

Experimentalist Competition Law Enforcement as a Complementary Data Sharing Toolkit: Learning from *AGCM v. Google – Ostacoli alla Portabilità dei Dati*

by

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Abstract

Analysing the Italian case *AGCM v. Google – Ostacoli alla portabilità dei dati*, this paper scrutinises the “experimentalist architecture” of public competition law enforcement in dealing with data sharing disputes. In *AGCM v. Google*, the

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experimentalist competition law enforcement aimed at ensuring and designing the right to data portability provided by Article 20 GDPR. The paper investigates the extent to which the conditions and distinctive features of the experimentalist architecture play a role in *AGCM v. Google*, which include: strategic uncertainty, polyarchic distribution of powers, high degree of discretion of local agents, dynamic accountability, and the participation of all stakeholders in the design, review and updating of cross-sectoral data sharing solutions. In conducting the analysis, the internal administrative dialogue between local actors within the national competition law enforcement process is examined. In addition, the paper explores the potential for an external administrative dialogue between national competition law enforcement, implementation mechanisms, and regulatory revisions of the data sharing framework, involving local and EU actors.

Resumé

À partir de l'affaire italienne *AGCM c. Google – Ostacoli alla portabilità dei dati*, cet article analyse « l'architecture expérimentale » de l'application des règles du droit de la concurrence dans le traitement des litiges relatifs au partage des données. Dans l'affaire *AGCM c. Google*, l'application expérimentale de la législation sur la concurrence vise à garantir et à concevoir le droit à la portabilité des données prévu par l'article 20 du RGPD. L'article scientifique examine dans quelle mesure les conditions et les caractéristiques distinctives de l'architecture expérimentale jouent un rôle dans l'affaire *AGCM c. Google*: il s'agit, par exemple, de l'incertitude stratégique, de la distribution polyarchique du pouvoir, du haut degré de discrétion des agents locaux, de la responsabilité dynamique et de la participation de toutes les parties prenantes à la conception, à l'examen et à la mise à jour des solutions de partage des données. Lors de l'analyse, le dialogue administratif interne entre les parties prenantes au sein de l'application de la législation sur la concurrence est examiné. En outre, le potentiel d'un dialogue administratif externe entre l'application nationale de la concurrence, les mécanismes de mise en œuvre et les révisions des réglementations sur les données, avec la participation d'acteurs locaux et de l'UE, est examiné.

Key words: Data sharing; Experimentalist competition law enforcement; *AGCM v. Google*; Data portability; Implementation; Administrative dialogues.

JEL: K21, K23, K24, K42

I. Introduction: data as an essential resource for EU digital targets

According to the European Data Strategy, data is an essential resource not only for economic development, but also for tackling social, climate-related, and environmental challenges.¹ It is the lifeblood for training artificial intelligence systems,² as well as the basis for personalised products and services, and better policy-making.³ As far as possible, data should therefore be readily available to any private and public entity, in order to favour innovation and competition within the EU Single Market and maximise the benefits derived from data-driven ecosystems.⁴ It is argued here that the European approach

¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Strategy for data, COM (2020) 66 final (hereinafter: **European Strategy for data**) 2–3; European Commission, Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data, COM (2022) 68 final (hereinafter: **Proposal for a Data Act**) 1; European Parliament and Council Regulation (EU) 2023/2854 of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 [2023] OJ L 2023/2854 (hereinafter: **Data Act**), Recital 1; European Parliament and Council Regulation (EU) 2022/868 of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 [2022] OJ L 152/1 (hereinafter: **Data Governance Act**), Recital 2; European Parliament and Council Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265/1 (hereinafter: **Digital Markets Act**), Recital 3.

² European Parliament and Council Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L (hereinafter: **Artificial Intelligence Act**), Article 3(1).

³ European Strategy for data (n 1) 2-3; European Commission, Digital Economy and Society Index (hereinafter: **DESI 2022**) 51; Teodora Groza and Beatriz Botero Arcila, ‘The New Law of the European Data Markets: Demystifying the European Data Strategy’ (2024) *Global Jurist* 21; Ariel Ezrachi and Maurice E Stucke, ‘Digitalisation and its impact on innovation’ (2020) R&I Paper Series Working Paper 2020/07, 5; Peter K Yu, ‘Data Producer’s Right and the Protection of Machine-Generated Data’ (2019) 93 *TulLRev* 860; Michèle Finck, ‘Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy’ (2017) *LSE Law, Society and Economy Working Papers* 15/2017, 2.

⁴ European Strategy for data (n 1), 1; Josef Drexl, ‘Designing Competitive Markets for Industrial Data Between Propertisation and Access’ (2017) 8 *JIPITEC* 262. In the absence of an official EU definition, the term “data-driven ecosystems” used in this paper refers to data resources that enable a group of actors (both supply- and demand-side) to rely on each other’s activities in order to create value from online and/or offline interactions. They are generally characterised by the co-evolution of the collaborating actors under an aligned vision, modularity, interdependencies, and non-generic complementarities that bind together data-driven ecosystem participants. Interdependencies identify structural relationships

to the creation of a single European data space, including several common EU data spaces,⁵ shifted from an individualistic human-centred perspective towards a broader societal one. The General Data Protection Regulation (hereinafter: **GDPR**), which replaced Directive 95/46/EC (hereinafter: **Data Protection Directive**), recognises the potential of data for economic and social progress,⁶ and ensures the free movement of personal data.⁷ However, its main objectives revolve around the protection of individuals with regard to their personal data, the reinforcement of individual rights, the assurance of informed and free consent for data subjects, and the enhancement of control over an individual's own data.⁸ The EU Data Strategy, on the other hand,

between actors in terms of the connection of their offers for the value to be created. Non-generic complementarities require specific arrangements and investments to make ecosystem participants' activities complementary to the others. Similar to the numerous conceptualisations of "ecosystems" in management literature, data-driven ecosystems are a governance mode that diverges from both full integration and the use of arm's-length contracts. See Michael G Jacobides, Carmelo Cennamo and Annabelle Gawer, 'Distinguishing between Platforms and Ecosystems: Complementarities, Value Creation, and Coordination Mechanisms' (2020) Working Paper, London Business School; Rahul Kapoor, 'Ecosystems: broadening the locus of value creation' (2018) 7 *Journal of Organization Design*; Michael G Jacobides, Carmelo Cennamo and Annabelle Gawer, 'Towards a theory of ecosystems' (2018) 39 *Strategic Management Journal* 2256; James F Moore, 'Business ecosystems and the view from the firm' (2006) 51 *The Antitrust Bulletin* 34; Marco Iansiti and Roy Levien, *The Keystone Advantage: What the New Dynamics of Business Ecosystems Mean for Strategy, Innovation, and Sustainability* (Harvard Business Review Press 2004) 211-224; James F Moore, 'Predators and Prey: A New Ecology of Competition' (1993) 71 *Harvard Business Review* 75. The Commission recently published the Revised Notice on the Definition of the Relevant Market in order to align the market definition with the case law of EU courts, the latest Commission practices and emerging market dynamics, particularly in the context of digitalisation. It is interesting to note that the (digital) ecosystem concept is receiving its first official recognition from EU institutions. For the definition of "digital ecosystem" see European Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C(2023) 6789 final (hereinafter: **2024 Revised Notice on Market Definition**), para 104; *Booking Holdings/Etraveli Group* (Case M.10615) Commission Decision C/2022/8430 [2023] OJ C 448/1; Case T-604/18 *Google and Alphabet v Commission* [2022] ECLI:EU:T:2022:541, paras 115–117.

