

Is This a Competition Problem? – The Challenge of Digitalisation and the Limits of Enforcement

Ariel Ezrachi*

Abstract

The digital revolution has benefited us all, and changed the way we shop and interact. Alongside its many benefits, new challenges emerged with the rise of digital platforms, network effects, big data and big analytics. Increased concentration levels raised concerns as to the true competitiveness of the digital economy and its effects on consumer welfare. This, in turn, led to a lively discussion on the need for antitrust intervention and the adequacy of current laws. The question - ‘Is this a competition problem?’ has become common in the face of new business strategies. It embodies a query as to the scope of competition law – its purpose, values and optimal use.

I. Introduction

The digital economy forms a central driver to future prosperity – delivering waves of innovation, efficiency and consumer welfare. It has transformed the way we communicate, engage, and consume, and heralded an era of perceived opulence - where more is the norm, where our needs are anticipated and catered for.

The evolution of digital markets has seen the rise of big data, big analytics, distinct network effects, and increased concentration. Network effects naturally led to the rise of key platforms and gatekeepers, to the creation of new ecosystems, and the tipping of some markets in favour of the dominant incumbent.

The digital landscape presents several key characteristics which arguably differentiates it from many other markets. Among them:

Big data, which undoubtedly drives much of the innovation and offering in the digital economy has risen to become a key asset in digital economy. Alongside the many improvements it offers, noteworthy is the fact that limited access to relevant and timely data may inhibit entry, expansion and innovation.¹ As noted by the

* Slaughter and May Professor of Competition Law, The University of Oxford. Director, Oxford Centre for Competition Law and Policy. An extended version of this paper was prepared and presented as part of the European Consumer Organisation (BEUC) project “Protecting Consumer Freedoms in the Digital Era” which explores the way in which EU competition law should apply in digital markets, and means to maximise the well-being of consumers in the European Union.

¹ The key themes below are discussed in greater detail in Ezrachi and Stucke *Virtual Competition - The Promise and Perils of the Algorithm Driven Economy* (Harvard University Press, 2016); Ezrachi and Stucke ‘Digitalisation and Its Impact on Innovation - Report Prepared for the European Commission’ (DG Research & Innovation 2018).

OECD, a positive feedback loop helps the strong become stronger, as the weak get weaker.² A data advantage over rivals can enable leading players to achieve critical economies of scale, which could tilt the data — and competitive balance — in their favour.

Big Analytics offer the power to optimise the use of data, identify patterns, improve the understanding of market dynamics, and open the door to accelerated innovation. Advanced analytics have also been central in the ability to identify consumers' needs and wants. Here as well, alongside the clear benefits, one can identify worrying trends. Data mining, data trade, online marketing, pattern recognition, demand estimation, and price optimization, have been used to approximate reservation price, identify bias, and power exploitative practices.

Network effects offer unparalleled efficiencies and economies of scale which drive the digital economy. At the same time, however, network effects may support the rise of significant barriers to entry and limit the competitive pressure on the incumbent.³ Indeed, the combination of network effects, access to data and analytics may tip the market in favour of a leading provider, which may become inefficiently entrenched.⁴ This may affect competition on data, competition on user-base, algorithm development and influence the nature and scope of innovation.

Friction and switching costs also characterise many concentrated digital markets. Platforms and service providers may seek to limit the switch-ability and availability of outside options by limiting interoperability between systems. Such practices affect entry and expansion of smaller competitors as they raise barriers to entry and expansion.

Controlled ecosystems also play a role in this environment. Users face asymmetric information as to costs, benefits and availability of outside options. As users are (de-facto) locked into one platform or providers, they are subjected to its control and possible use of behavioural techniques ('sludge'⁵). Such environments are ripe for tracking, manipulation and exploitation.⁶ The controller of the ecosystem may also invest in means to ensure continued engagement, and sharing data within the

² OECD, *Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report* 29 (October 2014), <http://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf>; reference within quotation is to Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network ECONOMY* (Harvard Business Press, 1999).

³ Germany, in 2017, for example, amended its competition law to specify that direct and indirect network effects be taken into account in assessing a firm's market position. § 18 (3(a)) of the Act against Restraints of Competition (Competition Act – GWB) - Last amended by Article 10(9) of the Act of 30 October 2017, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6.

⁴ See the Report for the Federal Ministry for Economic Affairs and Energy (Germany) Heike Schweitzer, Justus Haucap, Wolfgang Kerber, Robert Welker 'Modernising the law on abuse of market power'.

⁵ See the report of The Behavioural Insights Team, 'The behaviour of online harm and manipulation, and what to do about it', 15 April 2019, https://www.bi.team/wp-content/uploads/2019/04/BIT_The-behavioural-science-of-online-harm-and-manipulation-and-what-to-do-about-it_Single.pdf

⁶ <https://www.wired.com/2016/11/subtle-ways-digital-assistant-might-manipulate/>

incumbent's digital ecosystem (often against their own interest).⁷ Indeed several reports have highlighted the increased investment by platforms and application providers in creating addiction, to facilitate retention, targeting and data harvesting.⁸

The accumulated result of the above characteristics has been a digital environment which may appear dynamic, but is often characterised by increased concentration and increased market power. An environment in which key players are able to dictate the nature and flow of innovation, the entry into the market, the expansion of services and the interface with consumers. These features arguably led many markets to tip, in favour of the dominant firm, making disruption less likely. Indeed, empirical data suggests that markets are becoming more concentrated,⁹ and display lower levels of investments in innovation.¹⁰

In a rapidly changing economic landscape and the new competition dynamics in the digital economy raise questions as to the normative scope of competition enforcement. The question - '*Is this a competition problem?*' has become common in the face of new business strategies, new forms of interaction with consumers, the accumulation of data and the use of big analytics. New market realities and business strategies raise questions as to the optimal use of competition law, its effectiveness, and more broadly, its goals.

This paper seeks to outline the scope of EU competition law – its purpose and values. While doing so, it considers how EU competition law should be applied to digital markets. Clarifying these norms provides the legal prism through which to view the market dynamics. It affects one's conclusion as to the nature of activities that competition law can address under European law, and what constitutes an infringement of the law.

The paper begins with a brief introduction of the foundations of European competition law. Following this, it considers the multitude of goals and values that European competition law aims to advance, and their significance in a digitalised economy. The discussion then moves on to explore the tension between the multitude of goals and economic analysis.

⁷ Forbrukerrådet, 'Deceived by Design. How tech companies use dark patterns to discourage us from exercising our privacy rights', <<https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>> .

⁸ Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector. http://www.autoritedelaconurrence.fr/doc/avis18a03_en_.pdf; Didem Kaya Bayram & Furkan Akyurek, 'How our voices could turn into a weapon of mass, hyper-targeted advertising' TRT WORLD, <https://www.trtworld.com/life/how-our-voices-could-turn-into-a-weapon-of-mass-hyper-targeted-advertising-18681>; George J. Stigler Center for the Study of the Economy and the State, available online: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-24-june-2019.pdf?la=en&hash=872E4CA6B09BAC699EEF7D259BD69AEA717DDCF9>

⁹ Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.*, NBER Working Paper No. 23583 (July 2017), <https://www.nber.org/papers/w23583>.

¹⁰ For example, a 2018 IMF working paper - Federico J. Díez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications*, IMF Working Paper WP/18/137 (June 2018); Also see: Jan De Loecker & Jan Eeckhout, *Global Market Power*, NBER Working Paper 24768 (June 2018); De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, NBER Working Paper No. 23687 (2017).

