Chapter IX

DOMINANCE, BIGTECHS AND DIGITAL PAYMENT SERVICES: REGULATORY APPROACHES[1]

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ABSTRACT: After defining Bigtechs for the purpose of this paper, it presents the status of their activity in the payment and E-money services EU internal market. Next it deals with the regulatory approaches called to face the leverage risk raising from the impact of their dominance in primary markets on the level playing field between the incumbents and these newcomers in the above mentioned financial services market. The regulatory mechanisms offered by the approaches based on the Law on Financial Services and on Competition Law are explored. The paper ends with some final remarks.
Keywords: dominance, Bigtechs, regulation, payment services, E-money services, competition, antitrust

1. The resources required for the delivery at the III Valencia International Meeting on Competition Law «Dominance, dependence and mergers in digital markets» of the presentation that gives rise to this work, as well as for its drafting, have been financed by the Regional Government of Aragon Reference Research Group on Legal Management of Innovative Business, Instruments and Organisations - LegMiBIO (S12_23R), as well as by the research project of the of the Spanish Ministry of Science, Innovation and Universities (2023-2026), entitled «Blockchain and Corporate Law (2). Bigdata, Fintech and the protection of the user of financial services» (I+D PID2022-137502NB-I00).

I. FOCUS

This paper aims to focus on the concerns raised by the activity of Bigtechs as financial services providers, more precisely, as providers of services in the digital payment services market, the need for regulation of such activity and the options to regulate it. These undertakings are dominant, i.e., they have a high market power, in primary markets, which are non-financial services markets; however, this dominance may have an impact on the competition in secondary markets, in this case, the payment and E-money services market, when they act directly or indirectly as providers in this market. The underlying problem that this paper wants to deal with is the leverage risk raising from the impact of said dominance on the level playing field in the payment and E-money services market between the already existing incumbents (i.e., banks, financial services entities and payment institutions) and these newcomers; and, if needed, how to regulate this power fight from a competition policy perspective. This is one of the main open fronts in this crossroad where Competition Law and the Law on Financial Services necessarily meet when considering the provision of financial services in digital markets. The other main open front of the battle between incumbents and newcomers, which is not going to be dealt with in this paper, is Open finance / Open banking, where an attempt to find a balance between innovation (i.e., Fintech) and competition marks the regulatory path. Here, the reference point is given by the Proposal for a Regulation on a framework for financial data access.[2]

After defining Bigtechs for the purpose of this paper, the current status of the activity of Bigtechs in the payment and E-money services EU internal market is presented. Next the paper deals with the regulatory approaches called to face the above mentioned risk, starting to explore the regulatory mechanisms offered by the approaches based on the Law on Financial Services and on Competition Law. The paper ends with some final remarks.

II. BIGTECHS

Even if it is generally known which undertakings are meant when tagged as «Bigtechs», in fact, they are not easy to be legally defined[3]. This is the situation

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2. Proposal for a Regulation of the European Parliament and of the Council on a framework for Financial Data Access and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/2554 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-:52023PC0360); see Pastor Sempere, C., «Open Finance», *Cuadernos de Derecho y Comercio*, no. 80, July-December 2023, pp. 17-60.

3. See, for example, Zurimendi Isla, A., *Gigantes tecnológicos, distribución online y Derecho de la Competencia*, Thomson Reuters Aranzadi, Cizur Menor (Navarra), 2021, pp. 13-14, where there is no definition, even no attempt to define what Bigtechs are: it is just said that Bigtechs are technology-based undertakings which have followed a strategy of constant growth «to the point of generating

at the present time in EU Law. For the purpose of this paper, and departing from the approach taken by the Financial European Supervisory Authorities (ESAs), Bigtechs can be defined as «technology companies with extensive customer networks; they include firms with core businesses in social media, internet search, software, online retail and telecoms»[4]. In this group of undertakings, the ESAs includes: Alphabet (previously Google), Amazon, Ant Group (Alibaba), Apple, Baidu (Du Xiaoman), JD.com, Mercado Libre, Meta Platforms (previously Facebook), Microsoft, NTT Docomo, Rakuten, Samsung and Tencent[5]. In fact, these undertakings are Mixed Activity Groups (MAGs); this feature is the ground for having the financial supervision authorities a poor visibility over the intra-group connections and dependencies.

Having a look at the above identified undertakings, there is a big match between them, the Gatekeepers designated according the Digital Markets Act[6] (DMA) and Very Large Online Platforms and Search Engines (VLOPSE) designated according the Digital Services Act[7] (DSA), being these Bigthechs also undertakings as addressees of Competition Law, i.e., of Art. 102 TFEU. The conceptual trouble is clear to be seen here, as this match takes place not from a conceptual perspective, but as the result of the application of different concepts, looking at the concrete undertakings tagged as Bigtechs and designated as Gatekeepers and VLOPSE.

On the one hand, according to the DMA, gatekeepers are information society service providers for whom three cumulative requirements are met (Art. 3(1) and (2) DMA): (a) they are providers that have great influence in the Internal Market[8]; (b) they are providers of a basic platform service[9] that is an important

a group of companies of hitherto unknown world size and which have been accumulating great power», being GAFAM (Google, Amazon, Facebook, Apple and Microsoft) identified as Bigtechs.

4. Joint Committee of the European Supervisory Authorities, *Report on 2023 stocktaking of BigTech direct financial services provision in the EU*, Joint-ESA Report JC 2024 02, 01/02/2024, p. 3 (https://www.eba.europa.eu/sites/default/files/2024-02/b0c38062-0055-4631-b99e-b728f19e3868/Report%20on%202023%20stocktaking%20of%20BigTech%20direct%20financial%20services%20provision.pdf)

5. *Idem*, p. 3. At the request of the Financial National Authorities, the Report also regards Orange, Tesla, Uber and Vodafone as Bigtechs.