⁵ European Commission, Staff Working Document on Common European Data Spaces, SWD (2022) 45 final.

⁶ European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 (hereinafter: **GDPR**), Recital 2; European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31 (hereinafter: **Data Protection Directive**), Recitals 1 and 2.

⁷ GDPR (n 6), Recital 13 and Article 1; Data Protection Directive (n 6), Article 1.

⁸ GDPR (n 6), Article 6; Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 8; Groza and Arcila (n 3) 43; Thomas Streinz, 'The Evolution of European

further emphasises the free movement of data, including non-personal data,⁹ highlighting the importance of the potential of data to address economic, social and environmental challenges.¹⁰ This broader view, reflected in the latest EU legislation such as the **Data Governance Act**, the **Data Act**, and the **Digital Markets Act**, implies the balancing of many private and public interests, and the involvement of all interested parties in data-related disputes.

To ensure that the EU data strategy and digital transition are successfully implemented, European institutions have established specific digital targets.¹¹ These targets align with the four cardinal points of the EU Digital Compass Communication: digital skills, digital infrastructures, as well as the digitalisation of businesses and of public services.¹² Regarding the digitalisation of businesses, the objective is that by 2030 at least 75% of EU enterprises should be using cloud computing services, data analytics technologies, and artificial intelligence systems, based on a fair sharing of data.¹³ Despite the digital advancement of recent years, data is still used by a small number of companies, even in several of the best performing countries.¹⁴ Moreover, 90%

Data Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 910-913; Joanna Strycharz, Jef Ausloos and Natali Helberger, 'Data Protection or Data Frustration? Individual Perceptions and Attitudes Towards the GDPR' (2020) 6 *European Data Protection Law Review* 407.

⁹ The first EU legislative act designed to facilitate the free movement of non-personal data is the European Parliament and Council Regulation (EU) 2018/1807 of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303/59. In the context of the EU Data Strategy, the two main pieces of legislation that deal with the free movement of non-personal data are the Data Governance Act and the Data Act.

¹⁰ Compare with the comprehensive analysis of the evolution of European data law provided by Streinz (n 8) 914–923 and 933–936.

¹¹ European Parliament and Council Decision (EU) 2022/2481 of 14 December 2022 establishing the Digital Decade Policy Programme 2030 [2022] OJ L 323/4 (hereinafter: **Digital Decade Policy Programme 2030**).

¹² European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2030 Digital Compass: the European way for the Digital Decade, COM (2021) 118 final (hereinafter: **2030 Digital Compass**) 4.

¹³ Digital Decade Policy Programme 2030 (n 11), Recital 16 and Article 4(3); European Commission, Proposal for a decision of the European Parliament and of the Council establishing the 2030 Policy Programme “Path to the Digital Decade” COM (2021) 574 final (hereinafter: **Path to the Digital Decade**), Article 4(3). The FAIR data sharing principles require for data to be findable, accessible, interoperable and reusable, see FORCE11, ‘The FAIR data principles’ <<https://www.force11.org/group/fairgroup/fairprinciples>> accessed 8 July 2024.

¹⁴ See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – State of the Digital Decade 2024, COM (2024) 260 final (hereinafter: **State of the Digital Decade 2024**) 2 and 12; European Commission, Annex 2 to the Communication – State of the Digital Decade 2024, COM (2024) 260 final, 20-21; DESI 2022 (n 3) 53–54.

of EU data is processed by US-based companies, while in practice less than 4% of the most popular online platforms that collect a substantial amount of data are European.¹⁵ Thus, the digital transformation of EU enterprises continues to face challenges in the uptake of data-driven solutions.¹⁶

To provide a comprehensive pathway for the digital transformation of the EU economy and society, the latest EU cross-sectoral data legislation goes beyond competition issues, although they acknowledge the “complementary” application of competition rules to regulated market practices.¹⁷ Simultaneously, competition policy and law are currently undergoing a comprehensive revision process to support progress towards EU digital targets.¹⁸ More precisely, due to their flexible enforcement mechanisms and case-by-case approach, they have been identified as a complementary toolkit to favour data sharing and data pool initiatives.¹⁹

The thorough analysis of the ongoing revision process of EU competition policy lies beyond the scope of this paper.²⁰ Rather, it aims to analyse the experimentalist aspects of public competition law enforcement related to data sharing initiatives, such as data portability.²¹ Data sharing challenges call for collaborative arrangements among all parties affected by the data practices at stake, as well as national authorities that are familiar with local markets. The analysis of collaborative arrangements requires the continuous consideration of

¹⁵ See 2030 Digital Compass (n 12) 3.

¹⁶ Digital Decade Policy Programme 2030 (n 11), Recital 16.

¹⁷ See Data Act (n 1), Recital 116; Data Governance Act (n 1), Recitals 13, 15, 25, 37 and 60; Digital Markets Act (n 1), Recitals 9–11.

¹⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A competition policy fit for new challenges, COM(2021) 713 final (hereinafter: **A competition policy fit for new challenges**).

¹⁹ *Ibidem*. Furthermore, see European Commission, Annex to the Communication – A competition policy fit for new challenges, COM(2021) 713 final/2.

²⁰ For an insight into the current revision process of EU competition policy and rules see Klaudia Majcher and Viktoria H.S.E. Robertson, ‘The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law’ (2022) Graz Law Working Paper No 05-2022; Emanuele Fazio, ‘Adapting Competition Law to the Digital Transition. Two Challenges’ (2022) 7 European Papers 981.

²¹ The term “data portability” generally identifies ‘the ability (sometimes described as a right) of a natural or legal person to request that a data holder transfer to the person, or to a specific third party, data concerning that person in a structured, commonly used and machine-readable format on an ad-hoc or continuous basis.’ Thus, it refers to various initiatives, ranging from a one-time download of data to real-time data sharing between digital services. See OECD, ‘Data portability, interoperability and digital platform competition’ (2021) OECD Competition Committee Discussion Paper <<https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf>> accessed 8 July 2024, 10 and 17.

any positive and negative dynamic effects, and how these are or can be balanced. Thus, the traditional approaches of hierarchical governance that opt for *ex ante* regulatory tools, top-down instruments, and detailed legal measures are functional but insufficient. Instead, as is proposed by this paper, it is necessary to exploit the flexibility of experimentalist governance, including *ex post* mechanisms, bottom-up instruments, and procedural safeguards, in order to adequately respond to the varying demands posed by data-driven solutions in each specific case.

Analysing the recent Italian case between its national competition authority (hereinafter: NCA), the *Autorità Garante della Concorrenza e del Mercato* (hereinafter: AGCM), and Google – *Case Autorità Garante della Concorrenza e del Mercato v. Google – Ostacoli alla portabilità dei dati* (hereinafter: *AGCM v. Google*),²² this paper scrutinises the experimentalist mechanisms of public competition law enforcement in data portability disputes. In section two, a description of experimentalist governance of cross-sectoral data sharing is provided. The intention is to investigate the extent to which public competition law enforcement displays experimentalist characteristics in solving data sharing issues. To determine the presence of these characteristics, a case study is thoroughly analysed in the third section. The flexibility provided by competition law enforcement, and the attention paid to the interests of all parties involved in the case at hand, are highlighted. Moreover, the paper aims to verify whether it is possible to identify an administrative dialogue within national competition law enforcement, which involves all interested parties and the NCA, referred here as an “internal administrative dialogue”. It is argued that the discretion granted to local actors, both private and public, and the multilateral revision of decisions, pave the way for this internal administrative dialogue. In addition to this internal dialogue, the third section seeks to determine whether an “external administrative dialogue” is at all feasible. This external dialogue would bridge national competition law enforcement with the mechanisms for implementing and revising data legislation, involving local actors and EU institutions.²³ The objective is to align the outcomes of national competition law enforcement with the new EU horizontal data regulatory framework. When a national competition law decision has the potential to influence, modify or even circumvent the implementation of data regulations, an external administrative dialogue that facilitates coordination between national competition law enforcement and data legislation should be further explored. It is suggested

²² *AGCM v. Google*, A552 – *Google-Ostacoli alla portabilità dei dati*, Provvedimento n. 30736 (hereinafter: *AGCM v. Google*), Adunanza del 18 luglio 2023 <<https://www.agcm.it/dotcmsdoc/bollettini/2023/29-23.pdf>> accessed 8 July 2024. The press release is available at <<https://www.agcm.it/media/comunicati-stampa/2023/7/A552->> accessed 8 July 2024.