II. Foundations

The Treaty on European Union (TEU) states that the ‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’¹¹ Among other things, the Union’s aim is to promote ‘the well-being of its peoples,’¹² to ‘establish an internal market,’¹³ promote ‘the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress,’¹⁴ and ensure ‘an open market economy with free competition.’¹⁵

Competition policy is one of several instruments used to advance and serve these goals. *Protocol No 27*, annexed to the EU Treaties, states that ‘the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted.’

The EU competition rules have, over the years, been interpreted and clarified through case law and official publications. According to the European Commission, competition on the market is protected ‘as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’¹⁶ This notwithstanding, EU competition law has also consistently been held to protect ‘not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’¹⁷ Moreover, a genuinely indigenous objective is worthy of note, namely that of promoting European market integration.¹⁸ The European Commission has emphasized the complementary nature of this goal, given that ‘the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.’¹⁹

¹¹ Art 2 Consolidated Version of the Treaty on European Union [2016] OJ C 202/13 (hereinafter ‘the TEU’).

¹² Art 3(1) TEU.

¹³ Art 3(3) TEU.

¹⁴ *Ibid.*

¹⁵ Arts 119, 120, 127, 170, 173, Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47 (hereinafter ‘the TFEU’).

¹⁶ European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ [2004] OJ C101/97, para.13 (hereinafter ‘the General Guidelines’).

¹⁷ Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, para 63. See also Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras 31, 36, 38-39; Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Recital 9; European Commission, ‘Green Paper on Vertical Restraints in EC Competition Policy’ COM (96) 721 final, para 180.

¹⁸ Information Service High Authority of the European Community for Coal and Steel Luxembourg, ‘The Brussels Report on the General Common Market’ (June 1956) (Spaak Report); David J Gerber, ‘The Transformation of European Community Competition Law?’ [1994] Harvard Intl LJ 97, 102.

¹⁹ General Guidelines (n 16), para.13; European 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 45/02, paras 1,5-7 (hereinafter ‘the Guidance Paper’); European Commission, ‘Guidelines on Vertical Restraints’ [2010] OJ C 130/1, para 7 (hereinafter ‘the Vertical Restraints Guidelines’).

In addition to these core goals, the Treaty-based competition rules – owing to their constitutional nature – must be interpreted in light of wider European normative values. Indeed, as mandated by the Treaty on the Functioning of the European Union (TFEU), ‘the Union shall ensure consistency between its policies and activities, taking all of its objectives into account.’²⁰ It so follows that, at the abstract level, Union policies may be implemented by taking into account, among other things, equality considerations,²¹ consumer protection,²² social protection,²³ public health,²⁴ environmental concerns,²⁵ investment,²⁶ transportation,²⁷ and regional development.

The multitude of competition goals, and their position within the wider normative EU values, is undoubtedly challenging, in particular when considered alongside the desire to engage in economic based analysis. As will be explained further below, for the most part, the Court of Justice of the European Union and the European Commission have developed the core goals of EU competition law in a consistent manner, utilising economic analysis to optimise intervention within the boundaries set by the Treaty provisions.

III. Key Competition Goals and Values of European Competition law

This section outlines the key goals and values of European Competition law – its unique DNA. The objectives, *together*, represent the ethos of competition law in Europe. As noted above, this diversity is not without challenge or controversy. The various goals have not always been clearly outlined. They represent an amalgamation of values which often overlap, but may also reveal friction. Indeed, their implementation calls for trade-offs between norms and may result in varying balancing points and ambiguity.²⁸ It is with this

²⁰ Art 7 TFEU.

²¹ Art 8 TFEU.

²² Art 12 TFEU; Art 38 Charter of Fundamental Rights of the European Union [2016] OJ C 202/389 (hereinafter ‘the Charter’).

²³ Art 9 TFEU refers to ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.’

²⁴ Art 168(1) TFEU; Article 35 Charter.

²⁵ Articles 11 TFEU; Article 37 Charter; Julian Nowag *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press, 2016).

²⁶ *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC [1993] OJ L 20/14, para 36: ‘In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, inter alia, to the creation of about 5 000 jobs and indirectly create up to another 10000 jobs, as well as attracting other investment in the supply industry. It therefore contributes to the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty.’ See also para 23 where it is stated that when considering an exemption under Article 101(3) the Commission took into account these ‘extremely positive effects on the infrastructure and employment in one of the poorest regions in the Community.’

²⁷ For example, the transport industry was exempted from the application of EU competition law by the Treaty of Rome. See to this effect Lars Gorton, ‘Air Transport and EC Competition Law’ [1997] *Fordham Int’l LJ* 602, 608.

²⁸ Pluralism comes at a cost and may not always allow for rational trade-offs among diverse aims. See: David A Hyman and William E Kovacic ‘Institutional Design, Agency Life Cycle, and the Goals of Competition Law’ [2013] *Fordham LRev* 2163; Albert A Foer ‘The Goals of Antitrust: Thoughts on Consumer Welfare in the US’ in Philip Marsden (ed), *Research in Trans-Atlantic Antitrust* (Edward Elgar Publishing 2006) 583.

pluralism in mind that this section seeks to highlight the complementary and interdependent nature of many of these goals and values, and the way in which they form a coherent whole.

The goals of European Competition law centre around, and are primarily consistent with consumer welfare, but are not limited to it. Without attempting to imply a hierarchy between the other values and goals, this multitude is illustrated below:



1. Consumer well-being and consumer welfare

The promotion of consumer well-being and the prevention of consumer harm have long been established as the prime goals of competition law. As noted by the General Court:

‘[T]he ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers... Competition law and competition policy... have an undeniable impact on the specific economic interests of final customers who purchase goods or services.’²⁹

The Court of Justice has clarified that consumer well-being may be harmed both directly and indirectly, holding that the competition provisions cover ‘not only those practices that

²⁹ Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-1601, para 115.

directly cause harm to consumers but also practices that cause consumers harm through their impact on competition.’³⁰

The term ‘*well-being*’, which is referred to in Article 3(1) TEU and in the case law, embodies somewhat abstract normative properties. With this in mind, the European Commission has made use of the term ‘*consumer welfare*’ and introduced it into the European Jurisprudence.³¹ Reflecting on the decision to utilise the term ‘*consumer welfare*’, Mario Monti, former European Commissioner, commented on it being driven, to some extent, by the desire to more clearly delineate the scope of competition provisions.³² The overlap between the two terms is evident, as the normative concept of well-being encompasses the more narrow, economically oriented, concept of consumer welfare. Importantly, while the concept of consumer welfare hints toward a clearer economic benchmark, it does not embody universally agreed properties.³³ Different views exist, as to its scope, measurement and the means to promote it.³⁴

The European Commission elaborates, in its guidelines, on the role of the consumer welfare standard. In the context of Article 101 TFEU, it notes that ‘[t]he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’³⁵ Similarly, in the context of Article 102 TFEU, the Commission notes that its enforcement activity aims to prevent ‘an adverse impact on consumer welfare, whether in the form of

³⁰ Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI, para 20; Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, para 24; Also note the CJEU judgment in *GSK* (n 6), where it clarified that to establish harm ‘it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price’ and that ‘[Article 101 TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’ Para 63.

³¹ Andreas Weibrecht ‘From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law’ [2008] ECLR 81, 85, referring to the ‘process of Americanisation’ in which the ‘Commission gradually adopted its own version of the consumer welfare approach developed by the Chicago School’ and led to fundamental change in jurisprudence (page 85).

