test that allowed the imposition of EU competition law unto a foreign company when its actions will foreseeably create an "immediate and substantial effect on the European Union".[328] Although this allows for a greater degree of internal markets, there has been little to no clarification of what effects qualify as immediate and substantial.[329] This gives the EU a considerably large amount of freedom to apply its own domestic laws to foreign actions due to the relative lack of specificity regarding the doctrine's application.

The US utilises the same doctrine when applying its Sherman Act (1890),[330] the jurisdiction's foundational piece of antitrust legislation. This was exemplified in United States v. Aluminum Co. of America (Alcoa) (1945) – 148 F.2d 416 (2d Cir.).[331] Although Alcoa's agreement with foreign companies to limit aluminium supply occurred outside of the US, the Second Circuit Court of Appeals judged that the companies' lack of US presence did not prevent the Sherman Act from applying to their conduct. It established the only prerequisite was that their actions had a direct and substantial effect on US markets, using a similar wording to the European interpretation of the doctrine. Hartford Fire Insurance Co. v. California (1993)[332] further posed the issue of implementing the Sherman Act against foreign company actions despite their legality under foreign jurisdictions.[333] In this case, the Court explicitly reinforced the applicability of US law despite differences in foreign antitrust law in the case of foreign actions having substantial effects on its markets. Again, this seems to expand the US' use of the effects doctrine to a similar extent of that of the EU, prioritising the protection of domestic markets in the case of negative consequences from foreign actions.

The US and the EU's reliance on this principle grants either country more flexibility in their interpretation and application of domestic law to foreign actors. This, however, can raise issues regarding legal certainty. Principles alone may not be a sufficient or stable form of evaluating whether domestic law applies, as their usual lack of specificity and reliance on judicial interpretation may result in inconsistent applications and outcomes. This has been implied by various scholars, including Peter

[327] Case 89/85, Ahlström Osakeyhtiö and Others v Commission of the European Communities [1988] ECLI:EU:C:1988:447 (27 September 1988) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61985CJ0089 accessed 26 June 2025

[328] Case C-413/14 P, Intel Corp v European Commission [2017] ECLI:EU:C:2017:632 (6 September 2017) https://curia.europa.eu/juris/document/document.jsf?text=&docid=198941&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9144 accessed 26 June 2025

[329] Pinar Akman, 'EU Competition Law and Extraterritorial Jurisdiction – A Critical Analysis of the ECJ's Judgment in Intel' (2020) 8(1) *Journal of Antitrust Enforcement* 184 https://www.tandfonline.com/doi/full/10.1080/17441056.2020.1840844accessed 26 June 2025

[330] Sherman Antitrust Act 1890, National Archives https://www.archives.gov/milestone-documents/sherman-anti-trust-actaccessed 26 June 2025

[331] United States v Aluminum Co of America (Alcoa) 148 F2d 416 (2d Cir 1945) https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/ accessed 26 June 2025

[332] Hartford Fire Insurance Co v California 509 US 764 (1993) https://supreme.justia.com/cases/federal/us/509/764/accessed 26 June 2025

[333] Idem.

Behrens, who have suggested the extension of the "long arm" of extraterritorial jurisdiction based on interpretation of mere doctrines may be a potential cause of conflict and uncertainty.[334] Ultimately, this may cause significant disturbances for both private and public actors, namely MNCs and other states, which will have greater difficulties in adapting to each jurisdiction's standards. Some scholars have also argued that the relative vagueness of the principles used is a purposeful tactic to expand the range of application of the doctrines and impose "legal imperialism" upon other international subjects and actors.[335]

3. The Foreign Trade Antitrust Improvements Act (FTAIA)

However, the US' use of the effects doctrine has been constrained to a greater level than that of the EU through the Foreign Trade Antitrust Improvements Act (FTAIA).[336] It limits the Sherman Act to import transactions unless there was "direct, substantial and reasonably foreseeable" effect on domestic and import commerce. It further amended both the Federal Trade Commission Act and the Clayton Act (two other legislative pieces fundamental to US competition law) to prevent their application to joint ventures with foreign companies and "unfair methods of competition" involving foreign companies. Again, the exception of import commerce and a direct effect on domestic markets was applied. The Act was utilised in F. Hoffmann-La Roche Ltd. v. Empagran S.A. (2004) – 542 U.S. 155,[337] in which the court emphasised the strict boundaries of US extraterritorial reach, being limited to "direct, substantial and reasonably foreseeable" effect on domestic commerce which gives rise to a claim. Once again, the reliance on a general principle that can be somewhat easily interpreted in a variety of ways may be criticised. Despite the wording of the Act may allow judges to extend jurisdiction depending on interpretation, there is no comparable attempt to limit the effects doctrine under the EU. This points to the US' extraterritorial jurisdiction being limited through self-imposed barriers that the EU does not put in place.

4. In re Vitamin C and Its Effects

This does not imply that the US has not put in place any prioritisation of its own jurisdiction. In re Vitamin C addressed a direct conflict between US and Chinese law, with Chinese law mandating conducts from pharmaceutical companies that resembled price fixing under US law. In this case, despite the Second Circuit establishing a certain degree of deference to Chinese law, the Supreme Court emphasised that courts needed to independently evaluate foreign governments' interpretation of its own laws, rather than consider them

[334] Peter Behrens, 'The Extraterritorial Reach of EU Competition Law Revisited: The "Effects Doctrine" Before the ECJ' (2016) Discussion Papers 3/16, Europa-Kolleg Hamburg, Institute for European Integration https://www.econstor.eu/bitstream/10419/148068/1/872385006X.pdf accessed 26 June 2025

[335] Huseyin Corlu, 'Extraterritorial Application of EU Competition Law: The New Standard-Bearer of Legal Imperialism?' (2022) SSRN Working Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4001509 accessed 26 June 2025

[336] Foreign Trade Antitrust Improvements Act of 1982, H.R.5235, 97th Congress, 1982 https://www.congress.gov/bill/97th-congress/house-bill/5235 accessed 26 June 2025

[337] F Hoffmann-La Roche Ltd v Empagran SA 542 US 155 (2004) https://supreme.justia.com/cases/federal/us/542/155/accessed 26 June 2025

automatically binding.[338] However, although this ruling re-established a court's duty to evaluate a company's conduct according to US competition law, it did not eliminate the respect for international comity. When remanded to the Second Circuit, the court ultimately dismissed the case and deferred to Chinese law because of the clear incompatibility.[339] This demonstrates US courts' habit to prefer treading on the side of caution when dealing with conflicting foreign jurisdictions, rather than imposing their own standards upon foreign companies, a habit that the EU does not necessarily share.

There is the issue of conflicting legal standards being imposed on private actors, most notably MNCs. These will increasingly have to learn how to navigate various sets of legal and regulatory standards that often contradict merely to avoid infringing a standard that is non-existent in their domestic jurisdiction, or even be placed between legal forces that are diametrically opposed, as seen in In re Vitamin C. A greater level of legal intelligence and compliance strategies through national regulation may be an appropriate policy measure to handle these complications. By providing more guidance and resources on how to handle differences between jurisdiction, national companies operating in other jurisdictions are more likely to avoid legal disputes. This may involve creating guidelines on how to adapt operations to various jurisdictions of greater economic importance and implementing regulations that incentivise these practices. Although this may involve the creation of government agencies to create and support these changes, its benefits may outweigh the increased resource use, and it is likely companies will take advantage of these resources to avoid litigation in foreign jurisdictions.

5. The Implementation Doctrine

The EU does not rely merely on the effects doctrine. The implementation doctrine has been established as an additional method for the EU to stretch its reach to foreign conducts. One of the most notable examples of its use appeared in the recent Google and Alphabet v. Commission case.[340] Google challenged the European Commission's €4.34 billion due to its abuse of its dominant position through restrictive contracts and its Android OS. Despite Google's lack of physical presence in the EU, the General Court of the European Union ruled that the company's mere implementation of its practices in the EU through its contracts with smartphone manufacturers was sufficient to establish its jurisdiction over its actions, especially due to the significant negative impact that Google's practices may have over European consumers and markets. This gave the Commission the right to apply Article 102 of the TFEU to Google's actions much like it would to the actions of any other European company. This doctrine offers the EU another recourse to apply its own competition standards to foreign companies which is not mirrored in the US. Contrasting this with the US' practice of deferring to foreign jurisdictions, at least in terms of competition law, the EU more aggressively prioritises its own internal markets relative to the US.

[338] In re Vitamin C Antitrust Litigation No 13-4791 (2d Cir 2016) https://law.justia.com/cases/federal/appellate-courts/ca2/13-4791/13-4791-2016-09-20.html accessed 26 June 2025

[339] 'Vitamin C Ruling May Trigger Comity Defense Resurgence' (Winston & Strawn LLP) https://www.winston.com/en/insights-news/vitamin-c-ruling-may-trigger-comity-defense-resurgence accessed 26 June 2025

[340] Case T-604/18, Google and Alphabet v Commission (Google Android) [2022] ECLI:EU:T:2022:541 https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7257877 accessed 26 June 2025

The EU's stricter approach to foreign incursions on internal markets may be due to its objective of not only protecting its Member States, but also creating an internal market shared by its members, as seen in Article 3(3) of the Treaty on the European Union.[341] Seeing that one of its fundamental goals is the creation of a single, cohesive and "highly competitive" market, it becomes more understandable why the EU generally applies its standards so much more rigorously than the US, which has no such goal.

However, the EU's greater commitment to imposing its own competition laws over foreign actors has been interpreted as an aggressive or even imperialist measure by some legal scholars.[342] This leads to the larger issue regarding the current handling of extraterritorial jurisdiction in competition law. The most commonly expressed concern naturally revolves around the conflict between competition law and international comity. A state or supranational organisation imposing its own standards for competition over the actions of foreign companies can easily be interpreted as an infringement upon the foreign state's jurisdiction. Any deference to foreign jurisdictions through limitations such as the FTAIA is often merely an attempt to avoid diplomatic tensions and any forms of retaliation by the affected country. However, as demonstrated by the differences between the EU and the US' extent of deference, evaluating the appropriate extent of deference presents a challenge for courts and policy makers. Especially in times of increasing geopolitical tensions, developing policies that aid ease tensions between international subjects is paramount to both grant legal clarity to actors such as MNCs and prevent any unnecessary escalation of conflicts.

Currently, the most effective form of international cooperation regarding cooperation law involves the creation of networks that encourage discussion. For example, the International Competition Network (ICN) stands as a collaboration of antitrust agencies that creates proposals for amendments with the goal of unifying international competition law. It does so by reaching consensus on antitrust issues and encouraging its members to implement recommendations through unilateral, bilateral and multilateral means.[343] Other networks, such as the Organisation for Economic Development (OECD) and the EU-US Trade and Technology Council, also provide forums for dialogue on competition law. Although these are useful mechanisms, they rely largely on soft law and non-binding decisions that are only adopted upon consent by each member. The ICN, especially, is largely considered an informal network. This reduces the authority of such organisations and leaves legal conflicts largely unbridled by international norms, which is presumably contrary to the organisations' goals.

Alternatively, the development of treaties setting international standards and specialised courts could placate concerns regarding legal imperialism and deference to foreign jurisdictions. The application of

[341] Consolidated Version of the Treaty on European Union – Title I: Common Provisions – Article 3 (ex Article 2 TEU), EUR-Lex https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008M003 accessed 26 June 2025

[342] Huseyin Corlu, 'Extraterritorial Application of EU Competition Law: The New Standard-Bearer of Legal Imperialism?' (2022) SSRN Working Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4001509 accessed 26 June 2025

[343] International Competition Network, 'International Competition Network Operational Framework' https://www.internationalcompetitionnetwork.org accessed 23 March 2025

antitrust laws by an independent court to countries that become parties to this treaty would curb accusations of political persecution of foreign companies or infringement on state sovereignty. It would further create a uniform body of competition law that would reduce legal challenges for MNCs that would otherwise struggle to adapt to the differing standards applied in each jurisdiction.

This proposition would evidently be controversial. Firstly, the immense use of resources required to develop an international form of competition law renders this idea a challenging task. Secondly, the possibility of various countries accepting the binding nature of such a court's decisions is likely unrealistic. The differences between the legal standards for competition alone would render a single set of laws an unlikely accomplishment. As an example, the EU and the US hold different standards regarding the existence of dominant forces in markets. Whilst the US tends to prohibit the mere existence of monopolies or attempts to monopolise,[344] the EU tends to allow dominant companies to continue in their position under the condition of non-abuse of their power.[345] This alone is a significant difference in evaluating competitiveness in a market, and is unlikely that either jurisdiction would agree to uniformising their standards. Furthermore, the political tensions between countries with significant economic prowess, including the US, the EU and China, makes it less likely that such a collaboration would be carried out. Unless incentivised by other means,

There may be a solution that combines the advantages of either measure. Whilst courts and arbitration services may require the development of international competition law standards, which is currently unlikely, mediation bodies and panels may provide an ad hoc option for negotiation. States that face ongoing legal conflicts regarding extraterritorial jurisdiction opt to join such panels in order to prevent an increase in animosity and diplomatic tensions whilst still protecting their markets' interests. A platform which allows for direct, constructive and cordial discussion relating to the conduct of large corporations and MNCs on an individual basis may be able to counteract the substantive and procedural standards between jurisdictions. It could also develop the principles currently in use, specifying them further and limiting them if necessary. However, this solution faces many of the same similar challenges - namely the likely lack of binding decisions that would result from such arbitration forms.

5. Conclusions

The EU and the US' application of competition law extraterritorially show some differing priorities. The EU's reliance on both the effects and implementation doctrines contrasts with the US' exclusive use of the effects doctrine, which is restrained by the FTAIA. These differences, combined with the differences in the standards for competition in markets found in either jurisdiction, threaten to create legal uncertainty for

[344] US Department of Justice, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act – Chapter 1' (archived) https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1 accessed 26 June 2025

[345] Consolidated Version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title VII: Common Rules on Competition, Taxation and Approximation of Laws – Chapter 1: Rules on Competition – Section 1: Rules Applying to Undertakings – Article 102 (ex Article 82 TEC), EUR-Lex https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102 accessed 26 June 2025

multinational corporations that operate in both jurisdictions, as seen In re Vitamin C.

While we currently institute informal international cooperation through the ICN and the OECD, these present some significant defects, particularly their non-binding nature. The theoretical possibility of an independent international court that offers binding conflict resolution, although seemingly convenient, can be seen as a highly idealistic yet unattainable option due to the deep-rooted contrasts between different jurisdictions and ongoing geopolitical tensions. Alternatives to either system tend to share their defects.

Striking a balance between the protection of domestic markets and deference for foreign jurisdictions is a necessary, albeit seemingly herculean task. However, we would be remiss to ignore the issue and allow future conflicts to play out through antitrust structures.

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A comparative analysis of the intersection of antitrust and intellectual property law in the EU and US: possibility for harmonisation?

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Abstract

This paper aims to analyse in a comparative framework the approaches of the United States and the European Union to the intersection of antitrust and intellectual property law, with a special attention to the discipline of compulsory licensing. After considering the current legislative and jurisprudential scenarios in both jurisdictions, differences in approach are examined, before concluding with policy recommendations based on recent international guidelines.

Keywords: Intellectual Property, Standard Essential Patents, FRAND, Compulsory licensing

1. Background

When considering the field of competition law, the intersection with the topic of intellectual property is one that poses an especially relevant concern, both for academics and policy makers.

While both aim to defend the public interest of consumers, and make sure that all companies on the market have effective protection of their rights, the inherently monopolistic nature of most instruments of IP protection often risk causing distortive effects and arouse the interest of antitrust authorities.

The space of intersection between the two has been the object of several decisions, both historic and recent, across most major jurisdictions. Although historically seen as adversarial by both scholars and judges, the relationship between these two fields has developed significantly over time and remains today one characterized by notable comparative discrepancies, in particular between the approaches in the US and the EU. In this already complex field, several other nations have developed alternative solutions that can offer important insights for legislators.

This paper analyses in a comparative way the approaches taken by EU and US law, considering both the guiding legal principles and relevant case law. After considering some starting definitions, the relevant legislation is considered, followed by a more detailed analysis of several significant cases.