²³ In this paper, the author identifies the two types of administrative dialogue based on the policy cycle phase, and on the involved parties.

here that certain instruments, such as executive rule-making,²⁴ can provide the foundation for this dialogue. The methodology applied in this paper is descriptive doctrinal intended to clearly identify the EU Data Strategy, its digital targets, the horizontal data regulatory framework, and the complementary enforcement of competition law in data sharing cases. Providing reflections on experimentalist competition law enforcement as a complementary data sharing toolkit, this paper contributes to the literature on experimentalist governance.

II. Experimentalist governance of data sharing practices

The new horizontal data regulatory framework²⁵ recognises that in the business-to-business context (B2B), the central obstacles to data sharing are the lack of technical standards,²⁶ abuses of contractual imbalance,²⁷ and the refusals to grant access not linked to competition concerns.²⁸ By contrast, in

²⁴ The term “executive rule-making” broadly refers to ‘all non-legislative acts of general application that produce external effects by concretizing the content of Treaty provisions or legislative acts and defining the criteria for the regulation of specific cases.’ Specifically, it includes delegated and implementing acts, as defined in Articles 290 and 291 of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01 (hereinafter: **TFEU**). Guidelines, publicly recognised private standards and other soft law measures can also fall within this category. See Robert Schütze, *European Union Law* (3rd edn, OUP 2021) 320–339; Paul Craig, *EU Administrative Law* (3rd edn, OUP 2018) 111–113 and 126–150; Joana Mendes, ‘Executive rule-making: procedures in between constitutional principles and institutional entrenchment’ in Carol Harlow, Päivi Leino and Giacinto della Cananea (eds), *Research Handbook on EU Administrative Law* (Edward Elgar 2017) 371.

²⁵ See n 1.

²⁶ To facilitate the interoperability of data processing services, see Data Act (n 1), Chapter VIII; Digital Markets Act (n 1), Recitals 59 and 60. For an accurate reflection on the need to adopt open and standardised Application Programming Interfaces (APIs) by private and public undertakings, see Oscar Borgogno and Giuseppe Colangelo, ‘Data Sharing and Interoperability: Fostering Innovation and Competition through APIs’ (2019) 35 *Computer Law & Security Review* 105314.

²⁷ Some national legal systems see abuses of contractual imbalance concerning data sharing as unfair practices, whereas others acknowledge their anti-competitive nature. As a result of this legal uncertainty, different sanctions and issues of administrative power arise. See Klaus Wiedemann, ‘A Matter of Choice: The German Federal Supreme Court’s Interim Decision in the Abuse-of-Dominance Proceedings *Bundeskartellamt v. Facebook* (Case KVR 69/19)’ (2020) 51 *International Review of Intellectual Property and Competition Law* 1168; Emanuele Fazio, ‘Il problema delle competenze settoriali e l’adozione di un approccio olistico alla data-driven economy’ (2020) 103 *Il diritto dell’economia* 653.

²⁸ See Data Governance Act (n 1), Recitals 27–30 and Chapter III, which assign to data intermediation service providers a facilitating role in the establishment of relations between data holders and data users in a transaction of data assets.

business-to-government data sharing (B2G), the main challenges are legal uncertainty and barriers, commercial disincentives, and a lack of adequate infrastructure.²⁹ As a result of these technical, economic and legal obstacles, some scholars have noted a paradoxical phenomenon regarding data sharing:³⁰ on the one hand, access to data has become crucial to any activity, but on the other hand, owing to technical, economic and legal obstacles, “data-rich companies”, such as the so-called “gatekeepers” under the Digital Markets Act,³¹ are still reluctant to share the collected data.³²

The framework being developed for data governance acknowledges the numerous interests involved and, consequently, the necessary contribution of all local stakeholders – private and public actors – in addressing the obstacles to data sharing.³³ This involvement requires parties affected by data sharing to not only play a passive role in this context, consisting of providing information, but rather an active role, participating in the implementation, collaborative enforcement and revision of relevant rules. Indeed, the cross-sectoral data regulatory framework stresses the relevance of market investigations to monitor substantial changes in any of the facts, keep the rules up-to-date, and possibly

²⁹ Proposal for a Data Act (n 1) 10; Data Act (n 1), Recital 2.

³⁰ According to Article 2(10) of the Data Governance Act, the broad term “data sharing” refers to ‘the provision of data by a data subject or a data holder to a data user for the purpose of the joint or individual use of such data, based on voluntary agreements or Union or national law, directly or through an intermediary, for example under open or commercial licences subject to a fee or free of charge.’

³¹ According to the Digital Markets Act, the term “gatekeeper” refers to an undertaking providing “core platform services” (e.g., Google Search), which shall comply with the negative and positive obligations set out in this EU Regulation. See Digital Markets Act (n 1), Articles 2(1)(2) and 3. On 6 September 2023, the Commission designated the first six gatekeepers, namely Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft, and twenty-two core platform services. On 29 April 2024, the Commission designated Apple as a gatekeeper for its iPadOS, the operating system for its tablets. On 13 May 2024, the Commission also designated Booking as a gatekeeper for its online intermediation service Booking.com. Overall, a total of twenty-four core platform services provided by these seven gatekeepers have so far been designated. See European Commission, ‘Commission designates Booking as a gatekeeper and opens a market investigation into X’ (13 May 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561> accessed 8 July 2024; European Commission, ‘Commission designates Apple’s iPadOS under the Digital Markets Act Commission’ (29 April 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2363> accessed 8 July 2024; ‘Digital Markets Act: Commission designates six gatekeepers’ (6 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> accessed 8 July 2024.

³² Marco Botta, ‘Shall we share? The principle of FRAND in B2B data sharing’ (2023) RSC Working Paper 2023/30, 8; Alberto Alemanno, ‘Big Data for Good: Unlocking Privately Held Data to the Benefit of the Many’ (2018) 9 European Journal of Risk Regulation 185.