³² In a speech, the former Commissioner reflected on two meta-economic reasons that supported the adoption of the consumer welfare benchmark. ‘One was to fight the emerging economic nationalism in the European Single Market which was coming up in those years.’ The consumer welfare benchmark provided an anchor ‘to resist more strongly, more fiercely, political pressure that would derail the competition enforcement.’ ‘If you adopt a consumer welfare principle [...] then you have an imperfect but rather objective reference and you can use that in order to limit the intrusion of economic nationalism.’ The second reason, noted by Monti, was geo-political. The desire to increase convergence and harmonious cooperation with the US. Full speech available on CCLP website: www.competition-law.ox.ac.uk.

³³ Ezrachi ‘Sponge’ [2016] JAE 1; International Competition Network, ‘Competition Enforcement and Consumer Welfare’ (2011) <<https://bit.ly/2K8RCd3>> accessed 17 June 2016; Gregory J Werden, ‘Consumer welfare and competition policy’ in Josef Drexler, Wolfgang Kerber and Rupprecht Podszun (eds), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing 2011). See for example: Jonathan Baker and Steven Salop ‘Antitrust, Competition Policy, and Inequality’ [2015] Geo LJ 1.

³⁴ On the concept of consumer welfare, see: Barak Y Orbach, ‘The Antitrust Consumer Welfare Paradox’ [2010] J C L&E 133. Also note discussion by Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (2013) CLES Working Paper Series < <https://ssrn.com/abstract=2235875>> accessed 30 March 2018.

³⁵ General Guidelines (n 16), para 33.

higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.’³⁶

Consumer well-being and welfare provide the core rationale at the heart of European competition law and identify the prime beneficiaries of the competitive process. In an attempt to transform these goals into workable benchmarks, competition authorities have often approximated them through the use of the consumer surplus benchmark.³⁷ Importantly, one should note the potential discrepancy between the abstract goal of well-being, the concept of consumer welfare, and the narrower economic benchmarks of consumer surplus used to approximate them. Being static in nature, the latter may only partially reflect the full spectrum of welfare effects.

Notwithstanding these challenges, the consumer welfare and well-being benchmarks provide a central pillar for intervention in digital markets. They may be used to address exclusionary practices, exploitation, agreements with the object or the effect of restricting competition, and concentrations. Furthermore, they may provide a prism through which one may consider wider effects which may harm consumer interests.

In the context of the digital economy, the following points are noteworthy:

First, the concept of consumer welfare may be used to address welfare effects on multiple groups of customers. As such, it can effectively address multi-sided markets, which characterise many digital markets. As noted by the Commission, ‘the concept of “consumers” encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession.’³⁸

Second, a price-centric approach to consumer welfare, may produce a distorted picture of effects. In the digital environment, where the price is often ostensibly free for consumers, quality forms an important dimension of competition. For example, quality degradation of services or product characteristics may result in harm to consumer welfare, despite the absence of price effects. It is likely that the digital landscape will increasingly require enforcers to consider a range of variables that impact on welfare, even when these are not easily quantifiable.

Third, advanced technological developments and changes in business strategies, may give rise to new challenges to consumer welfare. One example concerns the increased use of tracking and third-party tracking services and the effect these have on the concentration of power and ability to exploit consumers.³⁹ Another example, which has generated lively

³⁶ Guidance paper (n 19) para 19. See also *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 23 April 2004; *Microsoft Tying* (Case COMP/39.530) Commission Decision of 16 December 2012; *Google Search (Shopping)* (Case AT.39.740) Commission Decision of 27 June 2017.

³⁷ Joseph F Brodley ‘The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress’ [1987] NYU LRev 1020. Note also Orbach’s comments that surplus is the only realistically applicable benchmark for antitrust purposes because welfare implies the use of general equilibrium models which are highly impracticable.

³⁸ General Guidelines (n 16) para 84.

³⁹ On the prevalence of tracking, see for example: Reuben Binns, et al, ‘Third party Tracking in the Mobile Ecosystem [2018] ACM WebSci’ 18; Sebastian Schelter and Jérôme Kunegis ‘Tracking the Trackers: A

debate in recent years, concerns degradation of privacy by dominant providers and the impact on consumer welfare.⁴⁰

Fourth, the use of personal data and advanced analytics and the possible impact on consumer welfare, draws attention to the *distribution of wealth*. Exploitation through profiling, discrimination, use of asymmetric information and asymmetric bargaining powers, may give rise to novel forms of harm that adversely affect consumers and may necessitate intervention.

2. Effective competition structure

In addition to the core focus on consumer welfare, European jurisprudence has emphasised the goal of maintaining an effective competitive structure. While the two goals often overlap, the focus on competition structure provides a supplementary nuanced prism. The European Courts have long held that competition law ‘is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.’⁴¹ In *T-Mobile*, the Court of Justice elaborated that European competition law ‘is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.’⁴² The Court added that a ‘concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices.’⁴³ Similarly, in her opinion in this case, Advocate General Kokott noted that the protection of the structure of the market indirectly also protects consumers ‘[b]ecause where competition as such is damaged, disadvantages for consumers are also to be feared.’⁴⁴ Likewise, in *GlaxoSmithKline Services Unlimited v Commission*,⁴⁵ the Court of Justice held that Article 101 TFEU ‘aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’⁴⁶

In *Konkurrensverket v TeliaSonera Sverige*, the Court highlighted the significance of preventing ‘competition from being distorted to the detriment of the public interest,

Large-Scale Analysis of Embedded Web Trackers’ < <https://ssc.io/pdf/trackers.pdf> > accessed 22 July 2018.

⁴⁰ See in particular: ‘Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules’ (02.03.2016) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html. On this issue, see amongst others, Wolfgang Kerber, ‘Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection’ [2016] GRUR Int 639. Note that although they are often conflated, data protection and privacy are two distinct rights protected under EU law. See generally Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016).

⁴¹ Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR-215, para 26; Case C-95/04 *British Airways Plc v Commission* Court of Justice, [2007] ECR I-2331, para 106; Case T-340/03 *France Telecom SA v Commission* [2007] ECR II-107, para 266; *TeliaSonera* (n 20) para 24; Joined Cases C-468 to 478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I7139, para 68; and Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, para 176.

⁴² *T-Mobile* (n 17), para 38.

⁴³ *Ibid.*

⁴⁴ *T-Mobile* (n 17), Opinion of AG Kokott, para 71.

⁴⁵ *GSK* (n 17).

⁴⁶ *Ibid.* para 63.

individual undertakings and consumers, thereby ensuring the well-being of the European Union.’⁴⁷ In line with this approach, the General Court noted in *Intel v Commission*, that ‘the Commission is not required to prove either direct damage to consumers or a causal link between such damage and the practices at issue in the contested decision... [Article 102 TFEU] is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.’⁴⁸

The protection of an ‘effective competition structure’ provides for a wider prism than that reflected by the consumer welfare benchmark. It draws attention to the competitive process *as such* and has led to the condemnation of conducts that impair genuine undistorted competition.⁴⁹

In the context of Article 102 TFEU, the protection of the effective competition structure has resulted in the imposition of a special responsibility on dominant firms not to distort competition on the market,⁵⁰ limit the buyer’s freedom as regards choice of sources of supply, or bar competitors from access to the market.⁵¹ In the context of Article 101 TFEU, the protection of the effective competition supports the view that ‘in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.’⁵²

Flowing from the protection of an ‘effective competition structure’ is the protection of input providers. Article 102 TFEU unambiguously indicates that an unlawful abuse may result from, among other things, the direct or indirect imposition of unfair purchase prices, or other unfair trading conditions. Similarly, Article 101(1) TFEU refers to the direct or indirect fixing of purchase or selling prices. In its decisional practice,⁵³ the Commission noted that the purchase price is a fundamental aspect of competitive conduct.⁵⁴ The focus on the supply side of the market was also noted by Advocate General Jacobs in *AOK Bundesverband v Ichthyol-Gesellschaft Cordes*,⁵⁵ where he pointed to the fact that buyer cartels may ‘suppress the price of purchased products to below the competitive level, with negative consequences for the supply side of the relevant

⁴⁷ *TeliaSonera* (n 30), para 22.