6. 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 (Digital Markets Act) - ELI: http://data.europa.eu/eli/reg/2022/1925/oj

7. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) - ELI: http://data.europa.eu/eli/reg/2022/2065/oj

8. In accordance with Art. 3(2) DMA, this influence is determined, alternatively, based on its annual turnover in the EU (equal to or greater than 7.5 billion euros in each of the last three years), its average market capitalization value or its fair value (equal or greater than 7.5 billion euros in the last financial year), or its EU implementation (it provides the same basic platform service in at least three Member States).

9. In accordance with Art. 3(3) DMA, basic platform services are: online intermediation services; online search engines; online social networking services; video sharing platform services; number-independent interpersonal communications services; operating systems; web browsers; virtual assis-

gateway for professional users to reach end users, the importance being measured, cumulatively, on the basis the monthly number of active end users established or located in the EU (at least 45 million) and the annual number of active professional users established in the EU (at least 10000); and c) said providers have an established and lasting position with respect to their operations or is foreseeable that they will achieve such a position in the future, a requirement that is met when the providers have reached the thresholds relating to users during the last three years. In short, these are undertakings that, without necessarily having a dominant position, have high market power; so much power, that they constitute a bottleneck in the relationship between other undertakings that use them («professionals») and consumers, showing control of entire ecosystems of platforms.

On the other hand, according to DSA, VLOPSE are digital services providers of online platforms (i.e., a hosting services that, at the request of a recipient of the service, store and disseminate information to the public; Art. 3(i) DSA) and online search engines (i.e., intermediary services that allow users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found; Art. 3(j) DSA) of very large size: those online platforms and online search engines that have a monthly average of active service recipients in the EU equal to or greater than 45 million (Art. 33(1) DSA).

As it can be seen, the delimiting data of the VLOSPE in DSA is shared with the gatekeepers submitted to the DMA, as it is one of the criteria that determines whether the provider is an important gateway to the basic platform service it provides. Thus, attending to the delimiting criterion of VLOPSE established in the DSA, in principle, any gatekeeper that provides basic online intermediation platform and/or search engine services will be designated a VLOPSE under the DSA, although not vice versa, as the DMA establishes additional requirements which will not always be fulfilled in the case of VLOPSE designated as such by the European Commission under the DSA. [10]

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tants; cloud services; and online advertising services (that is, advertising networks, advertising exchange platforms and any other advertising intermediation service) provided by any of the providers of the above services.

10. See BUESO GUILLÉN, P. J., «Mecanismos de aplicación del Reglamento de Mercados Digitales, su aplicación privada y responsabilidad civil de los guardianes de acceso: una primera aproximación», in: HERNÁNDEZ SAINZ, E., MATE SATUÉ, L. C., ALONSO PÉREZ, M. T. (dir.), *La responsabilidad civil por servicios de intermediación prestados por plataformas digitales*, Colex, A Coruña, 2023, pp. 83-85 and 89-91.

So, at the end of the day, todays designated DMA gatekeepers are: Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft for the core platform services identifies in the figure above.[11]

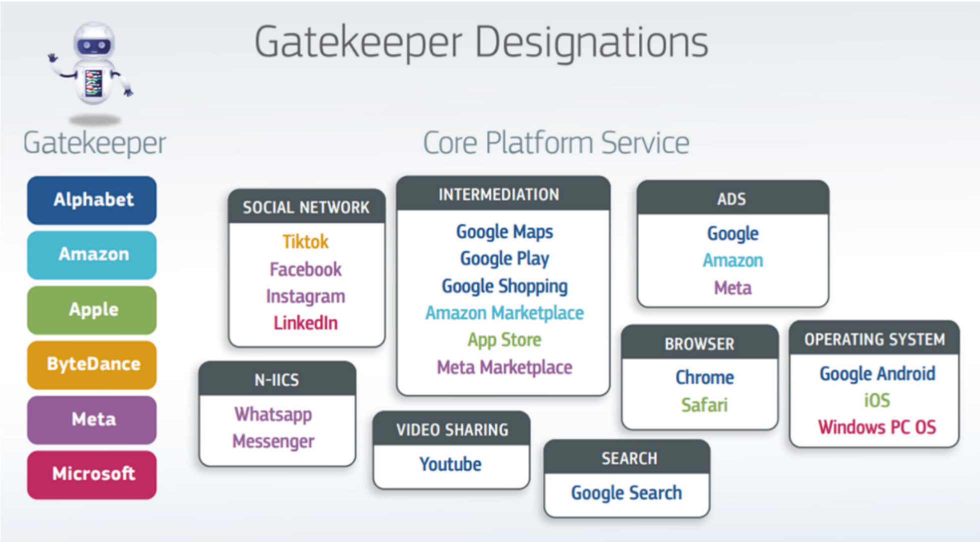

Figure 1: European Commission: Designated DMA Gatekeepers on September 6, 2023 (https://digital-markets-act.ec.europa.eu/gatekeepers_en)

Additionally, Booking, ByteDance and X have notified their potential gatekeeper status to the Commission under the DMA[12]. And todays designated DSA VLOPSE are Alphabet, Amazon, Apple, Ant Group, Aylo Freesites, Booking, ByteDance, Meta, Pinterest, Snap, Tecnius, Twitter, WebGroup Czech Republic, Wikipedia, and Zalando.[13]

This «mostly factual» subjective match (mainly in the case of Alphabet, Amazon, Ant Group, Apple, Meta and Microsoft) causes an overlap of different reg-

11. Designated gatekeepers on September 6, 2023 (https://digital-markets-act.ec.europa.eu/gatekeepers_en); not designated as gatekeepers for the following core platform services on 13 February 2024: Apple, for Messaging service iMessage; and Microsoft, for Online search engine Bing, Web browser Edge and Online advertising service Microsoft Advertising.