The analysis concludes by considering how policy approaches have affected the balance struck between these two disciplines, the author hopes to finalize policy recommendations for how to best guarantee a competitive market without having to violate IP rights to a disproportionate degree.

2. Issues at hand

The fundamental problem that any Intellectual Property Right (IPR) creates is that exclusive right of economic use inherently creates a monopoly for a protected product, process or work[346]. As with any consideration within the field of antitrust, this is not necessarily a negative event as far as consumers or the competitive market is concerned.

In specific sectors, protected processes and products have however become essential for access to the market, causing very relevant antitrust concerns in cases where licensing is denied by IPR holders. On this issue, an important school of case law, on both sides of the Atlantic, has been created over time, specifically on the issues of so-called standard essential patents (SEPs). [347]

The origin of this protection in Europe was by analogy in European Court of Justice (ECJ) judgements with the concept of essential facilities doctrine (EFD), originally applied to physical infrastructure to which access was necessary although privately owned. Starting from this concept, which in Europe originated from Roman law involuntary servitudes but interestingly had already been expanded on in US case law in the XX century[348], the concept of compulsory licensing to competitors was created. Under this doctrine, in the interests of a competitive market, standard essential patents can be licensed under fair, reasonable, and non-discriminatory terms (FRAND) to competitors (a large part of the differences between EU and US, however, originate to the extent of these patents and the nature of competitors to which they are granted).

Over time, the two systems diverged, as the EU bloc, guided by the ECJ case law (examined in the second part of this paper), given the Commission's competence over significant antitrust issues, moved towards a greater limitation of IPR in the interests of a fair and competitive market, while US limited these "interferences" to the minimum, guided by a view of maximum protection of intellectual property. [349]

Today discrepancies remain both in the legislative framing of the field and in the value which is given to the legal principles at stake. To begin with this analysis, we shall consider part of the legislative framework and case law that this issue concerns in both jurisdictions individually.

3. Antitrust and intellectual property in the United States

Firstly, we shall consider the situation in the United States. The fundamental antitrust legislation to consider is the Sherman Act of 1890, which in 1 outlaws "every contract, combination, or conspiracy in restraint of trade," and in 2 any "monopolization, attempted monopolization, or conspiracy or combination to

[346] RD Blair and W Wang, 'Monopoly Power and Intellectual Property' in RD Blair and DD Sokol (eds), *The Cambridge Handbook of Antitrust, Intellectual Property, and High Tech* (Cambridge University Press 2017) 204–21

[347] 'SEPs Licensing: A Pro-Competitive Determination of FRAND Royalties' in G Muscolo and M Tavassi (eds), *The Interplay between Competition Law and Intellectual Property – An International Perspective* (Wolters Kluwer 2019) 121 ff

[348] *United States v Terminal Railroad Association* 224 US 383 (1912)

[349] Gustavo Ghidini, 'The Interplay between Antitrust Law and Intellectual Property: Stages of the European Evolution' (2023) 11 Suppl 1 *Journal of Antitrust Enforcement* i24–i36 https://doi.org/10.1093/jaenfo/jnac025 accessed 26 June 2025

monopolize."[350] The act was later amended and broadened in scope by several more recent statutes.[351]

Despite its broad provisions, however, courts for many years saw the monopoly that patents and other IPRs granted as an exception to antitrust scrutiny, and in some cases saw it as so broad as to effectively "immunise" the area from the Sherman Act.[352]

Over time, starting from cases such as United States v. Line Material Co. in 1948, such immunity was reduced.[353] By the 1970s several practices related to abuses of IPR were included in lists of practices considered to be automatically connected to antitrust sanctions. In the 1980s and 1990s, however, there was a second "swing of the pendulum", with a return to more favourable views to IPRs and less antitrust concerns being highlighted.[354]

Just before the start of the 21st century, a formally collaborative approach between IP and antitrust was set up by authorities such as the Federal Trade Commission (FTC), through instruments such as the FTC and Department of Justice "Antitrust Guidelines for the Licensing of Intellectual Property" in 1995.[355][356]

The guidelines remain in place today, updated in 2017 based on evolving case law and market development.[357] The fundamental principles common to both can be taken by the words of Renata B. Hesse, acting assistant Attorney General, when presenting the guidelines:

- The agencies apply the same antitrust analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right.
- The agencies do not presume that intellectual property creates market power.
- The agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.[358]

Another guiding principle of the guideline is that antitrust sanctions will not be imposed on companies that refuse to licence their intellectual property from competitors (which we shall see is a large difference compared to the European Union).

The guidelines and relevant case law cover several aspects of the intersection between IP and antitrust, including the anticompetitive effects of patent pooling, mergers resulting in combined IP creating a dominant position and companies with large market shares involved in anticompetitive practices related to IP (forcing companies to exclusive licence of IP in exchange for economic collaboration, as in Intel 1999).[359] For the

[350] 26 Stat 209 (Sherman Act 1890)
[351] Federal Trade Commission, 'Guide to Antitrust Laws' https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws accessed 26 June 2025
[352] Sheila F Anthony, 'Antitrust and Intellectual Property Law: From Adversaries to Partners (Public Statement)' (Federal Trade Commission) https://www.ftc.gov/news-events/news/speeches/antitrust-intellectual-property-law-adversaries-partners accessed 26 June 2025
[353] *United States v Line Material Co* 333 US 287, 308, 76 USPQ (BNA) 399, 408 (1948)
[354] R Hewitt Pate, 'Antitrust and Intellectual Property' (Speech, Acting Assistant Attorney General, 23 January 2004) https://www.justice.gov/archives/atr/speech/antitrust-and-intellectual-property accessed 26 June 2025
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[359] Intel Corporation, No 9288 (FTC 3 August 1999)

purpose of this paper, the scope of analysis is limited to patents by a single or group of companies resulting in a dominant position or effective monopoly rather than antitrust issues involving IP.

The issue of refusal to licence is one of particular contention, with various contrasting decisions from federal courts. The refusal to licence, if held as anticompetitive, could result in sanctions under section 2 of the Sherman Act.

The dominant case law such as CSU, L.L.C. v. Xerox Corp.[360] has stated that unless linked to openly anticompetitive practices such as tying a refusal to licence can never be held as a sanctionable under antitrust law. To support its position, the court quotes section 271 (d) of the US Patent Act[361], which states that "No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having [...] refused to license or use any rights to the patent".

Several notable criticisms in US policy making emerged over time regarding this approach, notably including Former FTC Chairman Robert Pitofsky, who claimed the decision:

"leap[ing] from the undeniable premise that an intellectual property holder does not have to license anyone in the first instance to the unjustifiable conclusions that it can select among licensees to achieve an anticompetitive purpose or can condition a license (for example, you receive a license only if you agree not to do business with my competitor) to achieve an anticompetitive effect."[362]

Many others defended the approach by stating that limiting IP would curtail innovation, and by pointing out that refusal to deal remains a right of all companies, even when market power and dominance are demonstrated.[363] We will see how the European approach is critical of such arguments and considers more the distinction between IP concerns and general antitrust law.

This was confirmed by the Supreme Court in the case of Verizon Communications v. Trinko (2004) where it stated that:

"as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trade or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'"

This was however compensated in part by the admission that "under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2".[364]

In this scenario, there is significant uncertainty among federal courts, with the 9th circuit in the case of Image Technical Services, Inc. v. Eastman Kodak Co. (1992) as confirmed by the Supreme Court.[365]

Overall, in the United States, many consider that antitrust is the weaker of the two sides in the debate over the extension of IPRs. The dominant case law generally states that IP grants a limited monopoly as compensation

[360] 203 F3d 1322 (Fed Cir 2000), cert denied, 531 US 1143 (2001)
[361] 35 U.S. Code § 271 (d)
[362] Robert Pitofsky, 'Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property' (Remarks before the American Antitrust Institute Conference: An Agenda for Antitrust in the 21st Century, 15 June 2000)
[363] R Hewitt Pate, 'Antitrust and Intellectual Property' (Address, Acting Assistant Attorney General, Antitrust Division, US Department of Justice, American Intellectual Property Law Association 2003 Mid-Winter Institute, 24 January 2003) https://www.justice.gov/archives/atr/speech/antitrust-and-intellectual-property accessed 26 June 2025
[364] *Verizon Communications, Inc v Law Offices of Curtis V Trinko, LLP* 540 US 398, 416 (2004)
[365] Image Technical Services, Inc v Eastman Kodak Co 504 US 451 (1992)

for the effort to produce innovation, and limitations of such rights would not only be a violation of the protection they are granted but also would be detrimental to the consumer. This approach is consolidated by case law and by many experts in the field, not without some resistance from senior members of the antitrust community.

4. Antitrust and Competition Law in the European Union

We now pass on to the second part of the analysis, this time referring to the legal system of the European Union, where competition is regulated at both a bloc-wide and national level. For the purposes of this paper, the focus shall be on the steps taken at an EU level rather than single normative systems.

As in the United States, the interaction between intellectual property and competition law passed through various stages, influenced by the variations in the political backdrop. In initial phases of the European Community, a very stringent approach to antitrust was embraced by the Commission, resulting in significant limitations being imposed on the freedoms of IPR holders in regulations such as 19/65 and 67/67.[366] [367]

Over time, as in the US, new economic trends lead to increasing exclusion of IP from the scope of antitrust protection in the interest of protecting the rights of businesses and promoting innovation.[368] This approach reached a concrete manifestation under the exemptions provided by the TTBER – Technology Transfer Block Exemption Regulation, 316/2014, in accordance with article 101(3) of the treaty for the functioning of the EU (TFUE).[369] These changes affected various aspects of IP and antitrust, with more favourable views for vertical (and to a lesser extent horizontal) agreements between companies, patent pooling and voluntary licensing, based on the pro-competitive and pro-consumer effects that were recognized.

At the same time, the Guidelines to the regulation itself recognized that these pools and licences risked creating an exclusive patent pool of such dimensions that it limited the possibility of new competitors to enter the market, a fact in no way recognized by US regulators.

This first phase was totally surpassed by the case law of the ECJ with the admission that the exclusivity of IPRs themselves could be called into question. In past decisions and legislation, it had never been doubted that the monopoly of use given by a simple IPR could be considered illegitimate, but over time the question of whether the advantage given by rights to exclusivity was inherently distortive of the market was for the first time considered.

To quote Professor Ghidini, the words of the law and economics scholars Guido Calabresi and Douglas Malamed, in a situation with a patent pull as an essential condition to access the market, for the first time it was considered that IPR could need to be transformed "from property to liability".

This brought about the development of compulsory licensing under fair, reasonable and non-discriminatory

[366] Commission Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements, [1967] OJ L57/849 (DE, FR, IT, NL)
[367] Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, [1965] OJ L36/533 (DE, FR, IT, NL)
[368] Gustavo Ghidini, 'The Interplay between Antitrust Law and Intellectual Property: Stages of the European Evolution' (2023) 11 Suppl 1 *Journal of Antitrust Enforcement* i24–i36 https://doi.org/10.1093/jaenfo/jnac025 accessed 26 June 2025
[369] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (Text with EEA relevance), [2014] OJ L93/17

terms (FRAND). This emerged most notably by the legislative framework of standards in sectors such as telecommunications. These principles were integrated consistently into a wider range of documents, notably the 2001 Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation.

The emergence of FRAND licensing for standard essential patents (SEPs) emerged in various decisions by the ECJ, among which it is notable to consider a few.

In the case of Magill (1995), dealt with by the ECJ, it was held that companies have an obligation to licence their IPRs if they are considered necessary for competitors in downstream markets.[370]

In IMS Health (2004), compulsory licence was extended to cases even within the same market.[371]

In Microsoft (2007), the court extended the obligation to licence not only to cases where there is effective elimination of competition but even to the risk of such elimination, essentially halting innovation.[372] The court distinguished from Magil because licensing in this case would not be a disincentive to innovation and no money had been spent on the development of the protected IPR.

More recently, in Huawei (2015), the court decided that in cases of SEPs to be licenced under FRAND conditions the offended parties can ask for injunctive relief to enforce their rights.[373]

In recent years there has even been a European Union court precedent that stretches as far as sanctioning the obtention of IP rights itself being considered anti-competitive: AstraZeneca 2012.[374] [375] Essentially this step reflects the considerations only timidly voiced in the US that the sheer quantity of patents may itself be a concern to a competitive market, and that more scrutiny should be added in the approval of IPRs themselves to balance these interests.

5. Differences in approach

Having considered both the US and EU situation, it is clear that significant differences both in the strategy of approach and the conclusions reached can be discussed.

The fundamental difference between the US and EU approach is the conception of intellectual property itself. The US courts consider IPRs to be analogous to any other form of property, without considering the important distinguishing circumstances.

There are two major reasons why this approach is not ideal: firstly, intellectual property rights are not a private good, their use by one actor does not diminish use by others, and secondly, the conception of IPRs for exclusive use does not just grant a right to the proprietors but also restricts the economic freedoms of others.

The traditional conception of IPRs aims to balance these aspects while incentivising innovation and rewarding the often-significant upfront investment companies have to employ in research and development. The solution is the temporal limitation of IPRs, employed both in the EU and the US.

When addressing the antitrust concerns raised by IPRs, only in Europe is the correct nature of intellectual

[370] Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities [1995] ECLI:EU:C:1995:98
[371] Case C-418/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG [2004], EU:C:2004:257
[372] Case T-201/04, Microsoft Corp. v Commission of the European Communities, EU:T:2007:289
[373] Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH, EU:C:2015:477
[374] Devaiah Bharadwaj, Gupta et al, Multi-dimensional Approaches Towards New Technology Insights on Innovation, Patents and Competition (Springer 2018) https://doi.org/10.1007/978-981-13-1232-8 accessed 26 June 2025
[375] Case T-321/05 AstraZeneca v Commission (2010) ECLI:EU:T:2010:266.

property identified. The analogy performed in the US between refusal to deal (contract theory) and refusal to licence IPRs is correctly discarded by EU case law. This is because the rights granted by IPRs are inherently monopolistic, and that monopoly cannot always be considered beneficial to consumers just because it is a reward for the investment by the creator and is therefore an incentive for innovation.

It is also necessary to give due consideration to the criticism brought in the US regarding the risk that limiting IPRs poses to innovation in the case of compulsory licensing. The practice of compulsory licensing itself is not totally new, as it has already existed for medicines under the TRIPS agreement since 1995.[376] However, it is important to notice how there is always direct remuneration, both in ECJ decisions and in recent proposals for EU wide compulsory licensing in crisis scenarios.[377] The remuneration of compulsory licensing under antitrust grounds is essential to not incur the damaging effects on innovation feared in the United States.

The second major European innovation compared to the US is the possibility of limiting patents altogether if their aim is not to foster innovation or to defend a legitimately novel idea.

The ECJ has recognized that in certain cases IP has gone too far in several directions: too many patents, often useless, being used in the wrong ways to exclude others. A case from the Italian courts, in line with ECJ doctrine, can be beneficial as an example. In 2009, Pfizer, the producer of the glaucoma drug Xatalan, applied to extend IP protection of the formula to stop competitors from being able to produce generic drug substitutes.[378] The Italian Antitrust authority found that this action, despite being valid according to patent law, constituted an abuse of dominant position and could be sanctioned. Interestingly, in 2024[379], the Italian Supreme Court judged that Pfizer was also liable for this action towards the Italian public health system (Servizio Sanitario Nazionale), in an innovative decision sure to become a relevant precedent for cases of this type regarding the medical field. [380]

In US case law, this approach is totally excluded, despite many experts supporting remedies of this type (especially from the antitrust sector).

At the same time, US guidelines introduce several useful points that need to be considered for a balanced review of antitrust and IP. Most importantly, the fact that a monopolistic intellectual property right does not always result in market power. This means that every analysis of abuse of a dominant position must be performed on a case-by-case basis. The existence of a standard essential patent can certainly be a factor that favours the classification this alone is also not enough.

A noticeable difference between the two jurisdictions, which may partly explain the differences explored, is the relevant legislator for each of the two disciplines.