⁴⁸ Para 105, Case T-286/09 *Intel Corp. v Commission*.

⁴⁹ In the context of Article 102 TFEU, note the special responsibility on dominant undertakings. See e.g. Case C-202/07 P *France Télécom v Commission* [2009] ECR I2369, para 105; *TeliaSonera* (n 30), para 24; *GSK* (n 17) paras 62-64.

⁵⁰ Case C-322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461, para 57, holding that the dominant undertaking has a ‘special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’.

⁵¹ In *Post Danmark* (n 30), para 26, the Court of Justice held that ‘[i]n order to determine whether a dominant undertaking has abused its dominant position by its pricing practices, it is necessary to consider all the circumstances and to examine whether those practices tend to remove or restrict the buyer’s freedom as regards choice of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition’ (case law omitted).

⁵² *T-Mobile* (n 17), para 39.

⁵³ *Raw Tobacco Italy* (Case COMP/C.38.238/B.2) Commission Decision of 20 October 2005.

⁵⁴ *Ibid*, para 280.

⁵⁵ Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others v Ichthyol-Gesellschaft Cordes and others* [2004] ECR I-2493.

market.’⁵⁶ Overall, the explicit reference to purchase prices has served as a backbone to the assertion that European competition law is also concerned with upstream effects.

In the context of the digital economy, the wider prism offered by the protection of an ‘effective competition structure’ has significant implications.

First, it offers an independent mandate for intervention, detached from direct effect on consumers. It enables the competition agency and courts to pre-empt by challenging actions that distort competition on digital markets. This does not necessarily imply more aggressive enforcement, rather a wider, and arguably more effective, consideration of effects on the digital landscape.

Second, is the focus on the effects of online platforms, intermediaries and other economic actors on the process of competition. Of particular significance is the subrogation of the dominant firm’s economic self-interests to its responsibility not to distort competition. While it is widely accepted that ‘not every exclusionary effect is necessarily detrimental to competition’,⁵⁷ unjustified distortions may trigger intervention.

Third, the focus on the competitive process draws attention to the potential use of networks, platforms or data pools as possible barriers to entry or expansion or as a mechanism to raise rivals’ costs. The increased significance of data in shaping markets and influencing their development, highlight it being a relevant parameter in the assessment of markets and possible distortion of competition.⁵⁸

Fourth, ‘effective competition structure’ draws attention to the consideration of choice in the digital world. It may be used to appraise dominant players’ ability to increase friction and limit consumer choice through manipulation while maintaining a façade of abundance.⁵⁹ Similarly, it provides a relevant intervention benchmark when dominant firms limit access of competitors through tying practices,⁶⁰ or reduced interoperability.

⁵⁶ *AOK Bundesverband* (n 55), Opinion of AG Jacobs, para 70. In its judgement, the Court did not address the fixing of input price as such, since it concluded that the sickness funds in question performed an obligation within the framework of the German statutory health insurance scheme. Subsequently, the funds were held not to constitute undertakings within the meaning of Article 101 TFEU. See *AOK Bundesverband* (n 55) paras 45-66.

⁵⁷ *Post Danmark* (n 30), para 22.

⁵⁸ See comments by Isabelle de Silva (French Competition Authority) stating that ‘Its interesting to see the importance of privacy rules [in] really shaping the way the market is working, and this needs to be taken into account in our competitive analysis’ (cited by Vesela Gladicheva ‘EU privacy rules key to competition analyses, head of France antitrust watchdog says’ (4 May 2018) *GCR Live: 7th Annual Telecoms, Media & Technology*); Also see comments by Margrethe Vestager (European Commissioner for Competition) stating that ‘... Competition law enforcement cannot do the full trick, but neither can regulation because you need a competitive dynamic marketplace. You need innovation that is driven by competition. And this is why I would take such an interest in privacy, also because it shouldn’t be a competitive edge for you that you completely disregard the need of each and every one of us to have privacy.’ (cited by David Brancaccio and Janet Nguyen ‘Europe’s top antitrust official: If there’s no regulation, “you have just the laws of the jungle and not the laws of democracy”’ (April 12, 2018) *Marketplace*).

⁵⁹ See for example the discussion on choice in search and whether the competitor is indeed ‘a click away’. See *Google Search (Shopping)* (Case AT.39.740) Commission Decision of 27 June 2017.

⁶⁰ Note for example the Commission’s decision on Google’s Android-related practices. Press release 18 July 2018 ‘Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to

Fifth, the consideration of upstream effects could offer a fresh perspective on how bottleneck digital players can impact the viability of input providers through practices that may negatively affect upstream, but also downstream markets and thus end consumers.

Sixth, the focus on the process of competition has a functional role beyond specific violations, as a tool which supports undistorted innovation in digital markets.⁶¹ Competition agencies should look at the effects various strategies may have on the nature and scale of innovation, and the incentives and ability to bring new products, processes and services to the market.

3. Efficiencies and innovation

Efficient allocation of resources for the benefit of consumers is an important facet of competition policy.⁶² Indeed, competition law enforcement strives to ensure that ‘markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.’⁶³

Although the scope and measurement of efficiency gains may be subjected to varying approaches,⁶⁴ a consensus exists as to their central role in the competitive assessment.⁶⁵ Efficiencies play a significant role in the application of Article 101(3) TFEU. In this context, the Commission has stated that the objective of Article 101 TFEU is to protect competition on the market, among other things, as a means of ensuring an efficient allocation of resources.⁶⁶ The role of efficiencies is also acknowledged under Article 102 TFEU as they may buttress potential justifications for otherwise abusive conduct. Indeed, as clarified by both the Commission and Union Courts, a dominant undertaking may justify conduct leading to foreclosure of competitors ‘on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.’⁶⁷ Finally, in its

strengthen dominance of Google's search engine’ IP/18/4581 < http://europa.eu/rapid/press-release_IP-18-4581_en.htm > accessed 22 July 2018.

⁶¹ Note comments by Pierre Larouche and Maarten Pieter Schinkel, ‘Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act’ (May 2013). TILEC Discussion Paper No. 2013-020 < <https://ssrn.com/abstract=2293141> > accessed 9 May 2018.

‘When Article 102 TFEU is seen against that background, it is sensible to use that provision to try to protect the competitive process as a value in and of itself. If innovation by its nature cannot be predicted by the authorities, and cannot even reliably be produced by the most skilled and focused firms, the best that competition policy can realistically achieve is to maximize the innovation rate by ensuring that potentially innovative firms deploy their efforts.’

⁶² General Guidelines (n 16), para 13; Guidance Paper (n 19) paras 1, 5-7; Vertical Restraints Guidelines (n 19), para 7.

⁶³ Guidance Paper (n 19), para 5.