12. See: https://digital-markets-act.ec.europa.eu/booking-bytedance-and-x-notify-their-potential-gatekeeper-status-commission-under-digital-markets-2024-03-01_en

13. Designated VLOPSE on March 14, 2024 (https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses) for the provision of the following digital services: for providing a Very Large Online Platform: AliExpress, Amazon Store, Apple AppStore, Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, Pornohub (Aylo Freesites), Snapchat (Snap), Stripchat (Technius), TikTok, XVideos (WebGroup Czech Republic), Twitter – X, Wikipedia, YouTube and Zalando; for providing a Very Large Online Search Engine: Bing and Google Search.

ulatory approaches, because of the intersection of the subjective scope of application of different relevant pieces of EU Law dealing with this big technology-based undertakings: (classical) Antitrust Law, DMA (as far as it can be consider not being a piece of Antitrust Law), DSA and Law on Financial Services, i.e., payment and E-money services.

III. CURRENT ACTIVITY OF BIGTECHS IN THE PAYMENT AND E-MONEY SERVICES EU INTERNAL MARKET.

Under the regulation of the EU internal market of payment and E-money services established in the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market[14] (PSD2) and the Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions[15] (E-money Directive), the activity of Bigtechs consists in both: the *direct* provision of payment and E-money services, i.e., Bigtechs having subsidiary or an intermediary companies carrying out regulated payment and E-money services in the EU, that means, via payment or E-money institution; and the *indirect* provision of payment services, i.e., the provision of technical services supporting the provision of payment services. When Bigtechs act as Technical Service Providers (TSPs) they are excluded of the scope of application of the DSP2 according to its Art. 3(j). More precisely, the exclusion covers services provided by TSPs which support the provision of payment services, «without them entering at any time into possession of the funds to be transferred, including processing and storage of data, trust and privacy protection services, data and entity authentication, information technology and communication network provision, provision and maintenance of terminals and devices used for payment services, with the exclusion of payment initiation services and account information services».

At the present time, regarding the direct provision of payment and E-money services, six subsidiary companies of Bigtechs (Alphabet, Meta, Amazon, Alibaba, Uber, NTT Docomo) are authorised as E-money institutions in five Member States, acting as hosts in up to sixteen Member States, and two subsidiary companies of Bigtechs (Alphabet, Tencent) are authorised as payment institutions, acting as hosts in up to thirteen Member States [16].

14. ELI: http://data.europa.eu/eli/dir/2015/2366/2015-12-23

15. ELI: http://data.europa.eu/eli/dir/2009/110/oj

16. Joint ESA *Report on 2023 stocktaking of BigTech direct financial services provision in the EU…*, cit., p. 6.

	Group	Subsidiary	Home MS	Host MS
E-Money Institutions	**Alphabet (Google)**	Google Payment Lithuania UAB	LT	12
	Meta Platforms (Facebook)	Facebook Payments International Limited	IE	14
	Amazon	Amazon Payment Europe SCA	LU	16
	Alibaba (Ant Group)	Alipay (Europe) Limited S.A.	LU	4
	Uber	Uber Payments B.V.	NL	10
	NTT Docomo	DOCOMO Digital Payment Services AG	LI*	3
Payment I	**Alphabet (Google)**	Google Payment Ireland Limited	IE	13
	Tencent	Wechat	NL	2
Credit I	**Orange**	Orange Bank	FR	3
	Rakuten	Rakuten Europe Bank S.A.	LU	13
Insurance	**Tesla**	Tesla Insurance ltd (undertaking)	MT	1
	Vodafone	Vodafone Insurance Limited (undertaking)	MT	9
	Amazon	Amazon EU Sarl (intermediary)	LU	2
	Apple	Apple Distribution International (intermediary)	IE	2
	Orange	Orange Slovensko (Intermediary)	SK	/

Figure 2: *Activity of Bigtechs in the EU internal market of financial services (Joint-ESA* Report on 2023 stocktaking of BigTech direct financial services provision in the EU…, cit., p. 6)

Additionally, some Bigtechs (Apple, Microsoft, Orange) provide payment services under PSD2 exemptions[17]. So, Microsoft provides payment services online, under PSD2 exemption in Art. 3(l)[18] in three Member States; and Apple Distribution International provides also services in Belgium under PSD2 exemption in Art. 3(k)(i).[19]

17. *Ibidem*, p. 14 and p. 22, footnote 73.

18. This exclusion covers «payment transactions by a provider of electronic communications networks or services provided in addition to electronic communications services for a subscriber to the network or service: (i) for purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content and charged to the related bill; or (ii) performed from or via an electronic device and charged to the related bill within the framework of a charitable activity or for the purchase of tickets; provided that the value of any single payment transaction referred to in points (i) and (ii) does not exceed EUR 50 and: - the cumulative value of payment transactions for an individual subscriber does not exceed EUR 300 per month, or - where a subscriber pre-funds its account with the provider of the electronic communications network or service, the cumulative value of payment transactions does not exceed EUR 300 per month».

19. This exclusion refers to «services based on specific payment instruments that can be used only in a limited way […] allowing the holder to acquire goods or services only in the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer»; in particular, here is included the issuance of Apple gift cards, i.e., a tokenisation service whereby the Apple Pay application tokenises a card after which the payment is executed by the issuer of the card according to PSD2 provisions.