While in the United States both intellectual property and antitrust are primarily a competence of the federal legislator, creating a need to balance the two fields for a

[376] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C to the Agreement Establishing the World Trade Organization (1994)

[377] Proposal for a Regulation of the European Parliament and of the Council on compulsory licensing for crisis management and amending Regulation (EC) 816/2006

[378] Italian Council of State (Supreme Administrative Court), decision No 693/2014 (12 February 2014)

[379] Italian Court of Cassation, Civil Section 1, decision No 9/2024, case No 669815/1

[380] Enzo Marasà, Elisa Stefanini and Francesca Ellena, 'The Intricate Interplay between Intellectual Property and Competition Law as Exemplified by the Xalatan Case' https://www.ibanet.org/intellectual-property-competition-law-xalatan-case accessed 26 June 2025

potential judge, in the EU only competition is a competence of the Commission (under the remit of integration) while IPRs are left to national legislators. For these reasons it may be possible to explain in part while IPRs can be seen as less protected by the EU.[381] This essentially creates a vacuum in which, unless the EU itself were to create a provision similar to Section 271 (d) of the US Patent Act, Article 102 would always prevail on efforts by single states to outlaw limitations to IPRs (or exclude such rights from antitrust oversight).

6. Policy recommendation: Codification of SEPs

Having examined the conclusions that can be drawn from the comparison between US and EU law, there are several policy recommendations to be considered to better harmonise transnational legislation and to best strike the balance between these two historically competing disciplines.

The first recommendation is to codify SEPs at an EU level. This makes sure that companies' obligations to licence essential patents are clear without judicial intervention. This benefits both the innovating company, which gains the advantage of certainty as to the status of its patents and control over their use, and the competitors who know that outside of the enumerated cases there is no obligation to license IPRs. This position is possibly reconcilable with US case law, considering that the number of patents and definition of "essential" would rest under the control of government authorities. There would be no unpredictable obligation to deal with since patents would be pre-emptively vetted to determine their essentiality. A similar consideration has in part been already applied by US case law to patent pools when considered damaging to the competitive market by intention.

7. Policy recommendation: harmonisation at a supranational level

Secondly, all legislators (and relevant authorities) should, as stated in the 2023 OECD report on competition law and intellectual property, aim to harmonise as much as possible the collaboration between antitrust and competition authorities and between antitrust authorities transnationally.[382] This point is not to be underestimated. The varying disciplines of these issues create serious discrepancies between countries in a global economy where most companies involved in litigation operate on a multinational level. In this scenario, it is fundamental that in the best interests of consumers governments take action to harmonise at least the fundamental principles. Among those recommended by the OECD guidelines are the definition of IPRs, the conception of IP rights as a form of property with significant differences from other goods, the absence of a direct link between IPRs and market power (which noticeably is already a point of convergence between the US and EU), and the need to define markets considering not only the scope of a single IPR.

These are just some of the recommendations that can be drawn from the analysis of this fragmented sector of the law, which is in urgent need of clear action. While the EU and US both have clear stances that on some aspects converge, it is without a doubt necessary in the globalised economy we live in that the overall approaches of both

[381] Mariateresa Maggiolino, *Intellectual Property and Antitrust*, in *New Horizons in Competition Law and Economics*(Edward Elgar Publishing 2011) 175–79

[382] Organisation for Economic Co-operation and Development, 'Recommendation of the Council on Intellectual Property Rights and Competition' (2023) https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0495 accessed 26 June 2025

blocs harmonise as much as possible. While the EU through the ECJ has made ground on the difficult task of limiting IPRs despite their historical importance, these ideas remain only supported by a minority on the other side of the Atlantic Ocean. A unified approach to antitrust and IP seems far away still, but in the meantime, clear and structured records and rules and the implementation of recommendations by international organizations such as the OECD can be an excellent starting point to achieve a better functioning market for consumers everywhere.

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DMA: Consumer Protection & EU Digital Sovereignty

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Abstract

Any regulatory mechanism that addresses fast developing industries poses a question as to whether it is a genuine regulatory necessity or an action driven by purely political motives. The Digital Markets Act (DMA) is said to be aimed at ensuring fair competition in the digital economy, however the clear rationale for its adoption is not obvious. The rationale for implementing the Act within the context of preventing the abuse of dominant positions held by big tech companies does not align precisely with the conventional limits of competition law. The arising political concerns about US' big tech involvement in the EU economy and market concentration significantly contributed to the creation of the framework for the DMA. The Act was both intended at protecting consumers as well as facilitating the growth of EU digital platforms to contest US's big tech leadership.

Keywords: DMA, big tech, US, gatekeepers, competition, consumer protection

1. DMA and its objectives

In 2020 the European Commission made a first proposal on the adoption of an act that would later become one of the milestones in the regulation of digital markets in the 21st century. Two years later, it entered into force marking the beginning of fundamental reshape of the big tech business operations in the European Union (EU). The Digital Markets Act (DMA) sparked discussion as to whether it was truly a consumer protection mechanism or simply an attempt to protect the European market from external influences.

1.1 Gatekeepers regulation

Gatekeepers are defined as companies with an entrenched and durable position, exercising a significant impact on the internal market.[383] Interestingly, the gatekeeper status is not automatic. It is established by the European Commission. Once designated, gatekeepers must comply with all the ex-ante prohibitions and obligations.

[383] 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 L265/1

In 2023, the European Commission designated six gatekeepers, referred to as 'GAFAM' and 22 core platform services provided by them as being bound by the new European legislative act. These platforms include Alphabet (Google Maps, Google Play, Google Shopping, YouTube, Google Search, Chrome, Google Android, Google), Amazon (Amazon Marketplace), Apple (App Store, iOS, Safari), Meta (Meta, Facebook, Instagram, WhatsApp, Messenger, Meta Marketplace) and Microsoft (LinkedIn, Windows PC OS).[384] The criteria for the evaluation was outlined in Article 3.2 of the Act where it is stated that gatekeeper is an undertaking which:

"(…) achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalization or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year." [385]

In addition to this, it must be established that the undertaking:

"(…) provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union.[386]"

DMA has been introduced as a regulation, not a directive, which makes it binding to all EU Member States and it doesn't need transposition into the national laws.[387] The Act creates prohibitions and obligations. The abovementioned platforms are obliged to comply with the objectives set in Articles 5, 6, and 7 of the Act.[388] These include: bans on cross-use personal data obtained in different products or services without express consent, increased interoperability between platforms, allow their business users to access the data that they generate in their use, provide third-party advertising platforms with tools and information necessary to carry out independent verification, allow business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform. Under Article 14, the designated gatekeepers are obliged to inform about all concentrations in the digital sector.

1.2. Consumer protection

It is argued that the main goal of DMA is to protect fair competition in digital markets; a premise that is emphasized in the legislation itself numerous times. Such an approach can be contrasted with the traditional antitrust perspective focused on protecting consumers from unfair pricing and monopolistic behavior.

[384] European Commission, 'The Digital Markets Act: Ensuring Fair and Open Digital Markets' (European Commission, undated) https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en accessed 17 March 2025

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[386] 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 O.J. (L 265) 1

[387] C Sayol and D de la Vega, 'Anatomy of a Regulation: The Digital Markets Act' (Pérez-Llorca, July 2022) https://www.perezllorca.com/wp-content/uploads/2022/07/legal-briefing-anatomy-of-a-regulation-the-digital-markets-act.pdf accessed 17 March 2025

[388] 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 O.J. (L 265) 1 (*hereinafter* "Digital Markets Act" or "DMA")

Nevertheless, despite of its goals, the Act doesn't fully address the intrinsic power disparities between business users and major digital platforms. It can be argued that it introduces yet another narrative which is ambiguous in nature. In fact, "the root word 'fair' appears 90 times in the DMA, in remarkably diverse contexts.[389]" creating confusion as to what is truly intended by the legislators. Therefore, it raises questions as to the role of the principle of fairness in the DMA whether it is a fundamental idea that underpins consumer protection, or if it is merely a supporting concept.

It is argued that the Act has empowered digital users to finally make choices that dominant digital platforms had previously made in their name. Since the entry into force of the Act, users could observe many changes, such as the pop-ups in iOS devices which ask about their preferred search engine. By curbing self-preferencing, the DMA allows customers to explore a greater range of services which are not restricted only to certain platforms.

From the perspective of the public interest theory, regulation is designed to promote the general welfare of the society.[390] Consumers and smaller tech companies would call for regulation to prevent abuse of data privacy, promote interoperability and ensure fairer access.

[389] European Papers, 'Fairness in the Digital Markets Act' (European Forum, 17 March 2022) https://www.europeanpapers.eu/europeanforum/fairness-in-digital-markets-act#_ftn2 accessed 19 March 2025

[390] Posner, R. A. (1974). Theories of Economic Regulation. The Bell Journal of Economics and Management Science, 5(2), 335–358. https://doi.org/10.2307/3003113

1.3. Compliance issue

It is up to the discretion of the European Commission to open an investigative procedure when the suspicion of non-compliance arises. The non-compliance results in the fine up to 10% of the annual turnover as outlined in Article 10. In cases of recidivism, the non-compliance fine increases to 20%. Pursuant to Article 11 of the Act, the designated gatekeepers are obliged to present a compliance report on an annual basis with description of the measures that have been implemented.[391] It must be noted that the Commission has opened a proceeding concerning Apple's compliance with DMA in relation to app stores and browsers as well as interoperability requirements.[392] One of the recent examples is Apple's non-confidential report submitted on the 7th of March 2025.

2. Competition law

2.1. Challenges

The Preamble of the DMA reflects the legislators' recognition of the shortcomings of competition law in effectively tackling the challenges presented by digital platforms.

"(…) existing Union law does not address, or does not address effectively, the challenges to the

[391] Apple Inc, 'Apple's Non-Confidential Summary of DMA Compliance Report' (2024) https://www.apple.com/legal/dma/dma-ncs.pdf accessed 18 March 2025

[392] European Commission, 'Commission Starts First Proceedings to Specify Apple's Interoperability Obligations under Digital Markets Act' (19 September 2024) https://digital-markets-act.ec.europa.eu/commission-starts-first-proceedings-specify-apples-interoperability-obligations-under-digital-2024-09-19_en?utm_source=chatgpt.com accessed 18 March 2025

effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms."

These challenges draw attention to the limitations of competition law; the conduct in which digital platforms are engaged cannot be clearly defined as anti-competitive. To illustrate, the DMA adopts a proactive approach prohibiting certain conduct whereas the traditional competition law approach adopts a reactive approach toward breaches. Therefore, there is a shift from punishing abuse to preventing abuse. The DMA regulation only applies to predesignated gatekeepers rather than to any company which is the case for the competition regulation. It becomes a European-wide regulation targeted at specific dominant companies.

As argued by Lazar Radic et al. in ICLE White Paper, "Regulate for What? A Closer Look at the Rationale and Goals of Digital Competition Regulations" (2024):

"Unlike traditional competition law, which seeks to protect the competitive process to benefit consumers, DCRs [digital competition regulations] focus on altering market dynamics through prescriptive interventions."

The definition of a gatekeeper established in the Act does not necessarily match the definition of a dominant undertaking under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The Article itself allows dominance in the competition market as long as such dominance is not abused. DMA sets a different criterion which does not strictly fall under the competition law framework. To illustrate, Apple with its iMessage platform is designated as a gatekeeper with market dominance however, it does not control the whole messaging market.

Additionally, the DMA is ex-ante in nature, it prevents the harm before it occurs and designates companies based on the specific evaluation criteria. Article 102 of the TFEU requires case-by-case analysis. This creates a significant difference between DMA and Article 102 of the TFEU, where DMA "introduces ex ante rules, as opposed to a system of ex post intervention.[393]" The ex-ante systems are characterized as being pre-emptive, where the enforcement is not desirable. The goal is to prevent the conduct from happening at all. In this sense "the more DMA 'enforcement' there is, the less successful the DMA will be.[394]"

2.2. UK's DMCC

As provided in the abstract of the Digital Markets Competition and Consumers Act (DMCC), it aims at taking "steps to promote competition where it considers that activities of a designated undertaking are having an adverse effect on competition.[395]" Similarly, the competition law narrative is adopted to tackle challenges posed by digital platforms.

[393] Assimakis P Komninos, 'The Digital Markets Act: How Does It Compare with Competition Law?' (2022) *IUS UE e Internazionale* https://ius-giuffrefl-it.bibliopass.unito.it/dettaglio/10049070/the-digital-markets-act-how-does-it-compare-with-competition-law accessed 19 March 2025

[394] Idem.

[395] UK Government, *Digital Markets, Competition and Consumer Bill* (2022) https://www.legislation.gov.uk/ukpga/2024/13/pdfs/ukpga_20240013_en.pdf accessed 17 April 2025

The approach towards regulating digital platforms in the UK is different than the one adopted in the EU. The focus is on more flexible, case-by-case interventions. Instead of defining the big tech companies as gatekeepers, the DMCC designated undertakings with Strategic Market Status (SMS). The Competition and Markets Authority (CMA), more precisely a newly created Digital Markets Unit (DMU) gains greater investigative and administrative powers to evaluate the status of the undertakings.

As per Article 2.2 of Chapter II of the DMCC, the undertaking with the SMS exercises substantial and entrenched market power as well as has a position of strategic significance. The turnover condition is specified in Article 7 where the distinction is made between global and national turnover. It is established that the condition is met when total value of the global turnover of an undertaking or when the undertaking is a part of a group "in the relevant period exceeds £25 billion, or when the total value of UK turnover exceeds £1 billion.[396]"

4. Step towards European digital sovereignty

As defined by the European Parliament, digital sovereignty efforts serve as "a means of promoting the notion of European leadership and strategic autonomy in the digital field.[397]" In many documents produced by EU institutions, there is an emphasis put on the protection of European citizens from abuse of their data and privacy by non-EU tech companies. The implicit intention of the legislators of the DMA is to bring to the international control the oversight of these businesses. It is an attempt to take control of dominant digital platforms' presence on the European market.[398]

4.1 Political statement

The aim of the DMA is to set its own standards in the EU rather than follow those established externally. Therefore, the Act can be interpreted as a statement made by the European Union to the big tech industries that are mainly based in the US. It is an attempt to pursue a digital sovereign union independent from outside control and geopolitical influences. One of the positives of such an approach is the protection of data of the European citizens. The disadvantage is overregulation which could potentially lead to the decrease in the ability to innovate, create higher consumer costs, and ultimately lead to the exit of the major players from the market. While the Commissioner for Competition, Teresa Ribera, reassures that the designation of gatekeepers "do not allow the Commission to discriminate against any company based on the location of its headquarters.[399]" She

[396] UK Government, Digital Markets, Competition and Consumer Bill (2022) https://www.legislation.gov.uk/ukpga/2024/13/pdfs/ukpga_20240013_en.pdf accessed 17 March 2025.
[397] Rózsa M, 'Digital Markets Act: EU Legislation in Progress' (European Parliamentary Research Service, February2021) https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf accessed 10 March 2025.
[398] European Partnership for Democracy, 'From Digital Markets to Democracy in the Digital Age' (European Partnership for Democracy, undated) https://epd.eu/news-publications/from-digital-markets-to-democracy-in-the-digital-age/#:~:text=The%20DMA%20would%20give%20the,available%20only%20to%20democratic%20institutions accessed 15 March 2025.
[399] Euronews, 'Commission Defends EU Digital Markets Rules in the Face of US Attacks' (7 March

also claimed that the DMA "allows companies to become more independent from large digital platforms in terms of distribution of their products and services and to develop innovative business models.[400]" Again, the narratives of greater EU digital sovereignty and consumer protection interests are mentioned as the main rationales for regulating digital markets. In February 2025, the Committee on the Judiciary of the US in a letter to the Executive Vice-President Ribera raised their concerns as to the "targeted nature" of the DMA. Among the concerns raised were that "the European Commission's goal is to remedy Europe's economic downturn by weaponizing the DMA against American companies.[401]"

5. Big tech lobbying

The stakes are high and tech giants are not wasting their time. In accordance with the newly published data, big tech lobbying in the EU has increased significantly and has become the biggest sector by spending.[402] The focus of lobbying lays on closing the doors for third-parties' greater involvement, self-preferencing bans, strict data localizations laws or trade regulations. Similarly, the goal of such an approach is to protect the presence of the GAFAM on the European internal market which they derive significant profits from. To illustrate, Apple and Meta earn above 20% of their revenue from the European market.[403]

From the perspective of the public choice theory, policymakers and legislators have a vested interest in regulating US-based big tech companies in order to appear politically influential. This theory focuses on applying economics to the study of government decision-making arguing that, "government spending decisions often contradict the preferences of the general public.[404]" Politicians and bureaucrats are incentivized to make decisions that maximize their personal benefits, such as the possibility of re-election, media visibility, or influence within their party. To illustrate, a legislator may support antitrust legislation not because they believe it will promote substantial economic competition, but because it will present them in the eyes of the public as a protector of an "average citizen" or "average user" against big tech corporate giants. This often gives an appearance of action rather than actual confrontation with structural challenges within big tech regulatory attempts.