⁶⁴ Damien Geradin, ‘Efficiency claims in EC Competition law and sector-specific regulation’ (November 8, 2004), 2 < <http://ssrn.com/abstract=617922> > accessed 30 March 2018; Brodley, ‘The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress’ [1987] NYU LRev 1020; Iwakazu Takahashi ‘On the Difference of Methodology in Jurisprudence and Economics’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012).

⁶⁵ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 76 (hereinafter ‘the Horizontal Mergers Guidelines’).

⁶⁶ General Guidelines (n 16), para 13.

⁶⁷ Guidance Paper (n 19), para 30. See also Case C-413/14 P *Intel v Commission* [2017] ECLI, para 140.

appraisal of concentrations, the Commission also considers substantiated efficiency claims in the overall assessment of the merger. In particular, it examines whether efficiencies would counteract the harmful effects on both competition and consumers which might otherwise result from the transaction.⁶⁸

Promoting economic efficiencies as part of the application of EU competition law echoes the philosophy of neoclassical and neoliberal economics. Importantly, however, while of central significance in EU competition law, efficiency considerations are entwined with the promotion of consumer welfare and conditioned on consumers benefiting from them.⁶⁹ As such, they feed off the consumer welfare and wellbeing benchmarks. Such is the case in merger control where efficiencies may be considered, provided they ‘counteract the effects on competition, and in particular the potential harm to consumers.’⁷⁰ ‘Efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.’⁷¹ Similarly, under Articles 101(3) and 102 TFEU respectively, ‘consumers must receive a fair share of the resulting benefits,’ and ‘anticompetitive effects may be counterbalanced, or outweighed, by efficiencies which also benefit the customers.’⁷²

The focus on consumers underscores the distribution ethos of European competition law. The imperative mandating a ‘fair share for consumers’ implies that total efficiency (or total welfare) gives way to, and embodies, consumer welfare and surplus benchmarks. Importantly, this normative position may be at odds with those who favour an antitrust regime which disregards wealth distribution,⁷³ or those who believe antitrust enforcement should solely promote efficiency.⁷⁴

In the context of the digital economy, of significance has been the treatment of dynamic efficiencies – that is, innovation – which characterise many digital markets. Innovation

⁶⁸ Horizontal Mergers Guidelines (n 65), para 76–88.

⁶⁹ To this effect, see Neelie Kroes, ‘European Competition Policy – Delivering Better Markets and Better Choices’ (2005) Speech delivered at the European Consumer and Competition Day <<https://goo.gl/3Fn750>> accessed 30 March 2018, stating that ‘Competition policy serves one goal – to make sure that markets can operate as efficiently as possible to deliver these outcomes for our citizens. We want to help create a virtuous circle of economic growth and social welfare, in which the benefits are passed on within societies. [...] Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy.’; Also see Philip Lowe, former Director General of DG COMP, stating that ‘Competition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare’ (Philip Lowe, ‘Preserving and Promoting Competition: A European Response’ (2006) Competition Policy Newsletter, May 2018).

⁷⁰ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1, Recital 29.

⁷¹ Horizontal Mergers Guidelines (n 55), para 79.

⁷² Case C-23/14 *Post Danmark* [2015] electronic Reports of Cases, para 47; *British Airways* (n 31), para 69; *Intel* (n 57), para 140; Guidance Paper (n 19), para 30.

⁷³ Eg Alan Devlin and Bruno Peixoto, ‘Reformulating Antitrust Rules to Safeguard Societal Wealth [2008] *Stan J L Bus Fin* 225.

⁷⁴ Robert H Bork, *The Antitrust Paradox* (2nd edn, The Free Press 1993); Frank H Easterbrook, ‘Predatory Strategies and Counter Strategies’, [1981] *U Chi LRev* 263, 266 at n 11.

processes stimulate dynamic markets, enhance consumer welfare, and may help offset otherwise diminishing marginal returns. As a key driver of competition *in*, but also *for* markets, innovation should be safeguarded and promoted. Clearly, competition law has a role to play in fostering competition in innovation⁷⁵ by supporting the free market system, and by creating conditions conducive to efficiency maximization, market integrity, and competition on the merits.⁷⁶ Ultimately, how one goes about supporting innovation may depend on one's affinity to either the Schumpeterian,⁷⁷ or Arrowian assumption,⁷⁸ to the inverted-U relationship model,⁷⁹ or other benchmarks.⁸⁰

The challenge for enforcement in the digital age pertains to the difficulties in apprehending dynamic changes. In the digital world, methodological limitations may undermine one's capacity to clearly identify the effects of certain behaviours on innovation. Given the nature of dynamic efficiencies and the uncertainty surrounding disruptive innovation, whether competition law can provide an effective tool to ensure competition for future markets (innovation for markets) remains unclear.⁸¹ Also challenging is the ability to differentiate between pro-consumer and negative innovation.⁸² Indeed, in a digitalised environment, the distinction between research and development that promotes the consumer interest, from innovation that is used to

⁷⁵ European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2011] OJ C 11/1, paras 119-122 (hereinafter 'the Horizontal Agreements Guidelines').

⁷⁶ Roger Alford, 'The Role of Antitrust in Promoting Innovation' (2018) Speech delivered at King's College London < <https://goo.gl/kcqtMQ> > accessed 30 March 2018.

⁷⁷ According to the Schumpeterian hypothesis, market concentration is understood to allow internalization of the rewards flowing from innovation efforts (increase monopoly rents). It therefore supports "creative destruction" – that is, the dynamic process in which new technologies replace the old. This hypothesis has often been viewed as establishing a negative correlation between competition and innovation; Josef Schumpeter, *Capitalism, Socialism, and Democracy* (4th edn, George Allen & Unwin 1954).

⁷⁸ The Arrowian hypothesis suggests that competitive pressure forms the key to investment in innovation, and that significant market power disincentivizes investment in further innovation. Accordingly, competition is viewed as a necessary pressure since a monopoly would likely under-invest in new technologies (or only invest when it generates additional profits); Kenneth J Arrow, 'Welfare and the Allocation of Resources for Invention' in Richard Nelson (ed), *The Rate and Direction of Economic Activities: Economic and Social Factors* (NBER Books 1962).

⁷⁹ The inverted U-shaped relationship suggests that an increase in competition (from an initial low position) increases the rate of innovation, but high levels of competition decrease the rate of innovation. Competition may increase the incremental profit from innovating (the "escape-competition effect") but may also reduce innovation incentives for laggards (the "Schumpeterian effect"); Philippe Aghion et al, 'Competition and Innovation: an Inverted-U Relationship' [2005] *The Quarterly J of Econ* 701.

⁸⁰ Terrel McSweeney and Brian O'Dea, 'Data Innovation, and Potential Competition in Digital Markets – Looking Beyond Short-Term Price Effects in Merger Analysis' [2018] *CPI Antitrust Chronicle*.

⁸¹ Generally speaking, modern economic literature suggests greater alignment with the Arrowian premise for most industries, which expects competition to stimulate innovative activity: Josef Drexler 'Anti-competitive stumbling stones on the way to a cleaner world: protecting competition in innovation without a market' [2012] *J C L&E* 507.