Here shall be also considered the emergence of partnerships between Bigtechs and their subsidiaries and financial institutions for the provision of payment and E-money services. The number of such partnerships does not seems to be significant at the present time, but their number is increasing. Here, the most relevant trend is the so called «white labelling / license-as-a-service partnerships». These partnerships see the involvement of regulated or non-regulated companies (referred to as «white label partners») that offer financial services and products through so-called white label providers. This type of partnership involving a regulated and an unregulated entity is mostly observed in the context of the provision of payment and E-money services; for example, a messaging app (white label partner) offers financial services through an E-money institution (white label provider). White label partners usually enter into contractual agreements with credit, E-money or payment institutions using their own name for the provision of financial services for which they are not licensed. Those unregulated white label partners can thus leverage the license belonging to the financial institution white label provider. This type of partnership represents a potential opportunity for Bigtechs, which are then able to make available products and services without having to be directly authorised and leveraging on their strong brand and customer base.[20]

Based on this situation description, in opinion of the ESAs, the direct provision of payment and E-money services «remains overall limited today» and «it does not currently pose a threat to financial stability»[21], even if the ESAs do not have access to reliable data on the provision of services in a cross-border fashion[22]. On the other hand, the ESAs have not gathered comprehensive information about Bigtechs acting as TSPs.

IV. REGULATORY APPROACHES

Previously to deal with the regulatory approaches as options to face the impact of the dominance of Bigtechs on the level playing field in the financial services markets among them and the incumbents, it is necessary to set a concept of «regulation» as starting point. So, following the OEDC, in a broad sense, regulation can be defined as «the imposition of rules by the government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector»[23]. Departing from this

20. Joint ESA *Report on 2023 stocktaking of BigTech direct financial services provision in the EU…*, cit., p. 4, footnote 19, and pp. 8-9; as example of a white label partnership (albeit involving two regulated financial institutions) is reported: the partnership of PayPal and Paxos for the provision of stablecoin-as-a-service (https://paxos.com/pyusd/).

21. *Ibidem*, pp. 1-2.

22. *Ibidem*, pp. 4-5.

23. OECD, *Glossary of statistical terms*, 2008 (https://doi.org/10.1787/9789264055087-en), p. 456. See also Parcu, P. L., Monti, G., Botta, M. (ed.), «Introduction» to: *The Interaction of Competition*

broad concept, Competition Law also constitutes a form of regulation, giving place to a regulatory approach.

In our case there is an overlap of three regulatory approaches: the «classical» Antitrust Law i.e. Competition Law approach, in this case Art. 102 TFU, which is «fully» transversal, in the sense that this rule is applicable to all economic activities in the Internal Market; the Information Society Services / Digital Service / Digital Market Law approach, which is «specifically» transversal, as it is applicable to the provision of information society services, specially, digital services in the sense of the DSA[24], in the Single Digital Market; and the Law on Financial Services approach, which is sector-specific, applicable to the provision of financial services, here, payment and E-money services.[25]

Focusing on the regulation on payment services and E-money as sector-specific regulation, there may be different reasons that explain the presence of such a sector-specific regulation. First, the presence of network infrastructure; this is the case of network industries regarded as public utilities. And second, the pursuit of non-economic objectives. This second case is the case of the regulation on financial services, where management of systemic risk-resilience and consumer protection can be identified as the main goals pursued by this regulation. On the other hand, sector-specific regulation constitutes a set of rules that can bind every industry player; in this case, we can speak about «*symmetric*» regulation, which usually aims the satisfaction of the non-economic objectives. And/or a set of rules targeting a limited number of market players, normally, players with significant market power; here we can speak about «*asymmetric*» regulation, «which usually aims at solving market failures related to the excessive concentration of market power»[26]. This combination of symmetric and asymmetric regulation can be observed in the Law on Financial Services. And, setting aside the discussion on the nature of the DMA, if the DMA is regarded, at least, to some extent, as a «spin-off» of Art. 102 TFEU, such a combination can be also observed in Competition Law.

Traditionally, Competition Law has been considered as the opposite regulatory option to sector-specific regulation[27]. However, and under specific consideration of the Law on Financial Services, they are not so distant as they seem to

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Law and Sector Regulation. Emerging Trends at National and EU Level, Edward Elgar Publishing, Cheltenham (UK)/Northhampton, MA (USA), 2022, p. 1.

24. In the sense of the DSA (Art. 3(g)), digital services are intermediary services, i.e., information society services consisting in a mere conduit service, a caching service, and/or a hosting service, consisting the last one of the storage of information provided by, and at the request of, a recipient of the service, including online platforms and online search engines.

25. The paper is going to focus on sector-specific approach given by the Law on payment and E-money services and on the Antitrust Law approach; the Information Society Services / Digital Services / Digital Market Law approach (except for some consideration of the DMA) remains untreated for future investigations.

26. Parcu / Monti / Botta, «Introduction»…, cit., pp. 2-3.

27. On the similarities and differences generally regarded between competition policy and sector-specific regulation see Parcu / Monti / Botta, «Introduction»…, cit., p. 6-7.