2025) https://www.euronews.com/my-europe/2025/03/07/commission-defends-eu-digital-markets-rules-in-the-face-of-us-attacks accessed 19 March 2025

[400] Ibid.

[401] U.S. House of Representatives Committee on the Judiciary, 'Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Teresa Ribera, Executive Vice-President for a Clean, Just, and Competitive Transition, European Commission' (23 February 2025) https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2025-02-23%20JDJ%20SF%20to%20Ribera%20re%20DMA.pdf accessed 20 March 2025

[402] Corporate Europe Observatory, 'The Lobby Network: Big Tech's Web of Influence in the EU' (Corporate Europe Observatory, August 2021) https://corporateeurope.org/sites/default/files/2021-08/The%20lobby%20network%20-%20Big%20Tech%27s%20web%20of%20influence%20in%20the%20EU.pdf accessed 5 March 2025

[403] Visual Capitalist, 'Visualizing How Big Tech Companies Make Their Billions' (Visual Capitalist) https://www.visualcapitalist.com/big-tech-companies-billions/?utm_source=chatgpt.com accessed 7 March 2025

[404] Longley, R. What is public choice theory?. ThoughtCo. (2022, October 27) https://www.thoughtco.com/public-choice-theory-6744655

Similarly, smaller tech companies in the EU might push for regulation not for the reasons of fairness or equality but rather to benefit from the restrictions on bigger companies.

6. Conclusions

The focus of the current discussion on the regulation of digital markers is thus, whether the adoption of the DMA was intended to protect consumers and competitive market from the domination of the big tech companies or whether it was simply a political step attempting to regulate foreign-owned companies to reduce reliance on US-based technology giants. DMA has a twofold objective of improving consumer protection while at the same time promoting the EU's digital sovereignty. Although on an institutional level, the regulation was mainly addressed as promoting competition it also functions as a political instrument for the EU to exert influence over digital markets and lessen the dependency on non-EU big tech companies.

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fairness-in-digital-markets-act#_ftn2 accessed 19 March 2025

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Antitrust and M&A: A Comparative Analysis of Control and Transparency between Italy and the U.S.

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Abstract

In recent years, the importance of merger control and antitrust law has grown significantly, making it essential to understand how both European and American legal systems operate in these areas. This paper offers a comparative analysis of the two systems, examining their respective institutions and mechanisms. In fact, while the US approach tends to be faster in the decision-making process but less legally clear, the European model is generally more transparent and consistent, though often slower and more rigid in its processes. The paper concludes with an answer to the question: Which legal system is more efficient in terms of control and transparency? – and propose a possible solution based on this analysis.

Keywords: term, term, term

1. Introduction

1.1 The importance of mergers and acquisitions

Since the end of the 19th century, mergers and acquisitions (M&A) have been fundamental in increasing companies' competitive advantage and growth[405]: these operations have become one of the best tools to operate in new markets and add resources to existing ones[406]. Its value rose from $200 billion in 1992 to about $4.74 trillion by 2017, and the peak dates back to 2015: $5.87 trillion in deal value.[407]

Through M&A operations, a company, the acquirer, purchases a majority of the shares (over 50%) of another company, the target, or parts of it, such as a division.[408]

[405] Paulina Junni and Satu Teerikangas, 'Mergers and Acquisitions' (2019) https://oxfordre.com/business/display/10.1093/acrefore/9780190224851.001.0001/acrefore-9780190224851-e-15accessed 26 June 2025

[406] B Rajesh Kumar, *Wealth Creation in the World's Largest Mergers and Acquisitions* (2019) https://doi.org/10.1007/978-3-030-02363-8 accessed 26 June 2025

[407] B Rajesh Kumar, *Wealth Creation in the World's Largest Mergers and Acquisitions* (2019) https://doi.org/10.1007/978-3-030-02363-8 accessed 26 June 2025

[408] Paulina Junni and Satu Teerikangas, 'Mergers and Acquisitions' (2019) https://oxfordre.com/business/display/10.1093/acrefore/9780190224851.001.0001/acrefore-9780190224851-e-15accessed 26 June 2025

In a merger operation, the merging companies generally have equal ownership. In fact, the term "merger" is often used by managers to position an acquisition as a means to alleviate fears of a takeover. There are several types of M&A operations, such as buyouts, takeovers, and minority acquisitions: each of them has its own characteristics and different implications for the parties involved. Yet, all M&A operations have the common aim of generating value from the transaction[409].

However, while some M&A operations can bring benefits to the economy, some transactions reduce competition and risk harming customers: on the one hand, some operations enable the new company to develop new products with lower costs and better quality. On the other hand, some of these operations might reduce the market competition, particularly when they create or strengthen a dominant position, which leads to a potential increase in prices, fewer choices, or lower innovation.[410]

1.2 The Importance of Antitrust and Competition Law

In this context, antitrust law is crucial: it is the body of laws which controls the creation, use and abuse of market power; in the United States, antitrust is another word for competition law, while in the European Union, antitrust is the part of competition law that covers abuse of dominance and anti-competitive agreements, but not merger control.[411]

Moreover, antitrust law aims to eliminate barriers to competition, ensuring the efficient functioning of the market for customers and consumers. It primarily addresses three areas of business conduct: agreements, single-firm practices, and mergers and acquisitions[412].

Competition law is also intended to encourage companies to offer consumers goods and services on the most favorable terms: it should stimulate efficiency and innovation, reducing prices. For this reason, to be effective, competition requires companies to act independently of each other[413]: in fact, competition law typically prohibits monopolistic or dominant firm behavior, and mergers that harm market competition: the key focus is on identifying these anti-competitive practices[414].

Even though the European Union(EU)and the United States (U.S.) share the common goal of safeguarding market integrity, they both adopt different approaches to regulating M&A transactions.

The Italian system, being civil-law-based, relies on a centralized oversight by the Autorità Garante della Concorrenza e del Mercato (AGCM), and as an EU Member State, strictly follows EU laws, with some exceptions. In the EU, antitrust law has rules protecting free competition. EU competition Regulations and Decisions directly apply in all EU countries, and also to all organizations engaged in economic activity, while Directives need to be implemented by a due date[415].

[409] Idem
[410] European Commission, 'Merger Overview' https://competition-policy.ec.europa.eu/mergers/overview_en accessed 26 June 2025
[411] Eleanor M Fox, 'Antitrust' (2021) https://www.concurrences.com/en/dictionary/Antitrust accessed 26 June 2025
[412] European Commission, 'Antitrust and Cartels Overview' https://competition-policy.ec.europa.eu/antitrust-and-cartels/overview_en accessed 26 June 2025
[413] European Commission, 'Competition Policy' https://competition-policy.ec.europa.eu/index_en accessed 26 June 2025
[414] Eleanor M Fox, 'Antitrust' (2021) https://www.concurrences.com/en/dictionary/Antitrust accessed 26 June 2025
[415] European Commission, 'Competition Rules and Antitrust Laws in the EU'

The U.S. system, rooted in common law, delegates antitrust enforcement to the Federal Trade Commission (FTC) and the Department of Justice. In the U.S., antitrust law proscribes unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal, based on the facts of each case. The objective has always been to protect the process of competition for the benefit of consumers, making sure that there are strong incentives for businesses to operate efficiently[416].

1.3 Key differences between Italy and the U.S. (Authority)

As previously discussed, the AGCM is an independent administrative authority that carries out its activities and takes decisions in full autonomy with respect to the executive power. It was established by Law no. 287/1990, containing "Rules for the protection of competition and the market"[417]. The President and the members are appointed by the President of the Parliament (Camera and Senato), with headquarters in Rome.

The AGCM's primary responsibilities include:

a) Ensuring competition and market protection;
b) Combating unfair commercial practice, misleading advertising, and preventing unfair contractual terms;
c) Monitoring conflicts of interest involving government officials;
d) Assigning legality ratings to companies upon request.

The AGCM has also additional enforcement powers, including supervising economic dependence abuses, monitoring contractual relationships in the agri-food sector, and overseeing late payment legislation. The AGCM has of course the duty to be intact with the European Commission[418].

Another Italian authority is the Consob (Commissione Nazionale Società e Borsa), which regulates financial markets and ensures transparency and protection of Italian capital markets. It enforces compliance with financial disclosure obligations, oversees securities markets, and collaborates with the European Securities and Markets Authority (ESMA) to harmonize Regulations at the European level[419].

At the European level, the European Commission is the authority which monitors anti-competitive agreements, abuses of dominant market positions, M&A, and State aid. The Commission has broad investigative and enforcement powers, including conducting inspections, holding hearings, and asking for sanctions. Governments have also a duty to notify in advance of any planned support for business (the so-called State aid)[420].

Some of its functions have been undertaken by Member States since 2004, under the "modernisation

https://europa.eu/youreurope/business/selling-in-eu/competition-between-businesses/competition-rules-eu/index_en.htm accessed 26 June 2025

[416] Federal Trade Commission, *The Antitrust Laws* (2013) https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws accessed 26 June 2025

[417] Autorità Garante della Concorrenza e del Mercato, 'Natura dell'Istituzione e Composizione del Collegio' https://www.agcm.it/chi-siamo/ accessed 26 June 2025

[418] Autorità Garante della Concorrenza e del Mercato, 'AGCM - I Compiti' https://www.agcm.it/chi-siamo/istituzione/indexaccessed 26 June 2025

[419] European Securities and Markets Authority, 'About ESMA' https://www.esma.europa.eu/about-esma accessed 26 June 2025

[420] European Commission, 'EU Institutions and Competition Policy' https://competition-policy.ec.europa.eu/about/what-competition-policy/eu-institutions-and-competition-policy_en accessed 26 June 2025

process"[421]. This allows national competition authorities (such as AGCM) and national courts to apply articles 101 and 102 TFEU (later discussed)[422].

In the U.S., there are two authorities: the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division (DOJ). The FTC has the duty to prevent fraudulent and unfair business practices and provide information to help consumers spot and avoid fraud[423].

The FTC operates through the Federal Trade Commission Act: it is the primary statute of the Commission, under which the Commission is empowered to:

a) Prevent unfair methods of competition, acts or practices affecting the market;
b) Seek monetary redress for conduct injurious to consumers;
c) Prescribe rules preventing unfair acts or practices;
d) Gather and compile information and conduct investigations;
e) Make reports and legislative recommendations to Congress and the public[424]

The DOJ enforces federal laws, seeks just punishment, and ensures the fair and impartial administration of justice[425]. It has both civil and criminal enforcement powers so that it can bring criminal charges against companies and individuals engaging in competition violations.

Both the FTC and the DOJ enforce federal antitrust laws: while their authority sometimes overlaps, they operate complementarily, with each agency specializing in certain industries. The FTC focuses on sectors with high consumer spending (healthcare, pharmaceutical, food, energy, technology). To prevent redundancy, the two agencies coordinate before launching investigations[426].

FTC investigations may stem from premerger filings, consumer or business complaints, congressional inquiries, or media reports. These investigations are usually non-public, in order to protect all the parties involved. If the FTC suspects a violation, it may seek compliance through a consent order, allowing the company to adopt corrective actions instead of admitting wrongdoing.

If no agreement is reached, the FTC may issue an administrative complaint or seek injunctive relief in federal court, and if a violation is found, a cease-and-desist order may be issued. In some cases, the FTC may also seek consumer redress, civil penalties, or other injunctions.

For mergers, the FTC can request a preliminary injunction to maintain market competition during its review. Moreover, the FTC can refer criminal antitrust cases to the DOJ: the latter has in fact full authority over criminal enforcement over specific sectors, such as telecommunications, railroad, airlines, and banking.

Another American authority is the Securities and Exchange Commission (SEC), an independent agency: its main activity is to oversee disclosure and investor

[421] Regulation 1/2003
[422] Idem.
[423] Federal Trade Commission, 'Federal Trade Commission (FTC) | USAGov' https://www.usa.gov/agencies/federal-trade-commission accessed 26 June 2025
[424] Federal Trade Commission, *The Antitrust Laws* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws accessed 26 June 2025
[425] Department of Justice, 'U.S. Department of Justice (DOJ) | USAGov' https://www.usa.gov/agencies/u-s-department-of-justice accessed 26 June 2025
[426] Federal Trade Commission, *The Enforcers* (2013) https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers accessed 26 June 2025

protection of stock markets. It was established in 1934, and its powers were redefined in 2002 with the enactment of the Sarbanes-Oxley Act[427].

In light of this brief description of M&A and competition law between the EU, Italy, and the United States, a comparison is needed to answer the question: which jurisdiction provides a more effective balance between regulatory oversight and market transparency in M&A transactions?

2. Main Body

2.1 U.S. approach (legislation, regulatory bodies)

The U.S. enforces competition law through different acts, incrementally enacted. There are three main pillars in the American system: the Sherman Act (1890), the Clayton Act (1914), and the Hart-Scott-Rodino Act (HSR) (1976).

The Sherman Act was introduced to prohibit "every contract, combination, or conspiracy in restraint of trade" and "monopolization, attempted monopolization, or conspiracy to monopolize"[428]. However, the Supreme Court reduced the scope of application only to unreasonable restraints of trade: for example, a partnership agreement may restrain the trade, but it is not unlawful as a direct consequence. Some other actions, such as price fixing, are considered harmful to competition and are a direct violation of the Act, with any kind of justification. Nonetheless, this flexible provision reduces legal certainty: there is ambiguity in determining which act is capable of restraining competition and which act is considered lawful, determining a sort of "arbitrary decision" by authorities, without a clear provision.

The violation of the Sherman Act can result in several penalties, including criminal prosecution by the DOJ: corporations may face fines of up to $100 million, and individuals up to $1 million and 10 years in prison. Fines may double if the violators' gain or the victims' losses exceed $100 million[429].

In 1914 the Clayton Act was introduced: this act was intended to target specific practices not clearly addressed by the Sherman Act, such as mergers and interlocking directorates. Section 7 of the Clayton Act prohibits mergers and acquisitions that may "substantially lessen competition or tend to create a monopoly"[430]. The act also prohibits certain discriminatory pricing and services between merchants. Additionally, the Clayton Act allows private individuals to sue for triple damage if they are harmed by actions that violate either the Sherman or Clayton Act, and to seek court orders to prevent future anticompetitive practices[431].

In 1976, the Hart-Scott-Rodino Antitrust Improvement Act further amended the Clayton Act, requiring companies to notify the government in advantage of large mergers or acquisitions. It is also established that companies shall provide certain additional information, and until that moment the transaction is suspended: this mechanism allows the

[427] Securities and Exchange Commission, 'Enciclopedia' https://www.treccani.it/enciclopedia/sec_res-c00ac8c6-8cce-11e2-b3e0-00271042e8d9_(Dizionario-di-Economia-e-Finanza)/ accessed 26 June 2025

[428] Sherman Antitrust Act 1890, §§ 1–2 https://www.archives.gov/milestone-documents/sherman-anti-trust-act accessed 26 June 2025

[429] Federal Trade Commission, *The Antitrust Laws* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws accessed 26 June 2025

[430] Clayton Act 1914, § 7 https://www.govinfo.gov/content/pkg/COMPS-3049/pdf/COMPS-3049.pdf accessed 26 June 2025

[431] Federal Trade Commission, *The Antitrust Laws* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws accessed 26 June 2025

authorities to verify whether the transaction violates Section 7 of the Clayton Act[432].