⁸² Note on this point the proposal by Thibault Schrepel to introduce a legal category specifically dedicated to anti-competitive effects linked to innovation (Thibault Schrepel, 'Predatory Innovation: The Definite Need for Legal Recognition' [2017] *SMU Sci & Tech LRev*).

develop exploitative technology or harmful exclusionary effects becomes, at times, blurred.⁸³

The unpredictable nature of innovation calls for cautious intervention. The scope of markets and products, existing and potential competition, and the nature of competition, may change with new waves of innovation. This dynamism supports the protection of the competitive process as an independent value, for the sake of, and focus on, innovation and future efficiencies.⁸⁴

In the case of merger review, the risk that ex-ante intervention may chill innovation has led some to call for a more *laissez-faire* approach.⁸⁵ On the other hand, risks associated with large networks, data pools, platforms and their impact on competing innovators, adjacent markets, market entry, elimination of potential competition and the tipping of the market in favour of the merged entity, have led others to call for greater scrutiny.

4. Fairness

The concept of fairness echoes a moral norm embodied in European Union competition rules. The concept of fairness reflects on the interpretation of the concepts of consumer welfare and efficiency benchmarks, and serves to align them. Article 101(3) TFEU expressly refers to the concept of "fair share" as part of the individual exemption mechanism available to otherwise anticompetitive agreements. More specifically, this provision requires the passing-on of overall benefits to compensate consumers for any actual or likely negative impact caused by the restriction of competition.⁸⁶ Article 102 TFEU stipulates that abuses of market dominance may be borne from, among other things, the direct or indirect imposition of unfair purchase or selling prices, as well as by other unfair trading conditions.

Fairness considerations have triggered intervention, alongside the consumer welfare value, in some cases involving exploitative prices imposed on consumers.⁸⁷ Another example may be found in the analysis of 'margin squeeze', where the unfairness of the spread between wholesale and retail prices is at issue.⁸⁸ Fairness, in this context, may be viewed as ensuring equal opportunities for efficient competitors and the protection of

⁸³ Ariel Ezrachi and Maurice E. Stucke 'Digitalisation and Its Impact on Innovation' Report Prepared for the European Commission, DG Research & Innovation (July 2018)

⁸⁴ Pierre Larouche and Maarten Pieter Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (2013) TILEC Discussion Paper No. 2013-020 <<https://ssrn.com/abstract=2293141>> accessed 30 March 2018.

⁸⁵ Alford (n 66), stating that 'there is a genuine risk of reaching the wrong conclusion.'

⁸⁶ General Guidelines (n 16), para 85-86.

⁸⁷ Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367; Case 27/76 *United Brands v Commission* [1978] ECR 207; Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra (AKKA)/ Latvijas Autoru apvienība (LAA)* [2017] ECLI; *Deutsche Post AG* (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40.

⁸⁸ As noted by the Court in *TeliaSonera* (n 20), para 34, 'the unfairness, within the meaning of Article 102 TFEU [...] is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be.' For a similar holding see also Case T-398/07 *Kingdom of Spain v Commission* [2008] electronic Report of Cases; *Deutsche Telekom* (n 41).

consumers. It is used to guarantee the legitimate expectations of economic operators and consumers.⁸⁹ Importantly, fairness should not be confused with protection of competitors. It is well accepted that the competition dynamic may result in less efficient undertakings being pushed out of the market and losing the contest. The value of fairness is not used to challenge such legitimate competition.⁹⁰

Beyond specific references in the provisions of Articles 101 and 102 TFEU, fairness also serves as an abstract normative value which is promoted by the competitive process,⁹¹ as well as ensuring a fair result of market outcomes. Fair competition cultivates trust in markets. It also crystallises legitimate expectations of market participants, and as such stimulates competition.⁹² As noted by the Commission in its 2015 Report on Competition Policy:

[H]ealthy competition gives companies fair chances to do business and to achieve their commercial goals, which in turn encourages growth, job creation and prosperity. When companies are able to compete on their own merits, businesses and households benefit from a wide range of good quality, innovative products and services at competitive prices.⁹³

In 2016, the Commission opened its Report on Competition Policy, by stating that:

[C]ompetition policy has a direct impact on people's lives, and one of its key features is promoting open markets so that everyone – businesses and citizens – can get a fair share of the benefits of growth.⁹⁴

The 2016 Report makes reference to the 2016 State of the Union speech by Jean-Claude Juncker, President of the European Commission, in which he stated that ‘a fair playing field also means that in Europe, consumers are protected against cartels and abuses by powerful companies. (...) The Commission watches over this fairness. This is the social side of competition law. And this is what Europe stands for.’⁹⁵

⁸⁹ Daniel Zimmer ‘On Fairness and Welfare: The Objectives of Competition Policy – Comment on David J Gerber, Christian Ahlborn and A Jorge Padilla’ in Claus-Dieter Ehlermann and Mel Marquis (eds) (*European Competition Law Annual 2007*) – *A Reformed Approach to Article 82 EC* (Hart Publishing 2008).

⁹⁰ See for example the court holding in *Post Danmark* (n 30), para 21, according to which Article 102 TFEU does not ‘seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.’

⁹¹ ‘Healthy and vigorous competition is of fundamental importance to a fair EU economy and society’ (European Commission, ‘Staff working document accompanying the Report on Competition Policy 2016’ SWD (2017) 175 final, 59).

⁹² See statement made by Commissioner Vestager stating that she is ‘convinced that real and fair competition has a vital role to play, in building the trust we need to make the best of our societies’. (Margrethe Vestager, ‘How competition can build trust in our societies’ TED Talk, New York, 20 September 2017) .

⁹³ European Commission, ‘Report on Competition Policy 2015’ COM (2016) 393 final, 2.

⁹⁴ European Commission, ‘Report on Competition Policy 2016’ COM(2017) 285 final, 2.

⁹⁵ State of the Union 2016, available online: http://ec.europa.eu/priorities/state-union-2016_en, quoted in the 2016 Report on Competition Policy, Id.

Fairness has also been linked to innovation, as a facilitating norm which ensures a level playing field. For example, Advocate General Bot opined that:

[C]ompetition, if it is fair, generally ensures technological progress and improves the quality of a service or product while ensuring a reduction in costs. It therefore benefits consumers because they can also benefit from products and services of better quality at a better price. In that way competition is a source of progress and development.⁹⁶

In its ‘abstract’ form, fairness is often seen as a guide, rather than a self-sufficient enforcement benchmark. In her Foreword to the 2016 Annual Competition Report, Margrethe Vestager, Commissioner for Competition, noted that: ‘competition policy contributes to shaping a fairer society, where all economic players – large and small – abide by the same rules’ and that ‘in times of globalisation, we also need to ensure that a world of global trade, and global businesses, gives small businesses and individuals a fair chance.’⁹⁷ Importantly, Commissioner Vestager positioned the value within the overall competition enterprise and noted that while competition rules make markets work more fairly for consumers, unfairness, as such, does not automatically result in a violation of the competition rules.⁹⁸ Similarly, Director General Laitenberger noted that ‘[c]ompetition policy and enforcement can, and do, help instil a sense of fairness and equity in the economy and society at large.’⁹⁹ Furthermore, he opined that the concept of fairness ‘is a way to express the overall goals and benefits of EU competition policy in a more tangible manner. It is not meant as a self-sufficient, generic legal test to be applied in cases. And certainly, the very concept of ‘fairness’ excludes that it substitutes rigorous, fact-based analysis.’¹⁰⁰

⁹⁶ Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, Opinion of AG Bot, para 245; For a similar statement, see also: Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, Opinion of AG Bot, para 58.

⁹⁷ Foreword to the Annual Competition Report 2016.

⁹⁸ See Margrethe Vestager, ‘Fairness and competition’ (2018) Speech delivered at the GCLC Annual Conference, Brussels, 25 January 2018.