be. In fact, in both cases we are talking about regulation (even if in a broad sense) and the enforcement is carried on by a devoted public authority: i.e., the European Commission and the National Competition Authorities in the case of Competition Law, and the European Supervision Authorities and the National Regulatory (Banking, Investment and Insurance) Agencies in the case of the Law of Financial Services. Further, the differences between Competition Law and sector-specific regulation on payment services seems to be blurring in the last years. First, Competition Law is supposed to pursue economic goals and, on the contrary, sectoral regulation is supposed to pursue non-economic goals; however, in the application of Competition Law, the implication of non-economic objectives (as it is the case of, privacy or sustainability) increasingly becomes more space[28]; and sector-specific regulation contains rules to increase competition, as it is the case in the PSD2, when regulating the data access in favour of Third Party Providers[29]; or as it is the case by means of the purposed regulation on Open finance. Second, regarding their enforcement, Competition Law is oriented to an enforcement *ex post*, and sector-specific regulation, as the Law on Financial Services, to an enforcement *ex ante*; but it can be said that Competition Law is moving to the enforcement *ex ante*, if we consider not only merger control, but also the antitrust commitments, the block exemption regulations and, if accepted as a piece of Competition Law, the DMA itself. In fact, *ex post* control, has not always been the general rule in Competition Law: we shall remember the procedure established to enforce art. 101(3) TFUE (prior authorisation) in the period prior to the Regulation EC 1/2003[30]. Third, it is said that Competition Law is built by a set of prohibitions while sector-specific regulation includes also a set of obligations determining how-to-behave; however, Competition Law is moving include sets of obligations, too, as the DMA does.

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28. So, as example of sustainability objectives supported or shared by EU Competition Law, see Section 9, Sustainability Agreements, of the Guidelines of the European Commission on the applicability of Art. 101 TFEU to horizontal cooperation agreements - C(2023)4752 final (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PI_COM%3AC%282023%294752); and nos. 8, 9, 144, 316 of the Guidelines of the European Commission on vertical restraints (DOUE C 248/01, 30.06.2022; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2022.248.01.0001.01.ENG) on the assessment of vertical agreements that pursue sustainability objectives; regarding these latest guidelines, see BUESO GUILLÉN, P.J., «Aproximación a las novedades en el Derecho de defensa de la competencia de la Unión Europea en el tratamiento del uso de internet por el distribuidor autorizado en los sistemas de distribución selectiva», in: RUIZ PÉRIS, J.I., ESTEVAN DE QUESADA, C. (dir.), GÓMEZ ASENSIO, C. (coord.), *Cooperación y mercados digitales*, Atelier, Barcelona, 2023, pp. 269-270 (Open Access: https://atelierlibrosjuridicos.com/wp-content/uploads/securepdfs/2024/01/Cooperacion-y-mercados-digitales_INT.pdf). In relation to privacy, see WIEDEMANN, K., «Data Protection and Competition Law Enforcement in the Digital Economy: Why a Coherent and Consistent Approach is Necessary», *International Review of Intellectual Property and Competition Law*, no. 52, 2021, pp. 915–933.

29. Artt. 35, 36, 66 to 68 DSP2; about these provisions, see BUESO GUILLÉN, P.J., «Servicios de pago, sistemas de pago y derecho de la competencia», in: MARTÍ MIRAVALLS, J., (dir.) RODILLA MARTÍ, C. (coord.), *Competencia en mercados digitales y sectores regulados*, Tirant Lo Blanch, Valencia, 2021, pp. 222-225.

30. ELI: http://data.europa.eu/eli/reg/2003/1/oj

The comparison of these regulatory approaches shows that the differences between Competition Law and sector-specific regulation, as the Law on Financial Services, are reducing. This allow to think, on the one hand, that it is possible to achieve competition policy goals using several legal tools, but not only Competition Law; and, on the other hand, that is possible to use Competition Law to support the achievement of non-economic goals, i.e., goals other than the allocative efficiency of scare resources, opening Competition Law to a more holistic application. In such a scenario, the issue is how to articulate these legal tools and how to configure Competition Law in order to achieve the policy goals without eroding legal certainty or, at least, keeping legal certainty in a workable level.[31]

V. RULING COMPETITION AND PAYMENT SERVICES.

Focusing on ruling competition in payment and E-money service market, we start by exploring the sectorial-specific regulatory approach, i.e., the EU Law on payment services.

A. Sectorial-Specific Regulatory Approach

Previously has to be noted, that, at the present time, the main piece of the EU Law on Payment Services, i.e., the PSD2, is under revision. On June 28, 2023, a review of the PSD2 was launched by the European Commission[32]. The review has resulted in several proposals to update the PSD2: (1) a Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010[33] (PSR), where the service provision framework is established; (2) a Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repeal-

31. Cf. De Vivero De Porras, C., «Servicios financieros complementarios y guardianes de acceso. Una aproximación y ampliación del concepto de gatekeeper», in: Olmedo Peralta, E. (dir.), *La aplicación del Derecho de la competencia en la economía de datos*, Thomson Reuters-Aranzadi, Cizur Menor (Navarra), 2021, p. 315, who strictly separates financial activity of Bigtechs (to be ruled by sector-specific regulation) and ancillary or complementary activities of Bigtechs (to be ruled by Competition Law).

32. European Commission, *Report from the Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee on the review of Directive 2015/2366/EU of the European Parliament and of the Council on payment services in the internal market*, Brussels, 28.6.2023 - COM(2023) 365 final (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13331-Payment-services-review-of-EU-rules_en)

33. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0367; see also https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13905-Payment-services-revision-of-EU-rules-new-Regulation-_en

ing Directives 2015/2366/EU and 2009/110/EC[34] (PSD3), which deals with the institutional framework: regulation of access to market of payment services, payment institutions and supervision of payment services providers; (3) the already mentioned Proposal for a Regulation of the European Parliament and of the Council on a framework for Financial Data Access and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/2554[35]; (4) a Proposal for a Regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins[36]; to this package belonged also (5) the Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 260/2012 and (EU) 2021/1230 as regards instant credit transfers in euro[37], launched in October 26, 2022; this Regulation has been already passed as Regulation (EU) 2024/886 of the European Parliament and of the Council of 13 March 2024 amending Regulations (EU) No 260/2012 and (EU) 2021/1230 and Directives 98/26/EC and (EU) 2015/2366 as regards instant credit transfers in euro[38], that will enter into force on April 8, 2024.