2.2 The Italian approach (legislation, regulatory bodies)

The Italian competition law is regulated under the Italian civil code and under the Law No. 287/1990. The latter was intended to ensure fair competition and prevent anti-competitive practices that could harm consumers and the economy. This law is designed also to align with the European Union's competition rules, in order to regulate market behavior.

Before 1990, the protection of competition law was guaranteed by the application of EU law and the civil code provisions. In fact, there are articles 1595-2601, regulating the legal[433] and contractual[434] limitations of competition, providing also a monopoly situation[435], and sanctions in case of violations. Regarding unfair competition[436], commits acts of unfair competition whoever:

a) Uses names or distinctive signs capable of causing confusion with the names or distinctive signs legitimately used by others;
b) Spreads news and appreciation on the products and on the activity of a competitor, capable of determining their discredit, or appropriates the merits of the products or of the company of a competitor;
c) Makes use directly or indirectly of any other means not in conformity with the principles of professional correctness and capable of damaging the company of others.

Sanctions are prescribed by Article 2599 cc, while compensation for damage is covered by Article 2600.

At the European level, Italy follows EU competition law as agreed by the Treaty on the Functioning of European Union (TFEU)[437] and several Regulations.

The TFEU is intended to organize the functioning of the Union and determine the areas of delimitation and arrangements for exercising its competencies through its institutions. This Treaty, together with the Treaty on European Union (TEU)[438], constitute the Treaties on which the Union is founded. In fact, these Treaties brought a more political and democratic dimension to European integration, beyond the original economic objective of creating a single market.

Articles 101 and 102 TFEU are the first of the three pillars of EU competition law, alongside articles 107-109, and Regulation 139/2004.

Article 101 TFEU prohibits restrictive agreements between independent undertakings: this article, so EU law, applies if these behaviors might affect trade between Member States to a certain degree, and if the consequence is the prevention, restriction or distortion of competition within the internal market[439].

Article 102 TFEU completes the previous one, dealing with agreements between two or more undertakings: 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

[432] Hart-Scott-Rodino Antitrust Improvements Act 1976 https://www.ftc.gov/legal-library/browse/statutes/hart-scott-rodino-antitrust-improvements-act-1976 accessed 26 June 2025
[433] Civil Code, art 1595
[434] Civil Code, art 2596.
[435] Civil Code, art 2597.
[436] Civil Code, art 2598.
[437] Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj/eng accessed 26 June 2025
[438] Treaty on European Union (TEU) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:4301855 accessed 26 June 2025
[439] Moritz Lorenz (ed), *Key Concepts of Article 101 TFEU* (Cambridge University Press 2013) 62–127 https://www.cambridge.org/core/books/an-introduction-to-eu-competition-law/key-concepts-of-article-101-tfeu/5A0F82CEF360A8827DDA4C46E12CE0DE accessed 26 June 2025

internal market in so far as it may affect trade between Member States[440].

The second pillar of EU competition law is the State aid control, regulated under articles 107-109 TFEU. The primary aim is to prevent Member States from granting selective advantages to specific companies that could distort competition and affect trade with the EU.

Article 107 TFEU provides a broad definition of State aid, prohibiting any aid granted by a Member State which distorts competition by favoring certain undertakings or the production of certain goods. There are of course some exceptions[441], allowing State aid for social purposes, natural disasters or environmental protection.

Then, article 108 TFEU establishes the procedural framework of state aid, requiring Member States to notify the European Commission of any planned state aid, and the Commission must assess whether the aid is compatible with the internal market[442]. Article 109 TFEU simply empowers the Council to adopt regulations to implement state aid rules[443].

The third pillar of EU competition law is the EC Merger Regulation 139/2004 on the control of concentrations between undertakings [444], and Regulation 2024/2776, which implements Regulation 139/2004, corrects Regulation 2023/914, and repeals Regulation 802/2004.

Regulation 139/2004 is based on the principle that concentration operations must be notified before they are carried out, and failure to comply with this obligation constitutes a sanctionable act with fines.

Regulation 2024/2776 gives companies the possibility of requesting, with a reasoned request, that a lawful concentration be referred to the Commission if the latter has sufficient information to verify the request. For this reason, standardized forms have been introduced with Regulation 2023/914[445].

3. Comparative section

3.1 Control efficiency: ITALY, EU and the U.S.

Control efficiency in M&A operations depends on the ability of each system to effectively control transactions, ensuring fair competition without excessive delays or long procedures.

To ensure effective control and efficiency, the Italian and European competition system includes several mechanisms.

a) Preventive Control and Merger Regulation

In Italy, the AGCM oversees merger control under Law 287/1990: M&A transactions that exceed specific turnover thresholds must be notified to the AGCM for review. However, its intervention is limited to transactions that affect a national dimension: the AGCM assesses whether a transaction substantially lessens competition in the Italian market, following EU law guidelines (Reg. 139/2004). If a merger has as a consequence the significant reduction of competition, the Authority shall block the transaction or impose remedies.

[440] Moritz Lorenz (ed), *Article 102 TFEU – Abuse of a Dominant Position* (Cambridge University Press 2013) 188–241 https://www.cambridge.org/core/books/an-introduction-to-eu-competition-law/article-102-tfeu-abuse-of-a-dominant-position/FB90CF417C50B1ED22D7808F5E24EBE2 accessed 26 June 2025
[441] Article 107 TFEU, paras 2–3
[442] Article 108 TFEU.
[443] Article 109 TFEU.
[444] Regulation 139/2004/EC https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139 accessed 26 June 2025
[445] Valentina Rocca, 'Concentrazioni fra imprese: modifiche ai formulari per la notifica' (8 November 2024) https://www.dirittobancario.it/art/concentrazioni-fra-imprese-modifiche-ai-formulari-per-la-notifica/ accessed 26 June 2025

Moreover, golden power regulations provide the Italian government with special intervention powers in strategic sectors to protect the interests of the State. Introduced by Law Decree 21/2012, it allows the government to control - and potentially block - operations that could threaten national security or public order. In fact, companies operating in these sectors (such as telecommunications or infrastructure) shall notify the government of relevant transactions. In this way, the government is entitled to impose conditions, impose the veto power, or impose an opposition to the operation[446].

The EU framework ensures that cross-border mergers affecting two or more EU Member States are reviewed by the European Commission rather than national authorities.

b) Ex-Post Investigation, Evaluations and Sanctions

In addition to the preventive control, the AGCM investigates suspected anti-competitive practices: if violations are found, the authority is entitled to impose fines of up to 10% of a company's global turnover[447].

Through the years, the European Commission has published several reports. On 24th June 2024, a new report on the evolution of competition in the EU presented new discoveries on the impact of competition on competitiveness and economic growth. Competition authorities are in fact increasingly interested in understanding the impact of their activities on markets and consumers: the goal is to improve the benefits of competition law for the society as a whole[448].

c) Leniency Program and Whistleblower Protection

To improve enforcement efficiency and prevent unfair competition, Italy has two powerful tools: the EU leniency program and whistleblower protection mechanisms.

The leniency program encourages companies involved in cartels to come forward by offering immunity or reduced finches in exchange for cooperation: the first company to provide decisive evidence receives full immunity, while the others can get reduced fines, based on the value of the cartel. Applicants must provide detailed information, and of course, cease cartel participation and fully cooperate with the European Commission[449].

For example, the Bundeskartellamt's Leniency Program, the German antitrust authority, was established in 2000 and codified in 2021 under section 81h to 81n of the German Competition At (GWB). Its mechanism is almost the same of other Member States: the first applicant who provides sufficient information has full immunity from fines, while subsequent applicants can receive up to a 50% fine reduction, depending on the value of the cooperation[450].

Whistleblowing is a tool for individuals - and not companies like the leniency program - to anonymously report cartel activities and other competition law violations. This tool ensures confidentiality and allows whistleblowers to share crucial information that could help detect and investigate anti-competitive practices.

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[446] Law Decree No 21/2012 https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2012;21 accessed 26 June 2025

[447] Law No 287/1990, art 15 (Sanctions for anti-competitive conduct)

[448] European Commission, 'Ex-Post Economic Evaluations' https://competition-policy.ec.europa.eu/publications/ex-post-economic-evaluations_en accessed 26 June 2025

[449] European Commission, 'Leniency' https://competition-policy.ec.europa.eu/antitrust-and-cartels/leniency_en accessed 26 June 2025

[450] Bundeskartellamt, 'Leniency Programme' https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Leniency_Programme_Info_Leaflet_08_2021.pdf?__blob=publicationFile&v=1 accessed 26 June 2025

d) Judicial Review and Appeals

The TFEU regulates judicial review under articles 263, 261, and 267. Article 263 TFEU provides that the Court of Justice of the European Union (CJEU) can review the legality of legislative acts - including the acts adopted by EU institutions[451]. This means that Member States and private parties are entitled to challenge Commission decisions, with different standards of proof. Effective judicial review serves as a counterbalance to the Commission's extensive powers, ensuring compliance with Article 47 CFR, which guarantees effective judicial review protection.

In contrast, the U.S. adopts a dual enforcement model, where the FTC and the DOJ share responsibility for antitrust oversight. There are similar mechanisms to guarantee control efficiency.

e) Merger Review and Preventive Control

The HSR of 1976 establishes that companies involved in significant mergers must notify these authorities and observe a mandatory waiting period before finalizing the transaction. Unlike the EU's centralized review system for large mergers between Member States, the U.S. allows both the FTC and DOJ to conduct parallel investigations, which can occasionally lead to jurisdictional conflicts. However, such conflicts are rare due to an efficient process which assesses the competence of each case, with a minimum chance of overlaps[452].

The authorities review the deal within 30 days to determine if it could significantly reduce competition. If it is ascertained, the authorities can either request additional information to conduct an in-depth investigation, block the merger or require divestitures.

To improve efficiency, the FTC and DOJ operate through economic modelling, predictive analytics, market data, and AI tools to assess potential anti-competitive effects: the U.S. system is in fact considered more efficient in scrutinizing mergers due to its data-driven approach[453].

f) Ex-Post Investigation and Sanctions

The FTC and DOJ actively investigate companies suspected of violating competition laws, including cartel investigations (often involving criminal penalties), monopoly abuse cases (such as the alleged monopoly abuse of Amazon, Inc[454]), or price-fixing and bid-rigging enforcement, targeting collusive business behavior.

Violators face several penalties, such as fines, structural remedies and behavioral remedies. When it comes to fines, every person who shall make any contract declared to be illegal shall be considered guilty of a felony and shall be punished with up to $100.000.000 in case of companies, and up to $1.000.000 in case of individuals, or imprisonment not exceeding 10 years, depending on the decision of the court[455].

Structural remedies typically re-establish the opportunity for competition by requiring a violator to divest or dissolve certain assets[456]. Behavioral remedies

[451] Article 263 TFEU https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E263:EN:HTML accessed 26 June 2025

[452] US Government Accountability Office, 'Antitrust: DOJ and FTC Jurisdiction Overlap, but Conflicts Are Infrequent' https://www.gao.gov/products/gao-23-105790 accessed 26 June 2025

[453] Federal Trade Commission, *Hart-Scott-Rodino Annual Report* https://www.ftc.gov/system/files/ftc_gov/pdf/fy2022hsrreportcorrected.pdf accessed 26 June 2025

[454] *United States v Amazon.com, Inc* (26 September 2023) https://www.ftc.gov/legal-library/browse/cases-proceedings/1910129-1910130-amazoncom-inc-amazon-ecommerce accessed 26 June 2025

[455] 15 USC § 1

[456] *Massachusetts v Microsoft Corp* 373 F3d 1199, 1233 (DC Cir 2004) (en banc)

are instead imposed to the extent they support the effectiveness of a divestment[457].

Structural remedies are generally preferred in a merger dimension, because they are "relatively clean and certain, and avoid costly government enlargement in the market"[458].

g) Leniency Policy and Whistleblower Protection

In 1993 the leniency policy was introduced in the United States: the DOJ provided predictable and transparent incentives for companies to make voluntary self-disclosures and cooperate in criminal antitrust investigations in exchange for non-prosecution protections. Individuals are also eligible for non-prosecution protection under the Individual Leniency Policy if they self-disclose their participation in a cartel and meet the established requirements[459].

The FTC's Office of Inspector General (OIG) provides whistleblower protection to encourage the reporting of fraud, abuses, and misconduct. Under federal law, employees, former employees and contractors are safeguarded from retaliation when making lawful disclosures. It is also guaranteed confidentiality[460].

h) Judicial Review

Unlike the EU system, which confers direct enforcement powers to regulators, U.S. antitrust cases often go through federal courts. Judicial review plays a crucial role in overseeing antitrust enforcement. Federal courts exercise judicial review to assess the legality of decisions made by regulatory authorities (FTC and DOJ), ensuring that enforcement actions align with statutory and constitutional principles. Through this process, courts evaluate the compatibility with the Sherman Act, Clayton Act, and HSR Act [461].

3.2 Transparency effectiveness

Transparency effectiveness in competition law refers to the clarity, accessibility and accountability of antitrust enforcement decisions. Both Italy and the U.S. have mechanisms to ensure transparency, with a different structure.

The Italian AGCM ensures transparency with the publication of decisions: the authority's rulings, investigations and sanctions are publicly available on its official websites, allowing the public to be informed[462].

The duty to publish information from public administrations is regulated under the Legislative Decree 14th March 2013 No. 33[463]. This practice not only increases legal certainty but also anticipates how competition law is applied in practice.

[457] Joshua Shapiro, 'The End of Remedies?' https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1122&context=ecgar accessed 26 June 2025
[458] Antitrust Division, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, Chapter 9' (25 June 2015) https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-9 accessed 26 June 2025
[459] Department of Justice, *Leniency Policy* (25 June 2015) https://www.justice.gov/atr/leniency-policy accessed 26 June 2025
[460] Federal Trade Commission, 'Whistleblower Protection' https://www.ftc.gov/about-ftc/office-inspector-general/whistleblower-protection-old accessed 26 June 2025
[461] Organisation for Economic Co-operation and Development, 'The Standard of Review by Courts in Competition Cases' https://www.justice.gov/atr/page/file/1314171/dl?inline accessed 26 June 2025
[462] Autorità Garante della Concorrenza e del Mercato, 'Autorità Trasparente' https://www.agcm.it/autorita-trasparente/accessed 26 June 2025
[463] Legislative Decree No 33 of 14 March 2013, art 1

The European Union has implemented several key regulations and directives to enhance transparency. The Regulation (EC) 1/2003 has enforced Article 101 and 102 TFEU: a key aspect is the introduction of a self-assessment system, replacing the previous requirement for companies to notify the European Commission in advance of potential competition concerns. Moreover, it empowered national competition authorities to directly apply EU competition rules.

Another important EU act is Regulation 2022/1925, the Digital Market Act. It imposed strict transparency obligations, targeting large digital platforms (referred to as "gatekeepers". It required platforms to provide clear and fair terms for access to their services. Then, it prohibited self-preferring practices, ensuring that digital markets remain competitive and open to innovation.

In the U.S., both the FTC and DOJ regularly publish detailed reports, guidelines, and analyses that help understand their decision-making processes: in January 2025, they jointly issued the "Antitrust Guidelines for Businesses Activities Affecting Workers", providing insights into how businesses practices impacting workers are evaluated under competition laws[464].

The HSR Act mandates the pre-notification of certain merger operations both to the FTC and DOJ. While specific transaction details remain confidential, the authorities often release summaries of their enforcement actions, enhancing public understanding of their activities[465].

4. Policy section

4.1 Strengths and Weaknesses

In the light of the comparative analysis of both EU and US legal systems about competition law, there are some aspects to take into consideration.

First, the EU adopts a harmonized legal framework, strongly connected to the main goals of the EU, in this case the internal market. By doing so, the structure ensures consistency between Member States, and the sources of EU law (mainly Regulations, Directives and Decisions) are intended to pursue it. However, this approach suffers from excessive procedural complexity and a lack of flexibility due to the rigidity of the legislative mechanism. Another issue is related to the bureaucratic burden and the potential overlap between national and EU authorities.