This approach resembles comments made in the US by Acting Assistant Attorney General Renata Hesse of the US Antitrust Division ‘And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement’ (2016) Opening Remarks at 2016 Global Antitrust Enforcement Symposium, Washington DC, September 20 2016: ‘The ultimate concern of antitrust law has always been protecting competition at all levels of the economy. Animating the beliefs of ordinary Americans who demand vigorous antitrust enforcement are the value of fairness and the belief that properly functioning competitive markets are themselves fair. To say it another way, competition is fair because it gives a chance to the small business owner to succeed in her business venture, because it delivers lower prices to consumers, and because it drives the innovation that improves products, business processes, and more. Competition among employers to attract workers is fair because it yields higher wages, better benefits, and safer working conditions. In general, competition is fair because it distributes these rewards broadly to participants in the economy. But when companies harm competition – choking off competition or agreeing with rivals not to compete – they infect the economy with unfairness by accumulating power that the few can wield at the expense of the broader American public.’

⁹⁹ Johannes Laitenberger ‘Remarks delivered at a panel discussion organised by the EU Delegation to Canada on the occasion of the 60th anniversary of the Treaties of Rome’ (2017).

¹⁰⁰ Johannes Laitenberger, ‘Panel on “Fairness in Unilateral Practice Cases”’ (2018) Speech delivered at the GCLC Conference Brussels, 26 January 2018 < http://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf > accessed 30 March 2018.

Accordingly, fairness is entwined in the competitive process and may guide the enforcer's approach. It does not, however, protect the losers of a legitimate competitive process, but rather ensures its legitimacy.¹⁰¹ Economic reasoning is therefore fused into the norm of fairness. Notwithstanding this, controversy remains as to the point of optimal fusion, with ranging views from enforcers, scholars, and businesses. Whichever stance one takes as to the interface between fairness and efficiency, one must crucially understand that fusion requires a balancing of values. In other words, the enterprise cannot be limited to an unreserved adoption of a norm-neutral economic approach. Doing so would divorce EU competition law from its constitutional roots and norms which include fairness. Non-efficiency objectives would thereby be expunged (rather than balanced with efficiency considerations), under the assumption that economic theory resolves normative concerns. Ultimately, such an approach would substitute democratic control with technocratic control.¹⁰²

Embedded in the concept of fairness is the notion that competition law should be utilised to prevent unfair transfers of wealth.¹⁰³ Both Articles 101 and 102 TFEU include provisions which support distributional justice – targeting unfair selling or buying terms and prices. As illustrated above when discussing the consumer welfare standard, distributive justice arguments – though anchored in the Treaty – are not without controversy.¹⁰⁴ Indeed, some have questioned the wisdom and practicality of using competition law to promote fair distribution of wealth.¹⁰⁵ Such a function is claimed to be better served through taxation, thereby untangling the application of competition law from the need to conduct subjective value judgements.¹⁰⁶

Another related value which may be woven into the discussion of fairness is that of privacy. Privacy and data protection concerns, as such, are typically regarded as matters falling outside the scope of competition law enforcement and protected through dedicated laws.¹⁰⁷ Case law accepts that in markets that are not concentrated; however, the increased market concentration and the role played by data and privacy in shaping markets increasingly supports their consideration as parameters in the competition assessment.¹⁰⁸ After all, degradation of privacy in the digital world, may be viewed as quality degradation and a tool for exploitation. In the context of fairness, this may give

¹⁰¹ For example, the goal of fairer prices for consumers, can be achieved through increased market competition and efficiencies. See Neelie Kroes, 'Cutting the price of phone calls – new termination rules' (2009).

¹⁰² Harry First and Spencer Weber Waller, 'Antitrust's Democracy Deficit' [2013] *Fordham LRev* 2543.

¹⁰³ Robert H Lande, 'Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' [1982] *Hastings LJ* 65.

¹⁰⁴ Christopher Townley, Eric Morrison and Karen Yeung 'Big Data and Personalised Price Discrimination in EU Competition Law' (2017) King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-38 < <https://ssrn.com/abstract=3048688> > accessed 30 March 2018.

¹⁰⁵ Okeoghene Odudu 'The Distributional Consequences of Antitrust' in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar Publishing 2006) 605; Louis Kaplow 'On the Choice of Welfare Standards in Competition Law' in Daniel Zimmer (ed) *The Goals of Competition Law* (Edward Elgar Publishing 2012) 3.

¹⁰⁶ Kaplow (n 105) 3.

¹⁰⁷ Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, para 63.

¹⁰⁸ See comments by Isabelle de Silva referred to in note 58 above. See also comments by Margrethe Vestager referred to in note 58 above.

rise to concerns regarding possible data and privacy-related activities which have exploitative or exclusionary effects. Noteworthy in this respect is the Bundeskartellamt (The Federal Cartel Office, Germany) investigation against Facebook Inc., for alleged abuse of its dominant position in the market for social networks by imposing onerous conditions with respect to its data collection from users, in violation of data protection provisions.¹⁰⁹ The case is anchored in national regulation and precedents,¹¹⁰ but nonetheless showcases the link between privacy and the control over data on one hand, and concepts of fairness, exploitation and abuse, on the other hand.

In the context of the digital economy, fairness could potentially play an important role.

First, as an abstract norm, it provides a guide to the nature of relations between online platforms, service providers and consumers. It may support intervention in view of unfair market practices, or when confronted with illegitimate transfers of wealth from consumers to service providers.

Second, and more specifically, it may serve to support intervention in cases of discriminatory practices by dominant online providers, especially when these lead to almost-perfect price discrimination (first degree price discrimination).

Third, it may be used to justify intervention when misleading information online facilitates or leads to distortion of competition.

Fourth, it may play a role when asymmetric information and asymmetric analytical capacity distort the relationship between users and service providers, and allow the latter to exploit users.

Fifth, it may play a role when data handling, data protection and privacy violations lead to distortions of competition or unfair exploitation.

¹⁰⁹ In a background information document (< <https://bit.ly/2G1Viec> > accessed 10 May 2018), the Bundeskartellamt elaborated on its theory of harm: 'If a dominant company makes the use of its service conditional upon the user granting the company extensive permission to use his or her personal data, this can be taken up by the competition authority as a case of "exploitative business terms". The use of exploitative business terms is a type of exploitative abuse under German competition law. With the provision on exploitative abuses the law aims to protect the opposite market side from being exploited by a dominant company. Such exploitation can take the form of excessive prices (price abuse) or unfair business terms (exploitative business terms). According to the case-law of the German Federal Court of Justice, civil law principles can also be applied to determine whether business terms are exploitative. On principle, any legal principle that aims to protect a contract party in an imbalanced negotiation position can be applied for this purpose. Often, such principles stem from the legislation on unfair contract terms or the German Basic Law. Following the Federal Court of Justice approach, the Bundeskartellamt also applies data protection principles in its assessment of Facebook's terms and conditions. In this regard, data protection law has the same objective as competition law, which is to protect individuals from having their personal data exploited by the opposite market side...'

¹¹⁰ The recently revised Section 18(3a) of the German Competition Act makes direct reference to personal data as a criterion relevant when establishing market power, especially in the case of online platforms and networks. Also note that according to the case-law of the German Federal Court of Justice, civil law principles can be applied to determine whether business terms are exploitative.

Sixth, it may be used to establish a certain fiduciary duty which restrains the ability to make use of data and analytics about biases and preferences, or use data for other exploitative or exclusionary purposes.