Regarding the issue of the inclusion of Bigtechs in the scope of application of the regulation on payment services, no changes in the scope of the Proposal of PSR-PSD3 can be noticed in relation to the scope of PSD2: there is no (general) enlargement of the scope of Proposal of PSR to include indirect payment services, i.e., to consider technical services provided by Bigtechs as payment services.[39]

Certainly, and apart from the fact that no reliable data on the provision of payment services under PSD2 exemptions are available, as above synthesised, at the present time, Bigtechs' activity do not evidence a significant level of direct provision of payment and E-money services. Neither the partnerships between Bigtechs and financial institutions in the form of white labelling / license as-a-service have a significant impact at the present time. On the other hand, regard-

34. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0366; see also https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13904-Payment-services-revision-of-EU-rules-Directive-_en

35. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0360; see also https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13241-Open-finance-framework-enabling-data-sharing-and-third-party-access-in-the-financial-sector_en

36. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0364; see also https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13392-A-digital-euro-for-the-EU_en

37. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0546; see also https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12931-Instant-payments_en

38. ELI: http://data.europa.eu/eli/reg/2024/886/oj

39. In the Proposal of RPS, following services are regarded as payment services: services enabling cash to be placed on and/or withdrawn from a payment account; execution of payment transactions, including transfers of funds from and to a payment account, including where the funds are covered by a credit line with the user's payment service provider or with another payment service provider; issuing of payment instruments; acquiring of payment transactions; money remittance; payment initiation services; account information services; and E-money services, including issuance of E-money, maintenance of payment accounts storing E-money units and transfer of E-money units.

ing services provided by TPSs[40], i.e., by operators of payment systems and entities involved in payment-processing activities, even if significant, especially in a B2B digital environment, the European Commission considers their inclusion in the scope of the Proposal of PSR as «premature»[41]. Because of this, according to Art. 2(2)(i) Proposal of PSR, services provided by TPSs remain generally excluded of the scope of application the regulation of payment services.

Here it shall be pinpointed that this decision on the enlargement of the scope of the Proposal of PSR-DSP3 is due to the assessment of the impact of the activity of Bigtechs from a shadow-banking[42] perspective, i.e., looking for the control of systemic risks and the resilience of the financial system, but not from a level-playing-field perspective. Here, the application of Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector (DORA) to TPSs[43], as well as already existing and forthcoming oversight done by ECB/Eurosystem are regarded as sufficient: to go beyond might generate a risk of duplication of the lawyer of supervision.

However, services provided by TSPs are becoming very relevant in the digital payments an E-money market, and not only in a B2B but in a B2C digital environment, too. Actually, and despite of the still remaining general exclusion of services provided by TPSs of legal delimitation of payment services in the Proposal of PSR, the Proposal itself includes new provisions, not existing under

40. The definition of TPS has been simplified in Art. 3(36) of the Proposal PSR. It means «a provider of services which support the provision of payment services, without entering at any time into possession of the funds to be transferred», but the scope of this exclusion matches the delimitation done in the PSD2. So, in Whereas 16 of the Proposal of PSR is said that: «Those technical services include the processing and storage of data, payment gateway services, trust and privacy protection services, data and entity authentication, information technology (IT) and communication network provision, provision and maintenance of consumer-facing interfaces used to collect payment information, including terminals and devices used for payment services. Payment initiation services and account information services are not technical services».

41. European Commission, *Report … on the review of Directive 2015/2366/EU…,* cit., p. 6.

42. About the concept of shadow banking, see, among others, Tapia Hermida, A .J., «Shadow banking y fintech», in: Marimón Durá, R., Martí Miravalls, J. (dir.), *Problemas actuales y recurrentes en los Mercados Financieros: financiación alternativa, gestión de la información y protección del cliente, Thomson Reuters Aranzadi*, Cizur Menor (Navarra), 2019, pp. 101-111; and Marimón Dura, R., «Cambios en el mercado del crédito: nuevos operadores y nuevos modelos de negocio» in: *Ibidem*, pp. 42-51. A legal definition of shadow banking entities can be found in the Commission Delegated Regulation (EU) 2023/2779 of 6 September 2023 supplementing Regulation (EU) No 575/2013 (Capital Requirements Regulation – CRR) with regard to regulatory technical standards specifying the criteria for the identification of shadow banking entities referred to in Article 394(2) of CRR (ELI: http://data.europa.eu/eli/reg_del/2023/2779/oj).

43. ELI: http://data.europa.eu/eli/reg/2022/2554/oj; implemented to TPS by Commission Delegated Regulation (EU) …/... of 22.2.2024 supplementing Regulation (EU) 2022/2554 of the European Parliament and of the Council by specifying the criteria for the designation of ICT third-party service providers as critical for financial entities (not yet published in the DOUE; see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13980-Critical-ICT-third-party-service-providers-criteria-fees_en).

the DSP2, in order to protect payment services users against TPSs[44]: (1) a rule on the liability of TPSs for failure to support the application of strong customer authentication (SCA) (Art. 58 Proposal PSR); (2) the obligation to enter into outsourcing agreements with a PSP in case of TSPs are to provide and verify the elements of SCA (Art. 87 Proposal PSR); and, (3) in the case of framework contracts where payment services are offered jointly with technical services, the statement that technical services shall be subject to the same framework contract requirements on termination fees than payment services (Art. 23(2) Proposal PSR).

So, in fact, the services provided by TSPs, even if they are not legally defined as payment services, are not fully excluded of the scope of application of the Proposal RSP. And despite of the regulatory decision taken, «[t]he Commission is however fully aware of the growing importance of these unsupervised operators in the provision of payment services, and of the potential risks that their activities may potentially cause to payment systems and financial stability»[45]. So, we can think that we are in a transitional period. Actually, there are clear potential opportunities for Bigtechs to move to the digital payments and E-money EU internal market by exploiting their intragroup dependencies; and such and evolution generates potential risks for the payments and E-money services EU internal market.