On the other hand, the US adopts a system based on economic efficiency and judicial enforcement, thanks to the intervention of both the DOJ and FTC. The use of predictive analytics, economic modelling, and fast-track merger reviews allows a faster (and maybe clearer) decision process. Nevertheless, the legal sources are not clear enough: the definition given by the Sherman Act about the "restraint of trade" might cause legal ambiguity, which leads to arbitrary interpretation.

4.2 A possible solution

Both the US and the EU have favorable aspects that could contribute to a more balanced regulatory model: in that sense, a hybrid system has the potential to effectively diminish the weaknesses of both systems.

For instance, the American economic-based assessment approach – and the consequently faster review period – can be combined with the strong

[464] US Department of Justice and Federal Trade Commission, *Antitrust Guidelines for Business Affecting Workers*https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf accessed 26 June 2025

[465] Federal Trade Commission, 'Premerger Notification and the Merger Review Process' (11 June 2013) https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process accessed 26 June 2025

transparency obligations of the EU system: it can be highly effective with the integration of AI systems.

On the other hand, the EU is characterized by robust procedural safeguards and transparency obligations: both the Digital market Act (DMA)[466] and the General Data Protection Regulation (GDPR)[467] are an example of this. While the EU model is slower, it can contribute to long-term legitimacy and clarity, for a stable capital market system.

By consequence, the problem related to the slower review process can be solved by implementing the US research methods, guaranteeing the procedural framework of the EU.

The Google Search (Shopping) case[468] is an example of a long review process: the European Commission opened formal proceedings in 2010 but only issued its decision in June 2017, highlighting the extensive procedural and consultation mechanism, on the one hand contributing to increase legal certainty, but lengthening the enforcement timeline on the other.

Another consideration is therefore important: Anu Bradford, professor at Columbia University, established the theory of "Brussels Effect"[469]. This theory argues that the EU has a unique ability to export its regulatory standards globally, shaping international markets through market mechanisms. This is possible due to the EU's large market size and its supremacy over Member States in some sectors.

If this effect continues, there will be also a "Brussels Effect" when speaking of transparency and fundamental rights, which might lead to an adaptation of the US model.

5. Conclusion

The comparative analysis of the US and EU competition law systems led to the two distinct approaches: the US system has developed economic driven enforcement and a rapid procedure, with a focus on consumer welfare and efficiency. Its procedural speed enables quick resolutions, but its vague statutory language might lead to inconsistencies or divergent interpretations.

First, this can negatively impact businesses, which have difficulty in anticipating the interpretation of the court about the conduct, and increasing legal risk. Then, consumers could have less protection, depending on how a case is pursued.

In contrast, the EU framework emphasizes a stronger bureaucratic procedure and normative alignment across Member States, with more legal certainty, uniformity and procedural formality. The harmonization through the TFEU and the centralization of the enforcement through the EU institutions ensure a more stable regulatory enforcement: for instance, the Court of Justice give consistent interpretations about EU law.

For businesses, this consistency is more beneficial: the uniformity and the transparency can both allow companies to design long-term strategies, because of the coherent interpretation of the COJ. However, the EU rigidity and slowness could lengthen intervention in rapidly evolving markets. Consumers, instead, have full protection and rights if they suffer wrongdoing, thanks

[466] Regulation (EU) 2022/1925 https://eur-lex.europa.eu/eli/reg/2022/1925/oj/eng accessed 26 June 2025
[467] Regulation (EU) 2016/679 https://eur-lex.europa.eu/eli/reg/2016/679/oj/eng accessed 26 June 2025
[468] European Commission, Commission Decision of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 EEA Agreement (Case AT.39740)
[469] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020)

to the introduction of European laws such as the DMA or the GDPR. However, they could suffer from delayed remedies due to the length of investigations.

For Member States, the Eu promotes coherence and alignment, avoiding arbitrary interpretations, and contributing to a shared enforcement through national competition authorities. This centralization could, however, lead to more delays.

In answering the research question, the efficiency of competition law depends on the right balance between control and transparency. The US competition law system has a faster process, yet it suffers from legal uncertainty and diverged enforcement. On the other hand, the EU competition system has better integration and is more consistent, but yet it has a slower procedure.

VBER dispositions and interpretations: how luxury brands safeguard exclusivity in the EU market arena

Featuring a Comparative Analysis of French and Polish Competition Rulings on Luxury Watches.

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Abstract

In the curated world of luxury, exclusivity is not merely a market position, it's the projection of a meticulously crafted strategy towards consumers. In a tightly woven regulatory tapestry as the one elaborated by the European Union, how far can this cultivated distinctiveness stretch before it becomes anticompetitive? Selective distribution and resale price maintenance emerge not as mere legal mechanisms, but as instruments that are carefully employed and leveraged by high-end brands to choreograph perception, price and access. Through the mirror of jurisprudence, it is possible to grasp a fragmented normative arena outlined by VBER dispositions, where national competition authorities oscillate between textual adherence and economic dynamics. The result is a paradox: law is both a constraint and an enabler of brands' legend-building.

Keywords: VBER, Luxury brands

1. Introduction

Luxury brands' establishment and evolution represent a perpetuous effort, continuously aiming at establishing a collective perception of uniqueness and rarity. By prioritizing image exclusivity and curated omnichannel consumer experiences, high-end etiquettes employ sophisticated vertical strategies, often leveraging selective distribution to maintain brand integrity and control. Such branding approach appears to be significantly shaped by the European Union's regulatory environment.

Within the European Union, the Vertical Block Exemption Regulation (VBER) and its accompanying Guidelines on Vertical Restraints (VGL) provide a regulatory framework, offering a safe harbour for certain agreements, thereby exempting them from the

prohibitions of Article 101(1) TFEU. [470] [471] The incidence of such normative panorama is particularly pertinent within the luxury sector and the prevalent model hereby employed, enabling manufacturers to impose specific distribution criteria and resale conditions, crucial in preserving brand aura and consistency across consumer touchpoints. The application of VBER, however, is contingent upon the absence of 'hardcore' restrictions, which consequently highlights the necessity for a nuanced regulatory interpretation to correctly balance brand protection and competition law.

While operating within the bounds of legality, luxury brands might strategically leverage and maneuver through these dispositions in ways that effectively elude the spirit of the system. Indeed, the normative architecture can be legitimately reconstructed to align with the strategic objectives of the luxury industry, making a concrete analysis essential. The role of upholding and safeguarding the teleological aim of the dispositions falls upon competent national authorities, often required to carry out a case-by-case evaluation. But, amidst the intricacies of this landscape, what takes on the role of the polestar? Or better, what should serve as such?

2. Main Body

2.1 Selective distribution in luxury goods

Selective distribution has been gradually integrated as a common practice among luxury brands seeking to safeguard their top-tier positioning and perception. This strategy, wherein solely a restricted cohort of distributors is authorized to retail their goods or services, hinges upon predetermined, qualitative criteria established by the supplier. To ensure legality within the European arena, as delineated in the Court of Justice's Metro ruling, these inputs must be objectively justifiable by the nature of the product, uniformly applied, non-discriminatory, and proportionate to the preservation of the product's inherent qualities.[472] Whilst suppliers are obligated to maintain the integrity of their distributive net, such necessity frequently precipitates in legal disputes concerning product resale, both within and beyond the authorized channels.[473]

To navigate in such intricated realm, the new Vertical Guidelines introduce a relaxation of the "equivalence principle" between offline and online sales from selective distribution systems. The choice comes from a raise in legislator's awareness, recognizing the manifest maturing of online sales into a well-functioning and independent channel that no longer requires special protection nor preferential regulatory treatment. Nevertheless, the right to impose differentiated criteria for online and offline sales, is mitigated by the need to provide that online restrictions do not have the effect of impeding the effective use of the internet.[474]

In the Coty ruling, the European Court of Justice (ECJ) upheld the right of luxury goods suppliers to prohibit their elected distributors from selling contract products via third-party platforms, all without infringing European Union (EU) competition law. The updated regulation codifies such a decision in explicitly stating that

[470] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union [2022] OJ L134/4
[471] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, art 101
[472] Case 26/76, *Metro SB-Großmärkte GmbH & Co KG v Commission of the European Communities* [1977] ECR 1875
[473] I Moustique, 'La distribution sélective et les marques de luxe' (Mark & Law, 24 November 2022)
[474] Contrast, 'Distribution Law Center: Metro v Commission (26/76)' (Distribution Law Center)

banning sales through online marketplaces altogether, as a sales channel, is not a hardcore restriction.[475]

Moreover, the revised VBER strengthens these architectures by allowing suppliers to prohibit exclusive distributors in territories outside the negotiated network from engaging in both active and passive sales to unauthorized distributors. Suppliers may also require distributors to pass these restrictions down the supply chain. Notably, these agreements now benefit from block exemption status, regardless of the product type, selection criteria, or whether such criteria are publicly disclosed. The inspiratory principle is therefore the one of balancing brand control whilst legitimately operating under competition law principles.[476]

2.2 Resale Price Maintenance in luxury distribution

Resale price maintenance (RPM) is where a supplier requires a retailer, directly or indirectly, not to resell the supplier's products below a specified price. [477] Luxury manufacturers often implement the strategy to uphold brand prestige and mitigate free-rider issues among retailers. Such firm grip on price conditions enables to prevent discounting that could erode the overall perceived exclusivity of a product. Additionally, RPM encourages retailers to invest in services like customer education and technical support, as they are assured that competitors cannot undercut them solely on the price aspect. This strategy proves to be instrumental in fostering a consistent brand image and enhancing overall consumer experience but it's subject to rigorous competition law scrutiny due to potential downsides. Although the European Commission classifies resale price maintenance as a hardcore restriction under its Vertical Block Exemption Regulation, this designation does not inherently render it a per se violation of EU competition law as a 'by object' restriction under Article 101(1) TFEU. Rather, competition authorities must establish that a vertical price-fixing agreement results in a tangibly sufficient degree of harm to competition in relation to the pertinent economic context.[478]

The revised Vertical Guidelines offer enhanced clarification on RPM, encompassing price monitoring and specific provisions for Minimum Advertised Prices (MAPs) and fulfilment contracts. MAPs, which restrict distributors from advertising prices below a supplier-set threshold, are generally labelled as hardcore RPM restrictions, thus contravening competition law. However, in limited circumstances, MAPs may be justified under Article 101(3) TFEU, particularly when necessary to prevent a distributor from using the supplier's product as a loss leader. Nevertheless, evidence is needed in establishing that the distributor regularly resells below the wholesale price, and that the MAP is solely instrumental in preventing such below-cost selling. [479]

2.3. So how can luxury brands concretely maintain the perception of exclusivity and continue to promote higher prices on the market without violating selective distribution requirements and RPM?

A careful application of such permissions and limits enables to highly-position a brand's image all the while legitimately acting under competition law. A carefully chosen distribution system, combined with global marketing strategies, ensures that products are sold in environments that maintain the brand's luxury image, justifying premium pricing. In addition, even though

[475] Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941, [2018] 4 CMLR 5
[476] Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:941, [2018] 4 CMLR 5
[477] Competition & Markets Authority, 'Resale Price Maintenance: Advice for Retailers' (29 June 2020)
[478] Antitrust Alliance, *Resale Price Maintenance* (2025)
[479] K Czapracka et al, 'New EU Competition Rules for Distribution Agreements' (White & Case LLP, 25 May 2022)

RPM is prohibited, setting Recommended Retail Prices (RRP) is not, unless accompanied by other measures which have the effect of making it a minimum resale price in all but name. [480]Nevertheless, the boundaries can become blurred. This delicate balance implies that the outcome of such strategies must be evaluated in light of the consequences that it has on the market and on the true intention of the parties, rather than on the sole nomen of the contract. This calls for a proactive and attentive analysis carried out not only by the European Commission but also by national authorities which uphold the role of guaranteeing the correct development of the competition game. The concretization of a luxury brand's need of conveying uniqueness

3. Comparative section: case law under analysis

3.1 Selective distribution violation: the case of Rolex and Autorité de la Concurrence in France

Established in 1905, the Rolex Group is a Swiss purveyor of luxury timepieces, engaged in the design, manufacture, and commercialization of watches under the Rolex and Tudor marques. Within the France area, distribution is executed via Rolex France SAS, a subsidiary of Rolex Holding SA, functioning as the sole authorized importer of Rolex products. The brand commands a dominant position within the French luxury watch market, recognized as the leading brand in virtue of its substantial market share and esteemed brand prestige. The company employs a selective distribution system, exclusively entrusting a network of authorized independent retailers who operate under the purview of a "Rolex selective distribution agreement", which governs the terms of sale and brand representation.

In the decision 23-D-13 of 19 December 2023 the Autorité de la concurrence levied a substantial fine, amounting to €91,600,000, against the distributive model perpetuated by Rolex France (along with its parent entities- Rolex Holding SA, the Hans Wilsdorf Foundation and Rolex SA which are jointly and severally liable).[481]

This decision stems from investigative actions conducted in order to unveil the enforcement of a ten-year prohibition on online sales by the watch brand's authorized retailers. The Autorité assessed that the restrictive clauses within Rolex France's selective distribution agreement constituted a vertical agreement that significantly impeded market competition. Rolex's justifications, predicated on the necessity to combat counterfeiting and unauthorized trade, were deemed disproportionate, as evidenced by the successful integration of online sales with appropriate safeguards by its competitors who face the same risks.

The selective distribution agreement between Rolex and its authorized retailers explicitly prohibited sales via mail order and, by extension, online platforms. The Autorité de la Concurrence ruled that an absolute ban on online sales is incompatible with standards of competition law. Notably, the ADLC highlighted Rolex's own engagement in online sales, citing its collaboration with a retailer to develop a certified pre-owned watch program which guarantees authenticity, thereby demonstrating the availability of less restrictive alternatives.

In computing and imposing such financial penalty, the Authorité expressly condemned the gravity of the practice by defining it as a closing of a marketing channel as well

[480] All New Business, 'RRP Meaning: What Is It and How to Set the Right Price in Retail?' (4 September 2023)

[481] Autorité de la Concurrence, *Décision 23-D-13* (19 December 2023)

as a detriment of both consumers and retailers which perdured for more than a decade. This decision encompasses a fundamental principle expressed on both communitarian and national level, that is: although suppliers have the right to tailor the structure of their distribution networks, such freedom must not inhibit competition. The principle of free organisation cannot extend to restricting resellers' commercial autonomy: prohibiting online sales by retailers distorts competition among them and with the supplier's own online sales. This rule still holds even in cases like these, particularly relevant in luxury brands, in which related products are distributed exclusively or almost exclusively through a network of independent retailers.[482]

3.2 Resale Price Maintenance: the case of Swatch Group Polska and UOKiK

Swatch Group is a global multinational holding company engaged in the production and sale of watches, jewellery, watch movements, and components. As the world's largest watchmaking group, it provides nearly all the essential components for the timepieces sold under its 16 individual brands (among others: Longines, Omega, and Tissot), as well as through its multi-brand retail networks, Tourbillon and Hour Passion.[483]

In Decision No. DOK 4/2015, issued on December 8th 2015, the Polish Office for Competition and Consumer Protection (UOKiK) sanctioned Swatch Group Polska Sp. z o.o. (SGP) and four retail distributors for violating Article 6 of the Polish Antitrust Act.[484] The Competition Authority found that SGP and its retailers engaged in resale price maintenance (RPM) by imposing maximum discount limits, effectively fixing minimum resale prices and restricting competition. As a result, UOKiK ordered the termination of these practices and imposed fines totaling up to 2 million PLN on the involved parties.

The anticompetitive agreement concerned the retail sale of watches under the exclusive distribution in Poland by Swatch Group Polska, encompassing names such as Omega, Tissot, Certina, Longines, Rado, Swatch, and CK. It involved SGP, acting as both an exclusive distributor and retailer, along with four non-exclusive retail distributors, operating since 2005 in physical stores and starting from 2009 also in online sales. The parties set maximum discount levels (rebates) that retailers could apply to the recommended resale prices (RRP), with variations based on brand and distribution channel. These limits changed over time, and SGP actively monitored compliance, imposing sanctions, including supply suspensions, on retailers who deviated from the agreed pricing.