³³ A European Strategy for data (n 1) 13 and 14; Data Act (n 1), Recitals 5, 24, 26 and 69; Data Governance Act (n 1), Recitals 13 and 45; Digital Markets Act (n 1), Recitals 11, 68 and 89.

impose behavioural or structural remedies upon dominant data holders, after consultation with the actors concerned, third-parties, and expert groups.³⁴ Moreover, in its market investigations, the Commission must also consider any relevant findings identified within competition law proceedings conducted under Articles 101 and 102 TFEU, which envisage the increasing participation of all interested parties.³⁵ It is clear that the Commission deliberately refrains from overly detailed and burdensome *ex ante* regulation, and prefers an agile approach to data governance that favours experimentation.³⁶

All the aforementioned conditions and features recall the experimentalist architecture of governance, comprehensively described by Charles Fredrick Sabel starting in 1998.³⁷ According to Sabel *et al.*, experimentalist governance is marked by a high degree of discretion of local agents, dynamic accountability, and the participation of all stakeholders in the design, review and updating of rules.³⁸ To be precise, the high discretion granted to national authorities and local stakeholders in identifying (data sharing) problems and solutions is brought about by the two conditions of strategic uncertainty and polyarchic distribution of powers.³⁹ Strategic uncertainty refers to the need for actors to learn what their goals are, and, while learning, to determine how to achieve them. It requires local actors, in cooperation with each other, to learn to define relevant problems and specific solutions, since any actor capable of setting a strategy independently would do so without being in a state of strategic uncertainty. On the other hand, the closely related polyarchic distribution of powers refers to the necessity of taking into consideration others' views, since no single actor can impose their own preferred solution.⁴⁰ Another distinctive element of experimentalist governance is dynamic accountability, rather than principal-agent accountability. According to the latter model, legislators set objectives and delegate the accountability for their implementation and enforcement to the administrative branch. Legislators monitor the

³⁴ A European Strategy for data (n 1), 12–14; Data Act (n 1), Recitals 96, 100 and 113; Data Governance Act (n 1), Recital 13; Digital Markets Act (n 1), Recitals 65, 69, 77, 78 and 82.

³⁵ Digital Markets Act (n 1), Recitals 86, 90, 91 and 105.

³⁶ A European Strategy for data (n 1) 12.

³⁷ Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267; Charles F Sabel, 'Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability' in Ewald Engelen and Monika Sie Dhian Ho (eds), *De Staat van de Democratie. Democratie voorbij de Staat* (Amsterdam University Press 2004) 173; Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *ELJ* 271.

³⁸ Charles F Sabel and Jonathan Zeitlin, *Experimentalist Governance in the European Union – Towards a New Architecture* (OUP 2010) 9–13.

³⁹ *Ibidem*, 9; Giorgio Monti and Bernardo Rangoni, 'Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism' (2022) 60 *JComMarSt* 1106.

⁴⁰ *Ibidem*.

administration's compliance with legislative instructions, while the electorate reviews the legislature's conformity to its political mandate.⁴¹

In the governance of data sharing practices, the distinctions between principals and agents are blurry, since all actors need to learn which technical, economic and legal obstacles they are solving, and what solutions they are seeking. Consequently, it is necessary to identify a new form of accountability in such a fluid situation, namely so-called "dynamic accountability". Dynamic accountability does not imply compliance with rules set down by the principal, but rather, it requires the agent to explain and justify its actions to those who have to understand and evaluate those actions.⁴² In the governance of data sharing, dynamic accountability implies a pro-active role of data holders in describing the functioning of their systems to data users, interested third-parties, and national authorities. Finally, dynamic accountability paves the way to collaboration in the design, review and updating of solutions.⁴³ Indeed, experimentalist governance entails a shift from transparency in the decision-making process, which allows individuals to access documents, to a more active participation of all interested parties in the "great machine of legislation".⁴⁴ It is notable that this active participation of local actors in the implementation of data governance rules extends to enforcement, and may lead to the revision of legislation.

III. Beyond the data regulatory framework: competition law as regulation

Data regulations are functional in challenging the "data sharing paradox", whilst also recognising the need for a complementary toolkit to react to constantly changing data-driven markets. Indeed, the latest *ex ante* regulatory framework provides a legal background to guide stakeholders' behaviour. However, it does not hold up as a future-proof solution to the dynamic nature and open-ended challenges of data-driven markets.

⁴¹ Sean Gailmard, 'Accountability and Principal-Agent Theory' in Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) 90–105.

⁴² Mark Dawson, 'The accountability of non-governmental actors in the digital sphere: A theoretical framework' (2023) 29 *ELJ* 78; Sabel and Zeitlin (n 38) 10–13.

⁴³ Francesca Bignami, 'Three Generations of Participation Rights before the European Commission' (2004) 68 *Law&ContempProbs* 63–67 and 72–78.

⁴⁴ Maria De Benedetto, *Corruption from a Regulatory Perspective* (Hart Publishing 2021) 6–7; Sabel and Zeitlin (n 38) 18–21; Gaetano Filangieri, *La scienza della legislazione*, vol 1 (Felice Le Monnier 1864) 46.

The data sharing paradox has adverse effects that are not limited to business-to-business (B2B) transactions, but extend further to government-to-business (G2B) and business-to-government (B2G) data sharing.⁴⁵ The interest in maintaining access to data for the benefit of society as a whole is one of the main reasons why the new data regulations advocate their application in tandem with competition law, rather than conceptualising data ownership rights to solve data sharing issues.⁴⁶

The boundaries between competition law and regulation have long been debated.⁴⁷ This section builds on the reasoning of Mario Siragusa and Fausto Cremona's comprehensive analysis.⁴⁸ It states that, historically, competition law and regulation were treated as two opposing categories. Competition law was perceived as a set of negative provisions (*i.e.* prohibitions) that can only be enforced *ex post*, namely after an anti-competitive behaviour has been discovered. In contrast, regulations were more typically characterised by their *ex ante* positive interventions (*i.e.* prescriptions) that prescribe the actions to be taken by firms in a certain market.

This distinction has faded over time, and disappears entirely when it comes to data-driven markets. As for the timing of intervention, competition authorities can intervene *ex ante* (*e.g.* by accepting commitments,⁴⁹ providing notices, guidelines and other measures); and regulators can act *ex post*, particularly when regulatory bodies are entrusted with powers of competition

⁴⁵ Botta (n 32) 8.

⁴⁶ See n 17. According to Josef Drexel, the recognition of a new data ownership right poses the risk of increasing market power, strengthening barriers to data access and, consequently, hindering the data-driven economy. Drexel (n 4) 261. For a contrasting opinion, see Herbert Zech, 'Data as tradeable commodity' in Alberto de Franceschi (ed), *European Contract Law and the Digital Single Market* (Insentia 2016) 51–80.

⁴⁷ The legal literature on the boundaries between competition law and regulation is vast, and there is no way to refer to it exhaustively. See, however, Stavros Makris, 'Responsive Competition Law Enforcement: Lessons from the Greek Competition Authority' (2023) 46 *World Competition Law and Economics Review* 205; Pinar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 *ELR* 85; Niamh Dunne, 'Commitment decisions in EU competition law' (2014) 10 *Journal of Competition Law & Economics* 399; Pablo Ibáñez Colomo, 'On the Application of Competition Law as Regulation: Elements for a Theory' (2010) 29 *Yearbook of European Law* 261.

⁴⁸ Mario Siragusa and Fausto Cremona, 'A reassessment of the relationship between competition law and sector-specific regulation' in Joseph Drexel and Fabiana Di Porto (eds), *Competition Law as Regulation* (Edward Elgar 2015) 153–162.

⁴⁹ For a thorough analysis of negotiated settlements, such as commitment decisions, as an example of *ex ante* enforcement of competition law see Makris (n 47) 207 and 224–228; Dunne (n 47) 417–419; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation – Theory, Strategy, and Practice* (2nd edn, OUP 2012) 490–491.

authorities (or when the line of demarcation between authorities is blurry⁵⁰). In addition, when categorising by the type of intervention, the distinction has been further blurred by the combination of prohibitions and prescriptions in both competition law and regulation in order to achieve the digital targets. Competition law has been assigned a pro-active role in facilitating the free flow of data through remedial designs, while regulation has been given the function of providing prohibitions and prescriptions.⁵¹ Recently, the long debate on competition law and regulation in data-driven markets was solved by the simultaneous and complementary application of the two sets of rules: (a) when competition law and data regulations are directed at different objectives; and when (b) data regulations leave room for anti-competitive practices.⁵²

Given that the data regulatory framework and competition law are “complementary”, they can be enforced cumulatively. However, there is still no consensus on what the balance is, between data regulations and competition law, that is generally best suited to address the challenges of data sharing.⁵³

⁵⁰ For instance, the Italian competition authority does not formally exercise regulatory powers, but its decisions end up *de facto* playing a regulatory role in the investigated markets. Marco D’Alberty and Alessandro Pajno, *Arbitri dei mercati – Le Autorità indipendenti e l’economia* (il Mulino 2010) 35.