The fact that Bigtechs are MAGs generates a set of potential opportunities derived from the existing intragroup dependencies: The common use of technological infrastructures (including platform dependency both in the provision of financial services and other non-financial services) allows Bigtechs to be operationally more efficient and to provide a better user experience at lower prices. The intra-group financial dependencies give Bightechs a significant freedom to finance their strategic decisions. The sharing of resources, specially of client datasets, together with the strategy dependencies, make that Bigtechs are able to provide a wider, improved and highly personalised range of services.[46]

44. The exclusion is done «without prejudice to Article 23(2), and Articles 58 and 87» of the Proposal PSR; see also Whereas 17 of the Proposal PSR.

45. European Commission, *Report … on the review of Directive 2015/2366/EU…*, cit., p. 6. Because of this, [t]he Commission will therefore, within 3 years of application of the revised legislation, carry out a thorough review, based on evidence and in close cooperation with the ECB/Eurosystem, assessing in particular whether a dedicated EU licensing and supervision regime for some of the hitherto excluded entities is necessary in addition to the existing oversight regime. This timescale is necessary in order to gather sufficient evidence of implementation».

46. Joint ESA *Report on 2023 stocktaking of BigTech direct financial services provision in the EU…*, cit., pp. 10-11.

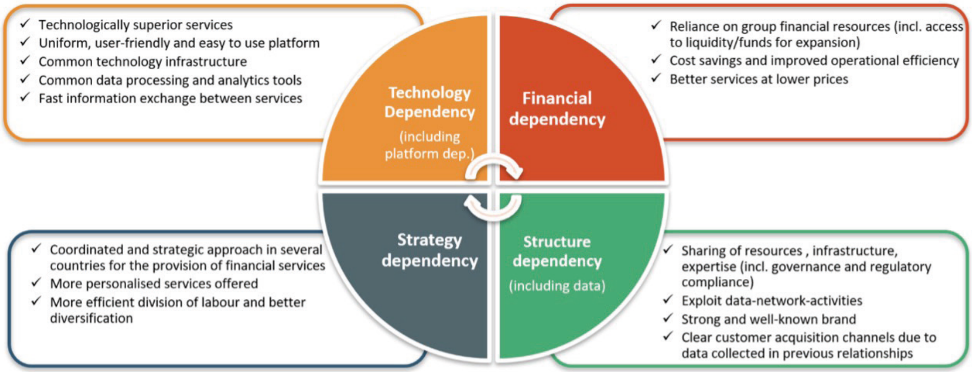

Figure 3: *Potential opportunities for Bigtechs arising from intragroup dependencies (Joint-ESA* Report on 2023 stocktaking of BigTech direct financial services provision in the EU…, cit., p. 10)

These opportunities derived from the existing intragroup dependencies are evidence of a clear competitive advantage over incumbents in the (digital) payment and E-money services EU internal market, as consumers would have access to better services. But such an entry in a bigger scale into this market raises relevant potential risk for the digital payments market, derived from both intragroup and external dependencies: operational resilience and cybersecurity risks; reputational spill overs risk that could pose a financial contagion risk; risk of defective governance (management lacking on due diligence or expertise; opaque operational structure); risk of data abuse and mishandling of customer data; risk of financial exclusion; financial, operational and reputational risks arising from the growth of partnerships between Bigtechs and financial institutions; risks to the of strategic autonomy of the EU[47]; and, here specially relevant, «a possible threat to financial stability in the event direct financial services activities were to increase», as far as «the potential lack of level playing field between BigTechs and more traditional institutions *as a consequence of, for example, increased competition on the viability of incumbents' business models*, for instance having implications on financial institutions' profitability [emphasis added]». Additionally, «[c]onsidering BigTechs reliance on massive customer base, the increase in the direct provision of financial services could reach a scale and concentration for which their failure or disruption (e.g., also in terms of operational resilience) might further contribute to enhanced financial stability risks».[48]

This last risk constitutes a very serious concern, as far as in such a scenario Bigtechs were no anymore acting as shadow-banking-like entities or providing services as TPSs that are not-yet-but-should-be under the regulatory umbrella of

47. *Ibidem*, pp. 11-14.
48. *Ibidem*, p. 14.

the Law on payment services. The increase of competition because of direct provision by Bigtechs of payment and E-money services is regarded as a threat to financial stability, based on a potential lack of level playing field. Hence, the adoption of asymmetric regulatory measures can be expected. However, such measures shall not be used to protect the viability of incumbents' business models as such, but the financial stability and the well-functioning of the EU internal market of payment and E-money services. Competition shall be regarded as a win, not as a loss. Competition and financial stability will have to find a new balance pattern; which Competition Law can also help to articulate, but for that, it has to evolve.

B. Antitrust Regulatory Approach[49]

Traditionally, dealing with antitrust issues in payment services markets meant to deal with horizontal agreements. The most well-known leading cases are the case of the standards of the European Payments Council for online payments (2013) and the case of the multilateral interchange fees (MIF) in payment cards (2007-2019)[50]; at the end, the conflict in the last case was solved by issuing a MIF Regulation.[51]

Nowadays, however, the enforcement of EU Antitrust Law in payment services market faces new issues: the changing regulatory (sector-specific) environment, the raise of Fintech and the entry of Bigtechs[52], who may use their market power to improve their position in digital payments market, moving from Art. 101 TFEU to Art. 102 TFEU.