Although the arrangement fits into a classical vertical resale price maintenance (RPM) scheme, it also exhibited hub-and-spoke characteristics through confidential information exchanges between SGP and retailers. Additionally, it contained horizontal elements, as retailers parties coordinated among themselves, influencing the maximum rebates and pressuring SGP to enforce stricter pricing policies. They also reported non-compliant competitors, prompting SGP's intervention to maintain uniform pricing.

The relevance of the case can be grasped if we consider it in relation to the Competition Policy published just a few months before, in September 2015. The document. Adopted by Poland's Council of

[482] Autorité de la Concurrence, 'The Autorité de La Concurrence Fines Rolex €91,600,000 for Prohibiting Its Authorised Retailers from Selling Its Watches Online' (19 December 2023)
[483] Swatch Group, 'Brands & Companies'
[484] Polish Competition Authority, Swatch, DOK1-410-1/13/JM (8 December 2015)

Ministers, aims at outlining the Competition's Authority intended shift towards an economic-based approach to agreements among non-competitors. Specifically, it emphasizes that non-horizontal agreements should be assessed individually due to their potential beneficial outcomes. Consequently, an intervention should occur only when the result of an economic analysis demonstrates an outweigh of anti-competitive effects.[485]

However, such premises weren't implemented in the Swatch case where the reasoning exhibits an absence of economic assessment, and RPM is classified as a restriction "by object", mirroring past judicial interpretations. The Authority bypassed any evaluation of market shares or the impact on consumer welfare, treating the infringement as an automatic contravention of public interest, thereby deviating from a more nuanced, economically informed approach.

This particular case adds up to a series of precedents unveiling the inconsistency in UOKiK's approach to vertical agreements on resale price maintenance, which have still an unclear status in Polish jurisprudence. Such ambiguity complicates businesses' self-evaluation of their distribution systems and their defence against potential charges. The core issue lies in UOKiK's conflicting stance on the classification of RPM: at times, it is treated as an inherently anti-competitive agreement falling under "by object" restrictions, while in other instances, it is considered a practice that may only occasionally produce adverse market effects, thus qualifying as a "by effect" restriction.[486]

This distinction carries significant practical implications. For agreements classified included in the so-called object box, the antitrust authority is not required to conduct a detailed assessment of their specific negative effects. However, if an agreement does not fall within this category, the authority must demonstrate that it has either already produced or is likely to generate anti-competitive effects in the future. Unfortunately, the law provides no clear criteria for determining which agreements belong to the object box and which do not.

As a matter of fact, the previously cited document dating back to 2015 promised the publication of guidelines on the matter, but this commitment was never fulfilled. This translates into an equally inconsistent judicial interpretation with divergent case law. The general perspective aligns with EU jurisprudence, thus placing RPM practices into the so-called object box, but that's not always the rule: in a notable deviation the Warsaw Court of Appeal stated that RPM agreements should not be automatically deemed by object restrictions.[487]

4. Policy section: the EU's regulatory landscape

Under Article 101 TFEU agreements, decisions, or concerted practices among businesses that potentially disrupt trade between EU member states and aim to prevent, restrict, or distort competition within the internal market are prohibited. This includes, notably, arrangements that control pricing, limit production, allocate markets, discriminate in trade, or impose unrelated contractual obligations. Although such arrangements are legally null, exceptions are permitted for those that demonstrably enhance production or

[485] G Materna, 'The Polish Competition Authority Imposes Sanctions for Retail Price Maintenance in the Wristwatch Distribution Sector While Announcing a New Economic-Based Approach to Vertical Agreements (Swatch)' [2016] *e-Competitions Bulletin*

[486] G Materna, 'Czy RPM Może Być Legalne? O Aktualnym Polskim Orzecznictwie' (Hansberry Tomkiel Sp. k., 24 March 2021)

[487] J Polański, 'A Comment on the 30 August 2018 Ruling of the Court of Appeals in Warsaw, Case VII AGa 1114/18 (Ski Team)' (Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2018)

economic efficiency, contingent upon the necessity of the restrictions and the preservation of substantial market competition, thereby ensuring equitable consumer benefit.[488]

In this context, Commission Regulation 2022/720 forms part of the Vertical Block Exemption Regulation (VBER) framework, which provides exemptions for specific supply and distribution agreements from the prohibitions outlined in Article 101 TFEU. [489]This regulatory framework acknowledges that certain vertical agreements, under specific conditions, may enhance efficiency and market integration rather than restricting competition, thereby warranting exemption from general antitrust prohibitions.

In particular, the adjourned framework is the result of an extensive evaluation regarding the evolving online platform economy, acknowledging that traditional concepts may not fully capture its complexities. As a matter of fact, key revisions regard the role of online intermediation services which can benefit from block exemptions, as well as the safe harbour of dual distribution and the connected practice of dual pricing, all needs resulting from the rise of online sales.[490]

Among others, the role of luxury strategies and related case law proves to be directly connected with certain crucial aspects of the regulation, in particular with the premises of selective distribution and the practical outcomes of resale price maintenance.

4.1 The interaction between the normative landscape and the case law

The interplay between the communitary legislation and domestic application oftentimes proves to be the starting point for a discussion regarding the efficiency of the dispositions themselves.

While VBER aims to create a safe harbor for efficiency-enhancing vertical agreements, its application reveals inherent tensions. National authorities are often more attuned to the specific competitive dynamics and consumer welfare issues within their own markets, which can influence their enforcement priorities and the remedies they impose. The Rolex case highlights this, where a seemingly standard selective distribution agreement was deemed anti-competitive due to an absolute online sales ban, a restriction the VBER framework now explicitly addresses more stringently in light of the growth of online retail. In addition, while VBER lists hardcore restrictions, the interpretation of what constitutes such a restriction in specific contexts can be debated, as seen in the Swatch case regarding maximum discount limits effectively acting as minimum prices. [491]

These rulings highlight a dual concern: first, whether the broadness of legal dispositions doesn't substantiate into ambiguity; and second, how luxury players can leverage any regulatory silence to advance their high-end positioning.

5. Conclusion and Considerations

Luxury brands seem to have found their way to operate, whilst benefiting from it, within a regulatory grey zone: by skilfully leveraging the ambiguities in competition law they reinforce their exclusivity while

[488] Jonida Lamaj, 'Interpretation of Articles 101 & 102 of TFEU' (2016) IV(8) *European Academic Research*
[489] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union [2022] OJ L134/4
[490] K Czapracka et al, 'New EU Competition Rules for Distribution Agreements' (White & Case LLP, 25 May 2022)
[491] B Rohrßen, 'VBER 2022: The Safe Harbour for Distribution Agreements' (Springer International Publishing 2023)

maintaining high prices. The interrelation between selective distribution and resale price maintenance serves as a prime example of how these brands capitalize on legal uncertainties to structure their market presence. Particularly, the cases of Rolex in France and Swatch in Poland illustrate how national authorities often oscillate between strict legal interpretations and economic pragmatism.

A significant methodological limitation within competition law enforcement lies in the frequent assessment of specific practices in isolation, rather than in the broader economic context. While selective distribution is often legitimized through the lens of brand preservation, and resale price maintenance is typically categorized as per se anticompetitive, the reality is more nuanced. The very mechanisms employed by luxury brands to mitigate free-riding and uphold brand equity can simultaneously function as instruments of market manipulation, effectively foreclosing distribution channels and suppressing price competition. Notably, regulators vacillate in applying consistent economic reasoning.

The Swatch case in Poland is particularly revealing. Despite the Polish Office for Competition and Consumer Protection's stated policy shift in 2015 towards a more economics-based assessment, the case reveals a failure to conduct a comprehensive cost-benefit analysis. The decision to treat RPM as a per se "by object" restriction rather than evaluating its actual market effects reflects a rigid application of competition law that disregards economic realities. By contrast, in the Rolex case, the French Autorité de la Concurrence took a stronger stance, recognizing that an outright ban on online sales harmed consumers and distorted competition. Nevertheless, even in this instance, the analytical emphasis appeared to center on market foreclosure rather than a comprehensive evaluation of broader economic consequences.

The European Commission's Guidelines on Vertical Restraints, supplementing VBER, aim to standardize the application of Article 101 TFEU throughout the European Union by providing a comprehensive interpretative framework. The rationale is that in order to diminish uncertainty in the EU panorama, national authorities should increasingly harmonize their assessments with these guidelines. But can this amount to an efficient solution in balancing exclusivity and competition?

In practice, national authorities still wield significant discretion in their evaluations, frequently without robustly integrating an economic analysis that is able to address the inherent tension between luxury brand strategies and fundamental competition principles. A more principled approach would entail moving beyond presumptive categorizations of practices usually employed. The focus should shift to a rigorous assessment of whether these strategies, commonplace in the luxury sector, genuinely promote market efficiency or merely function to entrench dominant positions and restrict competitive dynamics, often citing the need to preserve brand exclusivity and prestige.

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The Impact of EU Legislation on Consumer Protection in Competition Law: A Comparative Analysis of Amazon's Market Dominance in Pre-Brexit UK and Post-Brexit UK

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Abstract

This paper examines how European law affects consumer protection in competition law. The analysis is carried out through a comparison between pre-Brexit legal context and post-Brexit one, considering the dominant position that Amazon [492]plays in the digital economy. Priorly giving a background about the meaning of Consumer Law and the way it is shaped by European legislation, the paper will focus mainly on the legislative differences that occurred in England after leaving the European Union, to assess whether and how consumer protection has changed, and whether this protection is effective or not. The arguments presented will be supported by two well-known case laws, which will help to grasp the differences between a protection based on European standards or on national ones. In conclusion, some limitations that consumer protection still maintains today, despite its common European basis, are highlighted, offering possible solutions to a theme of ever-increasing importance.

[492] Lena Hornkohl and David Pérez de Lamo, Competition Law and Friendship: Presenting the Rubén Perea Award, Journal of European Competition Law & Practice, Volume 12, Issue 3, March 2021, Pages 165–166, Competition Law and Friendship: Presenting the Rubén Perea Award

1. Section heading

Digital platforms have long been experimenting with an increasingly central role in the lives of consumers[493], defined as the natural people who act from the purposes other than any entrepreneurial, commercial, craft or professional activity carried out. The current personalization [494] of marketing offers both benefits and vulnerabilities to consumers, that by interfacing with companies who are enabled to target their psychological weaknesses, they lose part of their autonomy, which goes in favor of a power asymmetry instead. European legislation has a wide impact [495]on consumer protection in competition law and contributes to maintaining fairness and transparency in online B2C contracts. It has a crucial importance in regulating[496] dominant market players like Amazon[497], the world's largest online retailer and a prominent cloud service provider, which offers a variety of products to a varied audience of consumers, of different ages, genders, geographical areas and different lifestyles. Dealing with more than one hundred countries, Amazon focuses on customer buying patterns and target groups based on loyalty and purchase habits leveraging its product variety, competitive pricing, and convenience to attract different levels of engagement[498]

The role that European legislation plays on consumer protection can be discovered by considering the following normative texts, that indirectly shape the legal framework of the EU Member States, obliged[499] to align with these rules. And so is Amazon. The overarching legal instrument that regulates unfair commercial practices that occur before, during and after a business to consumer transaction is the Unfair Commercial Practice Directive ("UCPD[500]"). It enables national enforcers to curp a broad range of unfair business practices: among these there are untruthful information to consumers or aggressive marketing techniques to influence their choices. The UCPD [501](2005/29/EC) contains general prohibitions of misleading and aggressive commercial practices (arts 6 to 9 UCPD). Among these misleading and aggressive practices are deemed unfair under all circumstances, like falsely stating that a product will only be available for a

[493] Legislation.gov.uk, Consumer Rights Act 2015, 01/10/2015, Consumer Rights Act 2015.

[494] Mireia Artigot Golobardes, Algorithmic personalization of consumer transactions and the limits of contract law, Journal of Law, Market & Innovation, Vol. 1 (2022), Algorithmic personalization of consumer transactions and the limits of contract law | Journal of Law, Market & Innovation

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[499] Publication Office of European Union, EUR- Lex, Legal acts - EUR-Lex

[500] Duivenvoorde Bram, Consumer Protection in the Age of Personalised Marketing: Is EU Law Future-proof, European Papers, p.636, Consumer Protection in the Age of Personalised Marketing: Is EU Law Future-proof?

[501] European Commission, EUR-lex, Unfair commercial practices directive, 17 Dec 2021, Unfair commercial practices directive - European Commission

very limited time, and creating the impression that the consumer cannot leave the premises before signing a contract. Finally, art. 5 UCPD [502]prohibits commercial practices that are "contrary to the requirements of professional diligence". This notoriously vague general clause essentially functions as a "safety net" in the UCPD: if a practice is neither misleading nor aggressive, the practice may still be prohibited as unfair under Article 5 UCPD: therefore descriptions and false discounts are prohibited. The Consumer Rights Directive (2011/83/EU)[503] applies to all contracts between a consumer and a trader, to which member states are forced to adapt, unless the directive itself admits a deviation from its rules. It harmonizes national consumer rules, providing the same strong rights across the EU. Therefore, Amazon has to display prices, the conditions of the product, the return policies: for example consumers have a 14-day withdrawal [504] period for online purchase.

In 2019 several consumer protection directives were updated by the so- called Modernisation Directive[505], also known as the Omnibus Directive [506] (2019/2161), that provided a stricter rule in relation to personal pricing, establishing that companies had to disclose that they offer consumers a higher or lower price depending on their location (no further needs, anyway, of disclosing the extension or the data used for this). It obliges to inform about the prior price [507]in case of price reduction, and to check whether the reviews come from consumers of the purchased product or service; to inform whether the third party offering the goods is a trader or not (depending on this the possibility to exercise consumer protection rights). Moreover, on the pre contractual stage consumers must be properly informed about their rights and how they can be exercised[508].

The General Data Protection [509](GDPR) (2016/679/EU) protects the natural person in relation to the processing of the personal data[510], which is defined as a fundamental [511] right, even if

[502] Publication Office of the European Union, EUR-lex, Official Journal C 526/2021, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2021:526:FULL

[503] Publication Office of the European Union, EUR-lex, Directive 2011/83/EU of the European Parliament and of the Council, 25 Oct. 2011, 2011/83 - EN - consumer rights directive - EUR-Lex

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[508] Publication Office of the European Commission, EUR-lex, Directive (EU) 2'23/2225 (36) Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and

[509] Publication Office of the European Union, EUR-lex,Regulation (EU) 2016/679 of the European Parliament and of the Council, 27 April 2016, Regulation - 2016/679 - EN - gdpr - EUR-Lex

[510] Altalex, Page Expired, Art. 1 GDPR (Regolamento UE 2016/679 Art. 1 GDPR - Oggetto e finalità

[511] FRA, European Union Agency for Fundamental Rights, Article 8 - Protection of personal data, 14.12.2007,

not absolute, whose necessity is shaped by the changes in society brought by technology and the free availability of information. This is the reason why Amazon [512]always needs consent to collect user data, which cannot be exploited for targeted ads without transparency. The Digital Services Act [513](DSA) is an attempt to regulate online intermediaries, imposing online platforms to let consumers know on the basis of what data their data are personalized. The strategic role that European legislation plays on consumer protection can also be traced in art 102 TFEU[514], which establishes that " 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". This is an interesting point considering that European Commission has investigated [515]Amazon for self-preferencing, since it favored its own products over third party sellers in search rankings. The Digital Market Act [516](DMA) (Regulation 2022/1925) classifies Amazon as a "gatekeeper" [517](together with other twenty-four core firms, like Alphabet, Apple, ByteDance, Meta, Microsoft). The DMA is one of the first regulatory tools to comprehensively regulate the gatekeeper power of the largest digital companies: it complements, but does not change EU competition rules, which continue to apply fully.