⁵¹ To illustrate the pro-active role of competition law in fostering the free movement of data, the following sections will focus on the Italian case *AGCM v. Google – Ostacoli alla portabilità dei dati*. Additionally, the Commission’s new competition policy consists of an extended relaxation of competition rules, through guidelines and other soft law measures, to promote data sharing and facilitate the achievement of EU’s digital targets. For instance, the Commission reviewed the guidelines for vertical and horizontal agreements to stress the necessity of pro-competitive agreements that provide digital benefits. Even on the State Aid front, the Commission reviewed its State Aid Guidelines and Block Exemption Regulations to channel private and public investments towards digital infrastructures. See A competition policy fit for new challenges (n 18); Majcher and Robertson (n 20); Fazio (n 20). On the other hand, some examples of prohibitions provided by the latest horizontal data regulations, along with the traditional prescriptions, can be found in the Data Act (n 1), Articles 5 and 6; Data Governance Act (n 1), Articles 4, 12 and 21; Digital Markets Act (n 1), Articles 5 and 6.

⁵² Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537, paras 49 and 51; Siragusa and Cremona (n 48).

⁵³ Even though the complementary role of competition law is acknowledged in EU data legislation, the relationship between the Digital Markets Act and competition law is widely debated owing to their overlapping objectives and legal interests. See Inge Graef, ‘Regulating Digital Platforms: Streamlining the Interaction between the Digital Markets Act and National Competition Regimes’ in Inge Graef and Bart van der Sloot (eds), *The Legal Consistency of Technology Regulation in Europe* (Bloomsbury 2024) 173–175; Jacques Crémer, David Dinielli, Paul Heidhues, Gene Kimmelman, Giorgio Monti, Rupprecht Podszun, Monika Schnitzer, Fiona Scott Morton and Alexandre de Stree, ‘Enforcing the Digital Markets Act: institutional choices, compliance, and antitrust’ (2023) 11 *Journal of Antitrust Enforcement* 345–348; Giuseppe Colangelo, ‘The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse’ (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4070310> accessed

Solutions to this question can only be provided case-by-case and with respect to specific issues. According to the report submitted to the Commission by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, two things are clear in data-driven markets: first, competition law is designed to react to the dynamics of these markets; second, competition law enforcement and regulation are not necessarily mutually exclusive, but in most cases they can reinforce each other.⁵⁴ Ultimately, even competition law – especially Article 102 TFEU – provides a “background regime”, similar to those of data regulations, for adjusting stakeholders’ practices in data-driven ecosystems. Arguably, this is the result of the ongoing modernisation of competition law enforcement, which started after the entry into force of Regulation (EC) 1/2003, in order to tackle the challenges of data-driven ecosystems.⁵⁵ Indeed, the current review process of competition law in light of digital transition has also involved Regulation (EC) 1/2003 and its Implementing Regulation (EC) 773/2004 (hereinafter, together: **Antitrust Procedural Regulations**). The type of competition law enforcement analysis, which is based on a thorough investigation of market failures and competitive practices in the context of the specific case, can help to implement and possibly re-design the chaotic data regulatory framework, as well as provide important bottom-up guidance to stakeholders and legislators.⁵⁶

8 July 2024; Pierre Larouche and Alexandre de Stree, ‘The European Digital Markets Act: A Revolution Grounded on Traditions’ (2021) 12 *Journal of European Competition Law and Practice* 542; Mario Libertini, ‘Digital markets and competition policy. Some remarks on the suitability of the antitrust toolkit’ (2021) *Orizzonti del Diritto Commerciale* 337.

⁵⁴ For a comprehensive analysis of competition law potentials and issues in data-driven markets see OECD, ‘Handbook on Competition Policy in the Digital Age’ (2022) <<https://www.oecd.org/daf/competition-policy-in-the-digital-age/>> accessed 8 July 2024; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, Report for the European Commission: Competition policy for the digital era (2019), European Commission <<https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>> accessed 8 July 2024.

⁵⁵ The Commission has started a public consultation for revising competition enforcement procedures in light of the digital transition. This review presents an opportunity to reflect on bottom-up measures and procedural safeguards to address the specific aspects of each case. To follow the ongoing review process see European Commission, ‘EU Antitrust procedural rules – evaluation’ (2022) <https://competition-policy.ec.europa.eu/public-consultations/2022-antitrust-procedural-rules_en> accessed 8 July 2024.

⁵⁶ See Crémer, de Montjoye and Schweitzer (n 54) 4 and 5.

1. Experimentalist competition law enforcement in *AGCM v. Google – Ostacoli alla portabilità dei dati*

So far, the discussion on the modernisation of competition law procedures after the entry into force of Regulation (EC) 1/2003, has mainly focused on the distinction between hierarchical and experimentalist governance, to describe the institutional arrangements of modernised competition law.⁵⁷ Commentators who subscribe to the hierarchical view, consider the modernisation process, and the associated decentralised implementation and enforcement procedures, as well as the creation of the European Competition Network (ECN),⁵⁸ as ways for the Commission to consolidate its traditional dominance over national competition authorities (NCAs).⁵⁹ On the other hand, the experimentalist perspective contends that the modernisation has established a multi-level “experimentalist” architecture, where NCAs and private and public stakeholders have discretion with respect to the implementation phase, which in turn affects regulatory revision at the EU level.⁶⁰ This paper argues that there has been a move away from – although by no means abandonment of – hierarchical governance for data sharing practices, which gives rise to a whole range of interesting questions concerning the coordination between national competition law enforcement and data regulations.⁶¹ Analysing

⁵⁷ Monti and Rangoni (n 39) 1106–1107; Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart Publishing 2020) 15–17. Hierarchical governance implies that policies are top-down, prescriptive and relatively complete, thereby limiting the discretion of those subject to the policies. However, the last two decades have seen a shift away from hierarchical approaches and towards new forms of governance, such as experimentalist governance. Sabel and Zeitlin emphasised the need for experimentalist governance, which could draw on diverse experiences, as a tool to address the complexity of problems, the breakdown of regulatory capacity, and the need to harmonise, coordinate and revise regulatory rules. See Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials* (7th edn, OUP 2020) 194–215; Sabel and Zeitlin (n 37) 279 and 298–299.

⁵⁸ As is well known, the ECN is a network formed by the national competition authorities (NCAs) and the Commission, where they cooperate closely, as prescribed by Regulation (EC) 1/2003. The Commission plays a central role in ensuring the coherence of competition law enforcement, particularly as a result of its examination of draft decisions submitted by the NCAs. Although the ECN is primarily designed as an enforcement network, it also functions as a policy-making network through mutual policy learning among the NCAs. See Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 303–304; Jurgita Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer 2020) 126–128; Ioannis Lianos and Damien Geradin, *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar 2013) 566–569.

⁵⁹ See n 57.

⁶⁰ *Ibidem*.