Apart from the troubles of properly controlling conglomerate mergers where Bigtechs participate, the attempts to control unilateral behaviour consisting in (mis)use of such a market power by the application of Art. 102 TFUE face difficulties of relevant market analysis[53], especially when dealing with multi-side markets where one side is priced at zero. Here, the new Commission Notice on

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49. Since many of the points to be developed in this section were the subject of other presentations at the meeting of which this paper comes from, this section made brief reference to them; their analysis will be the object of subsequent research.

50. See BUESO GUILLEN (2021), «Servicios de pago…, cit., pp. 219-221.

51. Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (ELI: http://data.europa.eu/eli/reg/2015/751/oj)

52. See MELI, V., «New Antitrust Challenges in Payment Systems», in PROFETA, V. (ed.), *Quaderni di Ricerca Giuridica della Consulenza Legale Competition and Payment Services*, Conference Papers, Banca d'Italia, Rome, 16-17 June 2022, p. 117. (https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2023-0093/index.html?com.dotmarketing.htmlpage.language=1&dotcache=refresh)

53. A useful summary of the last cases of application of Art. 102 TFEU in digital markets, including interesting references to the US Antitrust Law, can be found in FOX, E.M., GERARD, D., *EU Competition Law. Cases, Texts and Context*, 2nd ed., Edward Elgar Publishing, Cheltenham (UK)/Northhampton, MA (USA), 2023, pp. 270 seq., 323 seq.

the Definition of the Relevant Market for the Purposes of EU Competition Law[54] might facilitate the verification of a dominant position in the case of multi-sided platforms (nos. 94-98; including how to deal with market shares in multi-sided platforms: no. 108) and after-markets, bundles and (digital) ecosystems (nos. 99-104).

In digital payments market there is a high risk of abuse of dominant position or market power, restricting access directly or indirectly, by the way of prevent or hinder interoperability, both on the part of the incumbents (as it could be the case of payment systems as VISA or Mastercard), and on the part of the Bigtechs. The latest might grant no access to payments by establishing close or self-sufficient ecosystems of payments (moving to offer payment services «on-us»), and by preventing interoperability to technical services for payments. Such strategies pose a risk of first exclusionary, later exploitative behaviour[55]. Here, the DMA (that applies without prejudice to the rules resulting from the PSD2; see Whereas 12 DMA) tries to face the two above identified behaviours of Bigtechs. Regarding the first one, Art. 5(7) DMA prohibits gatekeepers to require end users to use, or business users to use, to offer, or to interoperate with […] a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services. And regarding the second behaviour, Art. 6(2) DMA obliges the gatekeeper to allow providers of services, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant of the core platform service as are available to services or hardware provided by the gatekeeper. In fact, Art. 6(2) DMA is clearly «inspired» by the case Apple Pay, a case under Art. 102 TFEU[56].

Competition Law is evolving to face the impact of digitalisation on the competition in the internal market, but, probably, help from the sectorial-specific regulation is needed to be successful.

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54. C(2023) 6879 final, adopted on February 8, 2024, and published in DOUE on February 22, 2024 (ELI: http://data.europa.eu/eli/C/2024/1645/oj).

55. See MELI, «New Antitrust Challenges in Payment Systems», cit., pp. 121-123.

56. See Whereas 56 and 57 DMA. Case AT AT.40452 *Apple – Mobile Payments* (https://competition-cases.ec.europa.eu/cases/AT.40452) About this case, see BUESO GUILLÉN, P.J, «Aproximación al tratamiento antitrust de las conductas de los guardianes de acceso en el mercado digital de servicios de pago», in: ROBLES MARTÍN-LABORDA, A., y OLMEDO PERALTA, E. (dir.), *Estudios de la Red Académica de Defensa de la Competencia (RADC) 2021*, Thomson-Reuters Aranzadi, Cizur Menor (Navarra), 2022, pp. 425-443. The last milestone in this case are the commitments proposed by Apple, that in fact concrete to the case the obligation set in Art. 6(2) DMA; see European Commission, «Antitrust: Commission seeks feedback on commitments offered by Apple over practices related to Apple Pay», Press Release IP/24/282, Brussels, 19 January 2024 (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_282).

VI. FINAL REMARKS

The pending «big disembarkation», the D-day of Bigtechs in digital payment services market poses a latent risk for competition, in form of abusive behaviour. The issue is how to manage it, taking also into account financial stability and consumer protection. In such a context, three relevant trends can be observed in the relationship between Competition Law and Sector-Specific Regulation. First, the expansion of Sector-Specific Regulation in network industries, but also in digital services and markets. Second, the expansion of EU Competition Law enforcement, where a risk of under enforcement to detriment of competition can be identified, if the future development causes an imbalance in favour of Sector-Specific Regulation and the implied non-economic goals, as well as a risk of over enforcement to the detriment of innovation, as Competition Law is moving from control *ex post* to control *ex ante*. And third, the evolution of this relationship between conflict and complementarity and the need for moving to coordination. This need of coordination that has to be satisfied at two different layers: first layer, the communication of goals, where a more holistic approach is required, abandoning the dogma of the existence of a clear divide between economic goals to be addressed by Competition Law and non-economic goals to be addressed by Sector-Specific Regulation; in fact, an «unconscious convergence» can be already observed; second layer, the action for regulation and enforcement, where a higher degree of coordination between Competition Authorities and Regulatory Agencies is needed to properly face risks arising from MAGs inter-dependencies of Bigtechs. Additionally, if Competition Law seeks to be effective when dealing with the market power of Bigtechs in secondary markets, as in this case, the payments and E-money service market, antitrust remedies should be rethought: what can be done to control «aggressive» newcomers? Is it enough to treat them as false incumbents (grant access to network to competitors / interoperability / unbundling)?

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