II. Analysis

The analysis will now develop by making a comparison between UK pre-Brexit and post Brexit, to see the effects of the European normative field on the rights of the consumers. As long as the UK was a member of the European Union a substantial portion of consumer protection law was derived from European directives and regulations that were binding. The Consumer Rights Act [518]2015, built upon EU consumer law principles, set out basic rules which govern how consumers buy and businesses sell to them in the UK, setting out for the first time rights on digital content in legislation, giving consumers a right to repair or replace the faulty digital content, and establishing the consequences for the lack of reasonableness and acre in providing the service. It

https://fra.europa.eu/en/eu-charter/article/8-protection-personal data#:~:text=Everyone%20has%20the%20right%20of,right%20to%20have%20it%20rectified

[512] Cromack.J, Why Amazon's GDPR fine really matters, 23 Jan. 2025, Why Amazon's GDPR fine really matters: Consent in marketing

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[514]Publication Office of the European Union, EUR-lex, Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 102 (ex Article 82 TEC) , 09/05/2008, EUR-Lex - 12008E102 - EN

[515] Colangelo Giuseppe, Antitrust Unchained: The EU's Case Against Self-Preferencing, GRUR International, Journal of European Law and IP law, Vol. 74, issue 4, Antitrust Unchained: The EU's Case Against Self-Preferencing | GRUR International | Oxford Academic

[516] European Commission, Digital Market Act (DMA), 2022, Digital Markets Act

[517] European Commission, Digital Market Act (DMA), 2024, DMA designated Gatekeepers

[518] Conway Lorraine, Consumer Rights Act 2015, 17 May 2022, Consumer Rights Act 2015

remains in force after the exit of UK from EU[519], but it lacks specific rules addressing Big Tech companies.

The abuse of dominant position was forbidden by the Competition Act 1998[520], and the protection of personal data was assured by the Data Protection Act 2018[521]. The Competition Act remained in force also after Brexit, resembling art 101 TFEU in Chapter I [522]and art 102 TFEU in Chapter II. The protection from misleading, aggressive and unfair commercial practices can be traced in Consumer Protection from Unfair Trading Regulation [523]of 2008. The Consumer Contracts [524](Information, Cancellation and Additional Charges) Regulations 2013 implements most provisions of the EU Consumer Rights Directive[525], ensuring clearness about the bargaining process from consumers and traders regarding information provided by traders to consumers; cancellation rights and responsibilities; and measures to prevent hidden costs. Since the regulation is applied to all the United Kingdom it concurs to an overall harmonization of consumer for contractual rules across the EEA[526], regarding pre contractual information. Consumers had the right to claim damages for defective products under the Consumer Protection Act [527]of 1987, that is construed accordingly with the product liability Directive, and under the Sale of Goods Acts [528]of 1979.

The primary goal of the European Union (Withdrawal[529]) Act 2018 was to provide a legal continuity towards the transposition of directly applicable already existing EU laws into UK laws: the result was the creation of a new category of domestic law known as "retained law[530]" (REUL), that was directly implemented in UK law from EU law, such that at least for UK consumers buying from UK businesses the protection is quite unchanged: an example is represented by Consumer Protection from Unfair Trading Regulations (2008). Since the Government has the

[519] Conway Lorraine, Brexit: UK consumer protection law, The House of Commons Library 21 May, 2021, Brexit: UK consumer protection law - House of Commons Library

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[527] Consumer Protection Act 1987, Which?, 4 Aug. 2022, Consumer Protection Act 1987 - Which?

[528] HM government and GDS,, legislation.gov.uk, 2015, Sale of Goods Act 1979

[529] House of Lords, Select Committee on the Constitution, 9th Report of Session 2017–19, 29 Jan. 2018, European Union (Withdrawal) Bill

[530] Conway Loren, Brexit: UK consumer protection law, House of Commons Library, Number 9126, 21 May 2021
Brexit: UK consumer protection law

right to choose to amend or replace retained EU laws in consumer contracts, online sales and digital content, the result is that it is possible to diverge from EU consumer protection law over time. Moreover, the interpretation of UK consumer protection law may diverge [531]from the equivalent law because the Court of Appeal and the Supreme Court, differently from the lower courts, have the right to diverge from the decisions of the European Court of Justice, and because any future decision of the same CJEU will not set precedents in the English legal system. The enforcement power of the European institutions, like the European Commission or the European Court of Justice, has failed: in fact, after Brexit, the competence on consumer protection is solely on UK law. Because of this the Competition and Market Authority [532](CMA), established by the Enterprise ACT 2002 to investigate anti-competitive practices, only has the enforcement power on these matters. If the protection is similar in the national context (where there is a case-by-case approach, and not a systematic one), a change has occurred at a transnational level. In fact, UK courts may need to seek redress through the courts of the state in which the trader resides rather than the UK courts; the enforcement of a UK court judgement against an EU based trader may be difficult or costly; UK consumers can't use anymore the EU-based mechanisms and the EU's Online Dispute Resolution (ODR) Platform. Then UK consumers may experience a weakened protection in cross border disputes with EU based businesses. Anyway [533]the Government has confirmed that the CMA's new powers to directly enforce consumer protection laws will come into force on 6 April 2025. As a result, from 6 April, the CMA will be able to investigate and impose fines of up to 10% of a company's global turnover for breaches of consumer law. The commencement order and the CMA Rules which will apply to consumer law enforcement have also been published. Particularly, these financial penalties will be imposed on businesses or individuals which fail to comply with mandatory information requisitions, to be served on parties outside of the UK provided that there is some form of "UK connection" too. In terms of remedies the CMA can impose on one side enhanced consumer measures (ECM), so that a business will be required to compensate consumers or otherwise remedy the breach, to impose measures in order to improve compliance with consumer law and prevent further breaches and help consumers have the relevant information to enable them to make an informed choice. On the other side it can impose issue online interface notices (OIN), which impose obligations on businesses, including third parties outside the UK, to take certain actions (or refrain from taking actions) with respect to websites or any form of digital content which is used to promote goods or services to UK consumers[534]. As Sarah Cardell,

[531] Turner Robert, The effect of Brexit on Uk consumer protection law, Jan. 11 2021, The effect of Brexit on UK consumer protection law

[532] gov.uk, About us - Competition and Markets Authority - GOV.UK

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[534] Evans Matt, Kamerling Alexandra, Szlezinger Sam, Lessar Sophie, McKinlay John, Cumber Chloe, CMA's new consumer enforcement regime comes into force in April 2025, DLA PIPER, 7 Apr. 2025, CMA's new

CMA CEO, said, the new consumer protection powers will be used to promote growth by promoting consumer trust and confidence through deterring poor corporate practices, and allows the CMA to support those businesses that do the right thing, giving them a level playing field in which to compete fairly. UK lacks the DMA's [535]ex ante rules, replaced by the Digital Markets, Competition and Consumers Bill: without the automatic protection assured by standardized EU regulations the variability of individual case enforcement comes into play. The UK authorities are no longer able to carry out joint enforcement with other EU authorities and have only limited ability to carry out coordinated enforcement. This is a particular issue in the context of larger transnational firms, where such joint or coordinated action can be especially effective[536]. Directive 2019/2161 on the better enforcement and modernisation of consumer protection rules has now been implemented across EU member states, but not the UK. This measure enhances existing EU consumer protection law, with a particular focus on digital services. It applies to UK firms when trading within an EU member state, including the Republic of Ireland. The EU Digital Services Act, which is currently being implemented, will further enhance protection for consumers utilising online platforms – for example, through requirements for transparency around recommender systems and advertising, and special obligations for marketplaces such as vetting the credentials of third party suppliers. For product recalls, the UK Office for Product Safety and Standards established a replacement site in April 2022. However, there is no legal obligation on UK authorities to notify EU authorities of product safety issues, or to act on the basis of the EU reports[537].

The aims that appear from the current policy of both UK and EU legislation are similarly [538]shaped to modernize consumer protection law, as it appears from the Consumer Green Paper and the Eu's New Deal for Consumers, but in the longer term the divergence will increase, affecting the position of the consumer. The Consumer protection Cooperation Regulation (2017/2394) has not been revoked, but it has been amended [539]to strengthen the enforcement of consumer protection rules across the EU. The P2B [540]Regulation, that is the set of rules for creating a fair, transparent and predictable business environment for smaller businesses and traders on online platform, will be applied to platforms based

consumer enforcement regime comes into force in April 2025 | DLA Piper

[535] European Commission, commission.europa.eu, The Digital Markets Act: ensuring fair and open digital markets - European Commission

[536] Fletcher Amelia, Consumer Protection p.50, Uk Regulation after Brexit, 19 Oct. 2022, UK Regulation after Brexit

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[538] Conway Lorraine,Brexit: UK consumer protection law, House of Commons Library, 21 May 2021, Brexit: UK consumer protection law - House of Commons Library

[539] Publication Office of the European Union, EUR-lex, Regulation 2017/2394,of the European Parliament and of the Council,, 12 Dec, 2017, Regulation - 2017/2394 - EN - EUR-Lex

[540] European Commission, EUR-lex-europa-eu, report 12.9.2023, on the first preliminary review on the implementation of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services

in UK used for EU businesses, together with an additional legislation that creates a dual regime but that is restricted to UK only. Several differences can be traced between the pre-Brexit and the post-Brexit context. In particular we can consider them at the level of the legal basis (art 102 TFEU applied by European Commission; UK Competition Act 1998, Consumer Protection from Unfair Trading Regulations under the UK CMA), but also in the different scope of the enforcement procedure, that after the Withdrawal is more open to remedies and structural intervention than to commitments to avoid formal penalties, and with an (obvious) more limited territorial range of action. The different levels of protection guaranteed to consumers, under the influence of European legislation or without, can be traced looking at two relevant cases which saw Amazon involved in a preferential treatment in product sales.

In November 2020, Amazon has been charged [541]by the European Commission with using the sales data of independent retailers selling through its sites to illegally gain an advantage in the European marketplace, distorting competition breaching EU Antitrust Law. The Commission also opened a second investigation into the possible preferential treatment of Amazon's own retail offers and those of marketplace sellers that use Amazon's logistics and delivery services. The executive Vice President Vestager, in fact, has stressed the need to maintain fair competition and equitable online consumer access for all sellers. The commercial practice, that saw Amazon as both a marketplace host and competing retailer, appeared to be in contrast with Art 102 TFEU. In fact Amazon's retail division [1] European Commission, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practicesNov. 10 2020, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices systematically uses competitor data to optimize its product offerings and strategic decisions, prioritizing its products and adjusting pricing, thanks to the use of some algorithms[542]. A potential counterargument posits that Amazon's operational practices do not constitute an abuse of dominant market position, since market dominance per se is not illicit; rather, illegality arises from behaviors that demonstrably impede competitive market dynamics. In fact, Amazon's platform gives the opportunity to sell their products to 150,000 businesses[543], that generate mutual benefits for both consumers and sellers. Assuming this, both consumers and sellers are favored by the central position of the platform in the market: consumer welfare is enhanced thanks to curated product selection, while sellers are incentivized to offer superior contractual terms and product quality in

[541] European Commission, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practicesNov. 10 2020, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices

[542] Maio Nicolò, Re Beatrice, How Amazon's E-Commerce Works?, International Journal of Technology for Business (IJTB), How Amazon's e-commerce works?

[543] Amazon, aboutamazon.eu, June 22, 2023, Creating opportunity for Europeans across EU Member States

order to be preferred. Therefore, according to this view, efficiency and market competition are improved. Anyway, this position has to be rejected, because it falls within the typical cases identified by art 102 TFEU[544]: by favoring its own products Amazon limited consumer choice, disadvantaging competitors driving them out of the market (letter 'c' art 102 TFEU); thanks to a unique access to data inaccessible to other sellers it created an unfair advantage that violates the principle of fair competition (letter 'd' art 102 TFEU).

Similar scenario but different outcome concerns a case that took place in July 2022, when the UK's CMA commenced an investigation [545]into Amazon's UK Marketplace to address potential anti-competitive conduct that could harm consumers. In order to address CMA's competition concerns, Amazon has committed to ensure Amazon doesn't use competitor data to gain an unfair advantage over other sellers; to guarantee equality in all product offers while deciding which of them will be featured in the "Buy Box"[546]; to allow a direct negotiation between third party businesses and independent providers of Prime delivery costs to reach better rates, that benefit consumers of lower delivery costs. The CMA has also required an independent trustee who will monitor the company's compliance with these commitments. The mechanism procedure is different, because the investigation was handled by the UK CMA: the approach is no more centralized but oriented to UK market and its consumers only, by applying the independent UK law. As a consequence of the no longer EU-centralized approach the inevitable complexity of the procedure that arises due to regulatory divergence causes a loss of harmonization and legal certainty in favor of a greater national discretion, even if the UK might be faster in responding to emerging concerns. Therefore greater pragmatism comes at the expense of predictability. Finally, bearing in mind what European legislation offers on the legislative and jurisdictional level, its importance for the protection of consumers is undeniable. Its action has a uniform impact on all *member states*, *thus ensuring uniform protection in all* of them. The exit of UK from EU has not determined an expansion of consumer rights thanks to its autonomy from European legislation. In fact, the focus was on deregulation [547]rather than enhancing consumer rights: the effect was a partial protection of consumer rights, relying on the national legislation only. The UK could reduce consumer protections under political or economic pressures, lacking the minimum standards granted by directives and regulations across Europe.

Policy section

While it is true that a common European legislative basis strengthens and improves consumer protection, some aspects require a more

[544] Publication Office of the European Union, EUR-lex, Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 102 (ex Article 82 TEC) , 09/05/2008, EUR-Lex - 12008E102 - EN

[545] gov.uk, competition and markets authority, 6 July 2022, CMA investigates Amazon over suspected anti-competitive practices - GOV.UK

[546] European Commission, ec.europa.eu, 20 Dec. 2022, Press corner | European Commission

[547] Conway Lorraine, Brexit: Uk consumer protection law, 21 may 2021, Brexit: UK consumer protection law - House of Commons Library

careful analysis. The speed that characterizes the digital economy clashes with the slowness that such practices often require in their application. This has led to the question of the effective protection guaranteed to consumers in digital platforms such as Amazon. A possible solution would be to readapt the legislative provisions now envisaged to the specific digital economy pattern, for example by increasing the scope of the DMA and DSA. "The current initiatives such as the data strategy, the AI regulation, the Digital Services Act and the European Cloud Federation appear still too scattered and uncoordinated to really deliver on Europe's ambition to lead the world in the sustainable use of technology", says Andrea Renda[548]: this determines the urge to provide stronger regulatory tools to deal with the dominance of companies like Amazon in the digital marketplace. In fact new and more sensitive issues should be regulated with specific regulations (for example regarding algorithms, accountability for users and third parties on the platform), so that the professional-consumer relationship would be made increasingly transparent. In addition, concerns arise regarding the impact that some provisions play on some actors in competition law: for example is art102 TFEU sufficient to forbid the abuse of dominant position granting an adequate protection to consumers that interact with digital platforms? Because of the need of fairness in commercial practices, especially when a weak party like a consumer is involved, the control exercised by EU should be maintained and reinforced. The control on the companies may be done by imposing stricter rules, accompanied by stronger penalties (maybe also standardized) in case of violation, and an overall clarity about rights and duties of the parties involved, in favor of their awareness. Looking at the UK field, instead, a unique legislative text could help to ensure uniform consumer protection, placed under the control of a uniform authority endowed with broader powers, both in the investigative phase and in the sanctions imposition phase, and in any case to be coordinated with international authorities. Despite no longer being part of the European Union, the UK should still act in line with the principles of the Union, especially in a very sensitive field such as consumer protection. This could also be justified in relation to the economic sphere: the numerous directives always imposed by the EU on consumer protection have always been a means to indirectly promote the good functioning of the market. And this could also apply to the United Kingdom, who could voluntary mirror parts of the European legislation..

Conclusion

In conclusion, this paper has analyzed the importance of European legislation in shaping consumer protection law, comparing the pre-Brexit and post-Brexit normative and jurisdictional fields, and keeping in mind the case of Amazon. The topic presented is of crucial importance in the international legislative context because it regulates situations that occur all over the world and that require compliant protection. It is then crucial to underline the strict legislative adaptation that is

[548] Renda Andrea, Making the digital economy "fit for Europe", Wiley, https://openfuture.eu/wp-content/uploads/2022/04/Making2520digital2520economy2520fit2520for2520Europe2520-2520Andrea2520Renda.pdf

necessary due to sudden changes in society, to the rapid exchanges of information and commercial practices, which place the consumer in an increasingly unstable position and therefore increasingly in need of protection.