⁶¹ The broader argument of this paper, that there has been a move away from hierarchical governance for data sharing, does not mean that there is little reliance on *ex ante* regulatory

competition law enforcement in the Italian *AGCM v. Google* case regarding data portability,⁶² the following section proposes a bottom-up perspective on data governance mechanisms.

On 9 September 2021, Hoda s.r.l.⁶³ reported to the Italian competition authority – the AGCM – a “possible” violation of the abuse of dominance prohibition under Article 102 TFEU and Article 3 of the Italian Competition Act (L. no. 287/1990) by Alphabet Inc., Google LLC, Google Ireland Limited and Google Italy S.r.l. (Google).⁶⁴ Google allegedly hindered interoperability in sharing data via “Google Takeout”⁶⁵ with other platforms, specifically with the Weople APP operated by Hoda in the Italian geographical market.⁶⁶ Google was suspected of impeding the portability right of personal data, and of restricting the economic and societal benefits that consumers can derive from their own data. Simultaneously, the alleged abuse could restrict competition as it reduced the capacity of alternative operators to develop data-driven services.

tools, top-down instruments, and detailed legal measures. For instance, the Digital Markets Act maintains a centralised implementation and enforcement system, although the NCAs are progressively gaining powers to support the Commission through regulation and competition law. On the other hand, the Data Act and the Data Governance Act provide decentralised implementation and enforcement systems, albeit with the Commission retaining a coordinating and supervisory role. See Digital Markets Act (n 1), Recitals 90 and 91 and Articles 1(6)(7), 22, 23, 27, 38 and 40; Data Act (n 1), Recital 107 and Chapter IX; Data Governance Act (n 1), Recitals 53-55 and 59, Articles 7, 13, 14, 23, 24 and Chapter V. This paper suggests that a shift towards more experimentalist governance for data sharing is in progress. However, it does not assert that hierarchical forms of governance should be excluded. The shift away from hierarchical governance does not imply that EU legislators are not centrally involved in law-making and policy-making for data sharing. Rather, it indicates that they are increasingly collaborating with local actors, such as NCAs, expert groups, representative associations, and private and public actors. Compare this with the broader analysis provided by Craig and de Búrca (n 57) 197.

⁶² GDPR (n 6), Article 20.

⁶³ Hoda s.r.l. is an Italian-based start-up specialised in data management. The company’s flagship service is the “Weople” App, which allows users to exercise their individual rights regarding data, such as the right to data portability, and share their data with third parties. For the functioning of Weople’s services see Weople <<https://weople.space/#come-funziona>> accessed 8 July 2024.

⁶⁴ *AGCM v. Google*, Provvedimento n. 30215, Adunanza del 5 luglio 2022 <<https://www.agcm.it/dotcmsdoc/allegati-news/A552%20avvio.pdf>> accessed 8 July 2024, para 3.

⁶⁵ Google Takeout is a service available to end users for backing up their data. This service requires data subjects’ consent throughout the entire process of extracting, collecting and transferring data. After logging in, users must also proactively specify: (i) which data they are interested in from the Google services, (ii) the frequency of extractions, (iii) the file format that will contain the data copy, and (iv) the destination for the data. For the specific steps that users have to follow in the Google Takeout interface see Google Takeout <<https://takeout.google.com/?pli=1>> accessed 8 July 2024.

⁶⁶ *AGCM v. Google*, Provvedimento n. 30215 (n 64), paras 4 and 5.

Indeed, to ensure effective data portability services, the interaction between Weople and other platforms, such as Google in this specific case, must take place through a technological protocol that allows for dialogue and real-time updating of the data flow.⁶⁷

Pursuant to Article 20(2) GDPR, Hoda repeatedly contacted Google wanting to identify Google's new interoperability mechanisms, so that Hoda's Weople users could transfer their data to their Weople accounts.⁶⁸ However, the only mechanism offered by Google was Google Takeout, which can only be reached directly and individually by each Google user, and only after authentication via ID and password. According to the evidence provided by Hoda, the number of requests for data portability from Google to Weople drastically decreased following the introduction of the "do-it-yourself procedure" in Google Takeout.⁶⁹ Therefore, the obstacles placed by Google to the identification of new data portability mechanisms resulted in undue "exploitation use of data"⁷⁰ (directly limiting the benefits to consumers), as well as in "exclusionary use of data"⁷¹ (limiting the development of Weople and other data-driven services).⁷²

The AGCM notified Google of the opening of its investigative procedure on 5 July 2022. Pursuant to Article 14-ter L. no. 287/1990, within three months of the notification of the opening of an investigation, companies can present commitments to eliminate the possible anti-competitive aspects of their practices.⁷³ Consequently, Google committed to modify its Google Takeout procedure, as well as to adopt a new direct data portability mechanism that

⁶⁷ *AGCM v. Google*, Provvedimento n. 30215 (n 64), para 6.

⁶⁸ *AGCM v. Google*, Provvedimento n. 30215 (n 64), para 9.

⁶⁹ *AGCM v. Google*, Provvedimento n. 30215 (n 64), paras 11–13.

⁷⁰ "Exploitation use of data" refers to situations where an undertaking uses its market power, deriving from the exploitation of data, to impose unfair data protection and privacy terms and/or other conditions on customers. OECD, 'Abuse of dominance in digital markets' (2020) <[https://one.oecd.org/document/DAF/COMP/GF\(2020\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2020)4/en/pdf)> accessed 8 July 2024 50.

⁷¹ "Exclusionary use of data" arises when an undertaking with market power adopts certain data strategies to push other competitors out of the market and/or prevent new entry. OECD (n 70) 24; European Commission, Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45, para 19. It is necessary to recall that the Commission has published a "Call for Evidence" with a view to adopting new Guidelines on the application of Article 102 TFEU to exclusionary conduct. To follow the revision process, see European Commission, 'Antitrust: Commission announces Guidelines on exclusionary abuses and amends Guidance on enforcement priorities' (27 March 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_1911> accessed 8 July 2024.

⁷² *AGCM v. Google*, Provvedimento n. 30215 (n 64), paras 34, 38 and 41.

⁷³ Italian Competition and Consumer Act (Law 287/1990 of 10 October), Article 14-ter.

would be available to third-party operators.⁷⁴ After consulting interested third-parties on the commitments offered by Google, including the views expressed by various associations, the AGCM concluded that the interoperability mechanism modifications offered by Google are appropriate for removing possible anti-competitive aspects of the practice under scrutiny.⁷⁵ In particular, the third commitment responded to the criticism regarding the Google Takeout procedure as it offered the possibility to start testing a new direct data portability solution, from Google's services to third-parties' services, before its official release (the so-called "Early Adopter Programme"). Moreover, it included technical support (e.g. in the form of technical guidelines and workshops) to assist third-party operators in developing their interoperable setups.⁷⁶

It is argued here that this commitment procedure is a clear example of "experimentalist competition law enforcement" meant to deal with the dynamic and open-ended challenges of data-driven ecosystems.⁷⁷ Following the experimentalist architecture, the case study's enforcement is first marked by the high level of discretion granted to the national supervisory authority in its proceedings, and to the private actor in removing data portability obstacles. According to Article 14 L. no. 287/1990, the AGCM can open the investigation in the case of "possible" infringements of Articles 101 and 102 TFEU (or Articles 1 and 2 L. no. 287/1990). On the other side, the investigated private undertaking can submit commitments under Article 14-ter L. no. 287/1990 designed to eliminate the possible anti-competitive aspects being investigated. Notably, the discretion granted to the authority is related first and foremost to whether to accept commitments or not. Commitment decisions are inappropriate in cases where the anti-competitive conduct appears sufficiently

⁷⁴ *AGCM v. Google*, A552 – *Google-Ostacoli alla portabilità dei dati*, Allegato al Provvedimento n. 30508 (27 February 2023) <https://www.agcm.it/dotcmsdoc/impegni/p30508_all.pdf> accessed 8 July 2024, 2.

⁷⁵ *AGCM v. Google*, Provvedimento n. 30736 (n 22).

⁷⁶ *Ibidem* 13.

⁷⁷ This is not the first time that an experimentalist approach has been adopted to influence the Google ecosystem through commitments. At the EU level, the Commission recognised the limitations of hierarchical governance and the prevailing condition of strategic uncertainty in the *Google Search (Shopping)* case. The supranational authority noted the uncertainty about the anticompetitive effects and remedies, allowing Google to choose the appropriate solutions to address the problem. However, unlike the Italian case examined in this paper, the remedial proposals were not collaboratively designed with the participation of all the interested parties. The Commission rejected the proposals and ultimately issued a formal violation decision. For a comparison see *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final [2017] OJ C 9/11, paras 698; Svetiev (n 57) 74–81.

severe to justify the imposition of a fine.⁷⁸ In the case at hand, the AGCM deemed the acceptance of commitments to be adequate for ensuring data portability, since no competitive harm had occurred (yet), and Google's involvement was necessary to align the interoperability mechanisms.⁷⁹

The need for Google's commitments was brought about by the strategic uncertainty, and the polyarchic distribution of powers, in addressing data sharing issues.⁸⁰ Strategic uncertainty required Google and local actors, *i.e.* the interested parties and the authority, to repetitively consider the definition of the relevant data sharing problems, and the specific solutions that might be able to resolve them. According to Google's first statement, in order to protect users' privacy, the Big Tech company can only process data portability requests sent from its users' Google accounts via the do-it-yourself procedure.⁸¹ Data regulation compliance, and technical feasibility with third-party services, require iterative monitoring of the new direct data portability tool, as well as the changes to Google Takeout. As a consequence of this ongoing uncertainty, Google has the right to revise, and possibly rescind, the aforementioned commitments at any time, particularly in case of legislative changes or significant technological developments.⁸² Closely related to the condition of strategic uncertainty, the polyarchic distribution of powers refers to the necessity of taking into consideration others' views, since no single actor – not even Google – could impose their own preferred solution.⁸³ Only the authority can issue orders to the *fiduciario*, that is an intermediary entity in

⁷⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1 (hereinafter: **Regulation 1/2003**), Recitals 13 and Article 5; AGCM, Comunicazione sulle Procedure di Applicazione dell'Articolo 14-ter della Legge 10 Ottobre 1990, n. 287 <<https://www.agcm.it/docmsdoc/normativa/concorrenza/P23863-comunicazione.pdf>> accessed 8 July 2024, paras 6 and 8; Consiglio di Stato – Sez. VI, 20 April 2011, n. 2438, para 2.3.3.

⁷⁹ *AGCM v. Google*, Allegato al Provvedimento n. 30508 (n 74), pages 8 and 9. It is interesting to note that even in the *Google Search (Shopping)* case, the Commission acknowledged significant uncertainty underlying its decision. First, it was challenging to classify Google's behaviour within the specific terms of Article 102 TFEU or the existing precedents and doctrines developed by EU institutions on the forms of abuse of a dominant position. Second, there were challenges in establishing the anti-competitive effects of Google's conduct. Finally, regardless of the legality of an abuse of dominance claim based on the contested conduct, remedial design and implementation also posed significant challenges. Specifically, hierarchical supervision of compliance was complicated by the frequent changes Google makes to its algorithm to enhance search results. See Svetiev (n 77).

⁸⁰ Sabel and Zeitlin (n 38).

⁸¹ *AGCM v. Google*, Provvedimento n. 30215 (n 64), para 10.

⁸² *AGCM v. Google*, Allegato al Provvedimento n. 30508 (n 74) page 8; *AGCM v. Google*, Provvedimento n. 30736 (n 22) para 24.

⁸³ Sabel and Zeitlin (n 38).

charge of monitoring Google's compliance with the commitments. However, the fiduciario's appointment and duties were determined by Google and the AGCM in collaboration.⁸⁴ The bottom line is that Hoda and the AGCM required Google's contributions and *vice versa* to ensure compliant, effective and continuous data portability between platforms.

It is argued here that another distinctive element of experimentalist competition law enforcement in the examined case is Google's dynamic accountability, as opposed to principal-agent accountability.⁸⁵ Experimentalist competition law enforcement seeks to iteratively redefine problems and solutions, in order to respond dynamically to the strategic uncertainty of data sharing. Consequently, a dynamic form of accountability is needed to cope with such a fluid situation. It does not imply compliance with specific rules set down by the authorities, including the AGCM. Instead, it requires Google to explain and justify its actions to parties interested in data sharing, which have to understand and evaluate those actions.⁸⁶

Finally, in the design, review and updating of data sharing solutions, experimentalist competition law enforcement also entails a shift from transparency in decision-making to the participation of all interested parties.⁸⁷ As already shown, the AGCM consulted various trade and consumer associations before making Google's commitments binding.⁸⁸ These associations have an active role both in accepting the commitments, as well as in approving any necessary changes over time. The different third-party interoperability mechanisms indeed needed to be taken into account in order to ensure their technical and legal conformity with the interoperability changes driven by Google. This necessity of considering the technical differences and opinions of the various economic actors paves the way for two forms of administrative dialogue between the various parties in data governance: an internal dialogue within the national competition law enforcement, and an external dialogue between national competition law enforcement and the implementation and regulation of data sharing solutions.

⁸⁴ *AGCM v. Google*, Provvedimento n. 30736 (n 22) para 24.

⁸⁵ Gailmard (n 41).

⁸⁶ Dawson (n 42); Sabel and Zeitlin (n 42).

⁸⁷ Bignami (n 43); Sabel and Zeitlin (n 44). In contrast to the analysed national competition case, the constraints on the experimentalist implementation of the remedies in the *Google Search (Shopping)* case stem from two factors. Firstly, the remedy's limitation arises from its lack of collaborative design, which excludes the participation of interested parties. Secondly, the limitation is rooted in the principle that the same measure must be implemented across different technological devices and national markets. See Svetiev (n 77).

⁸⁸ *AGCM v. Google*, Provvedimento n. 30736 (n 22) paras 25–38.

2. Enforcement, implementation, and regulatory dialogues

Given the strategic uncertainty and polyarchic distribution of powers, the AGCM instituted a dialogue with stakeholders and third-parties interested in the acceptance, monitoring and review of Google's commitments.⁸⁹ The aim of such dialogue is to test the effectiveness and proportionality of the implemented data portability solutions, in the context of the specific case. However, such dialogue also intends to ensure that concerns about data protection and/or privacy do not diminish pro-competitive forms of collaboration among data holders and data recipients.⁹⁰ It is precisely these forms of collaboration that prevent possible anti-competitive effects of the practice at stake. From this perspective, the dialectic relationship between experimentalist acceptance, monitoring and peer review⁹¹ blurs the boundaries between *legis-executio* (i.e. data sharing implementation and enforcement directed at achieving digital targets) and *legis-latio* (i.e. data rule-making).⁹² The final result is that, on the one hand, the digital targets and the EU data strategy trigger competition law revisions, but, on the other hand, competition law enforcement can also affect the implementation and revision of data rules with the involvement of local actors. To untangle this observation, this section first investigates the internal dialogue within national competition law enforcement, and then proceeds to administrative mechanisms opening to the external dialogue between national competition law enforcement, data sharing implementation and revision.

Starting from the internal administrative dialogue within national competition law enforcement, the Italian NCA repeatedly stressed the importance of market testing as a form of peer review of the design of commitment-based data portability.⁹³ Before "finalising" its decision to accept the commitment, the AGCM considered Hoda's observations, the opinions of two other companies, trade and consumer associations, as well as other entities in shaping the remedies voluntarily proposed by Google.⁹⁴ This broad participation by all interested parties in the national enforcement process

⁸⁹ Ibidem.

⁹⁰ The definitions of "data holder" and "data recipient" are provided by Article 2(13)(14) of the Data Act and by Article 2(8) of the Data Governance Act.

⁹¹ For a thorough analysis of "peer review" in experimentalist market regulation and competition law see Svetiev (n 57) 95-124; European Parliament and Council Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3 (hereinafter: **ECN+ Directive**), Article 12; Regulation 1/2003 (n 78), Article 14(7).

⁹² See De Benedetto (n 44) 9.

⁹³ *AGCM v. Google*, Provvedimento n. 30736 (n 22) paras 23, 24 and 39-48; *AGCM v. Google*, Allegato al Provvedimento n. 30508 (n 74) pages 5, 6 and 9.

⁹⁴ *AGCM v. Google*, Provvedimento n. 30736 (n 22) paras 10, 11 and 25-38.

helped uncover data sharing issues hidden from the EU legislator working *ex ante*. For example, Hoda requested certain modifications to the first commitment with a view to minimising the need for direct user intervention in the data portability procedure.⁹⁵ Hoda's request highlighted the importance of minimising the user's role in the technical procedure that follows the data subject's consent according to the GDPR. In addition to a peer review that precedes the decision to accept commitments, experimentalist competition law enforcement also requires ongoing review of the commitments' implementation. Especially, Google offering the new direct data portability solution before its official release (the third commitment), allowed interested parties to provide input concerning the effective technical compatibility of the Early Adopter Programme with their services.⁹⁶

Regarding the external administrative dialogue between national competition law enforcement, data rules implementation and revision, involving local actors and EU institutions, the Digital Decade Policy Programme 2030 recognises the necessity to monitor, and possibly amend, the specified digital targets according to technical, economic and legal developments.⁹⁷ Consequently, experimentalist data governance encourages close cooperation and coordination between local actors, the Commission and the EU legislators in monitoring digital advancement. Thus, EU data governance supports administrative mechanisms that ensure the effectiveness of policies and measures, as well as the exchange of information and best practices. It is argued here that it is possible to structure a bottom-up pathway that leads from the results of experimentalist competition law enforcement to the revision of data regulations at the EU level. For instance, the new data sharing obligations and prohibitions imposed by the DMA onto the designated gatekeepers are susceptible to being "further specified".⁹⁸ The feature of "further specification" provides a channel for collaborative design and revision of rules between local actors and the Commission. Indeed, NCAs can consolidate commitment-based data portability in executive rule-making measures,⁹⁹ such as national guidelines, taking into consideration the (technical) guidelines and workshops offered by private actors.¹⁰⁰ Subsequently, such national guidelines can be considered by the Commission in the adoption of implementing acts, specifying the rules that the gatekeeper concerned is

⁹⁵ *AGCM v. Google*, Provvedimento n. 30736 (n 22), para 30.

⁹⁶ *AGCM v. Google*, Allegato al Provvedimento n. 30508 (n 74) pages 5–6.

⁹⁷ Digital Decade Policy Programme 2030 (n 11), Recitals 20, 22, 24, 29, 33, 38, 39 and Articles 8, 9; 2030 Digital Policy Compass (n 12) 14–15.

⁹⁸ Digital Markets Act (n 1), Article 6.

⁹⁹ See n 24.

¹⁰⁰ See *AGCM v. Google*, Allegato al Provvedimento n. 30508 (n 74) page 5.

to implement, and/or delegated acts updating such rules.¹⁰¹ In general, as already shown, cross-sectoral data regulations acknowledge the relevance of market investigations to monitor implementation and substantial changes in facts, as well as keeping the rules up to date. Moreover, the Commission is obliged to consider any relevant findings identified within competition law proceedings in its regulatory market investigations.¹⁰² Consequently, when the Commission deems it necessary to review or modify essential elements of data regulations, following a market investigation (*e.g.*, to update the prohibitions and obligations of gatekeepers), it must take into account the results of (experimentalist) competition law enforcement.

This bottom-up structure makes it possible to consider the particularities of individual cases, given that legislation, until it is implemented and enforced, merely expresses a written imperative waiting for “the proof of facts”.¹⁰³ Moreover, it can help limit “legislative inflation”¹⁰⁴ of the new data regulatory framework, as the high quantity of new data regulations risks impeding the achievement of EU’s digital targets. The suggested pathway is not intended to replace the hierarchical top-down approach of the Commission providing guidance to national authorities, but rather, to act as a parallel mechanism.

IV. Conclusions: experimentalist competition law enforcement as a complementary data sharing toolkit

By going beyond the institutional arrangement discussion on experimentalist governance, this paper unveils the experimentalist elements of public competition law enforcement in the Italian *AGCM v. Google* case that concerns the data portability issue. It reveals the importance of analysing the effectiveness of the data regulatory framework starting from individual cases. The EU data legislation has been comprehensively adopted. However, it is not yet effective law: until it is implemented and enforced, it merely expresses a written imperative waiting for practical cases to prove its worth. The change in perspective derived from the case analysed here clearly shows the dynamic and open-ended challenges of data sharing initiatives. To respond adequately to these challenges, the conditions and features of experimentalist architecture in competition law enforcement are investigated thoroughly. They direct the attention to *ex post* mechanisms, bottom-up instruments, and procedural

¹⁰¹ Digital Markets Act (n 1), Recitals 65, 77, 98, 99 as well as Articles 8, 12 and 19.

¹⁰² See n 34 and n 35.

¹⁰³ De Benedetto (n 44) 9.

¹⁰⁴ *Ibidem*.

safeguards, rather than *ex ante* regulatory tools, top-down instruments, and detailed legal measures.

The *AGCM v. Google* case showcases the conditions and features of experimentalist architecture, as well as the importance of dialogue within national competition law enforcement. This internal administrative dialogue, which involves all interested parties and the domestic authority, seeks to provide iterative monitoring and revisions to data sharing solutions, and safeguards aligned to the associated risks. The Italian NCA clearly supports the necessity of a regular dialogue within national competition law in this case. The results of the internal dialogue can be useful to ensure, design, review and possibly avoid the implementation of the regulatory, rather than competition law, solutions of the data framework. Subsequently, the paper examines external administrative dialogue among enforcement, implementation, and regulation, in order to determine to which extent the national enforcement solutions can feed back into national and EU level revisions and through which mechanisms. Some scholars have already noted that competition law enforcement relying on innovative remedies blurs the lines between *ex ante* regulation and *ex post* competition law enforcement.¹⁰⁵ It is argued here that this distinction remains, but the complementary role of experimentalist competition law enforcement for data regulations must be investigated thoroughly. In *AGCM v. Google*, experimentalist competition law enforcement aimed at ensuring the right to data portability provided by Article 20 GDPR, and at designing an effective remedy to that end. Similar interactions are nowadays encouraged by the Digital Decade Policy Programme 2030, designed to trigger collaborative analyses among local actors, national authorities and the Commission, to identify the weaknesses of EU digital targets, and to propose actions for effective remedies.

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¹⁰⁵ Yane Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization, or Experimentalist Architecture?' in Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union – Towards a New Architecture* (OUP 2010) 97.

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