5. Economic freedom, plurality and democracy

Economic plurality and freedom of choice are inherently linked to the quest for an effective competition structure. They reflect a societal agenda which seeks to promote the general public interest. As noted by the Court of Justice, among other things, competition rules ‘prevent competition from being distorted to the detriment of the public interest...’¹¹¹

Indeed, a competitive marketplace and freedom of choice are both key to the realisation of the Union’s guiding democratic values and freedoms.¹¹² The significance of economic plurality transcends the market economy and may be normatively connected to the broader concern of ensuring a healthy political process, unimpaired by distortions induced by powerful firms.¹¹³ As such, the preservation of economic freedom has been viewed as creating the preconditions for democracy, safeguarding against political and regulatory capture.¹¹⁴ Indeed, influence, lobbying and capture, so the argument goes, are subject to economies of scale and scope, both of which intensify as market concentration increases.¹¹⁵ While EU law does not target economic power, nor the political power of large corporations, a competitive landscape helps safeguard the market for ideas against its monopolisation by powerful economic players.¹¹⁶

Similar to the consideration of fairness as an abstract norm, these values would not likely serve as stand-alone intervention benchmark, yet they embody the European ethos and form part of its moral core.¹¹⁷

In the context of the digital economy, the value of plurality, democratic values and freedoms may support intervention in cases where firms distort markets, information flows, and subsequently impact on consumers’ freedom.

¹¹¹ *TeliaSonera* (n 30), para 22.

¹¹² BEUC, ‘Why Competition Law Must Protect Democracy – A European Perspective’ (2017) Contribution to the OECD Global Forum on Competition – Competition and Democracy 7-8 December 2017.

¹¹³ Luigi Zingales, *A Capitalism for the People: Recapturing the Lost Genius of American Prosperity* (Basic Books 2012) 38.

¹¹⁴ Elias Deutscher and Stavros Makris ‘Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus’ [2016] *Comp LRev* 181; David J Gerber, ‘Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe’ [1994] *Am J Comp L* 25; Spencer Weber Waller, ‘Antitrust and Democracy: Democracy in Antitrust’ (2017) < <https://ssrn.com/abstract=3086260> > accessed 30 March 2018; First and Waller (n 92).

¹¹⁵ Adi Ayal ‘The market for bigness: economic power and competition agencies’ duty to curtail it’ [2013] *JAE* 221; Zingales (n 113).

¹¹⁶ Note for example the blocking of merger between media giants in New Zealand due to a finding that the concentrated media ownership threatened the country’s democracy. See Justice Robert Dobson stating that ‘We consider that it is appropriate to attribute material importance to maintaining media plurality [...] It can claim status as a fundamental value in a modern democratic society [...] The risk is clearly a meaningful one and, if it occurred, it would have major ramifications for the quality of New Zealand democracy’ reported by Eleanor Ainge Roy, ‘New Zealand: merger of two largest print media companies blocked by high court’ *The Guardian* (19 December 2017).

¹¹⁷ For a review of the notions of ‘freedom’ and ‘freedom to compete’, see Pinar Akman ‘The role of “freedom” in EU competition law’ [2014] *SLS Legal Studies* 183.

In this respect, noteworthy is one of the hallmarks of the online dystopia – stealth – a feature that pertains to the growing means for targeting unsuspecting users. These include a variety of sophisticated techniques that enable firms to surreptitiously harvest user data,¹¹⁸ merge off-line and online data, as well as target and manipulate user behaviour and public opinion. Linked to this is the use and direction of individuals to specific echo chambers to reinforce existing or desired viewpoints.

The values of plurality and freedom may also draw attention to search engine manipulation effects. Illustrative are ranking biases, search suggestions and search engine manipulation effects which have attracted attention in recent years due to their potentially causal connection with the outcome of certain political elections.¹¹⁹ Advanced manipulation through *filtering* and *ordering* may remain largely undetected.¹²⁰ Also illustrative are means used to increase usage of networks and applications through behavioural manipulation.¹²¹

In an environment increasingly dominated by a handful of leading online gatekeepers, the exercise of power over the design and functionality of the user interface may affect user freedom and perception. Against this backdrop, the ever-old challenge of identifying the point at which such distortions may call for intervention or be treated as abuse of dominant position remains.

6. Market integration

EU competition law is instrumental in achieving the goal of integrating national markets.¹²² The Commission has alluded to the economic benefits flowing from market integration, ‘since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.’¹²³ Market integration considerations naturally affect the scope of illegality and the approach to horizontal and vertical agreements. They draw attention to possible segmentation of the EU-wide market into national monopolies.¹²⁴ The Court has held that ‘an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty’s

¹¹⁸ See for example Facebook’s business model which enabled Cambridge Analytica to harvest data from users (e.g. Zeynep Tufekci, ‘Facebook’s Surveillance Machine’ *New York Times* (19 March 2018) <<https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html>> , accessed 30 March 2018.)

¹¹⁹ Robert Epstein and Ronald E Robertson ‘The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections’ [2015] *PNAS* 4512.

¹²⁰ Cass R Sustein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press, 2017).

¹²¹ Tristan Harris ‘How a handful of tech companies control billions of minds every day’, (2017), <www.ted.com>, accessed 10 May 2018.

¹²² See to this effect *TeliaSonera* (n 30), para 20, stating that ‘Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon [...] is to include a system ensuring that competition is not distorted.’

¹²³ General Guidelines (n 16), para13; Guidance Paper (n 19), paras 1, 5-7; Vertical Restraints Guidelines (n 19), para 7.

¹²⁴ *CISAC* (Case COMP/C2/38.698) Commission Decision of 17 July 2008, para 203, overturned on appeal before the General Court (Case T-442/08).

objective of achieving the integration of national markets through the establishment of a single market.¹²⁵ In a similar vein, in its pay-TV decision, the European Commission criticised as anticompetitive by object agreements which prohibit or limit cross-border passive sales and grant absolute territorial exclusivity:¹²⁶

... an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market. Thus, where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.¹²⁷

Market integration can be seen through the prism of consumer welfare, as parallel trade is liable to exert pressure on prices, while, on the other hand, the segregation of markets may result in reduced competitive pressure.¹²⁸ While the European Courts and the Commission have alluded to the economic nature of market integration, the protection of the internal market may naturally affect the threshold for intervention.¹²⁹ This may be noticeable in vertical agreements, licencing,¹³⁰ and online sales.¹³¹

In the context of the digital economy, market integration may, in particular, affect business strategies which limit the use of technology, interchangeability, online access, or freedom of online retailers, and, in doing so, create barriers between Member States. Such, for example, may be the case when:

- Contractual restrictions are used to prevent wholesalers and retailers from selling goods online, to buyers in other Member States.¹³²

¹²⁵ *GSK* (n 17), para 61; *Sot. Lélos kai Sia* (n 31), para 65.

¹²⁶ Case AT.40023 *Cross-border access to pay-TV*, para 47.

¹²⁷ *Ibid*, para 38.

¹²⁸ See for example, *Sot. Lelos kai Sia* (n 31) paras 53, 55 holding that '...parallel exports of medicinal products from a Member State where the prices are low to other Member States in which the prices are higher open up in principle an alternative source of supply to buyers of the medicinal products in those latter States, which necessarily brings some benefits to the final consumer of those products... parallel trade is liable to exert pressure on prices and, consequently, to create financial benefits not only for the social health insurance funds, but equally for the patients concerned...'

¹²⁹ *GSK* (n 17), para 139-140.

¹³⁰ Note the ongoing investigations into restrictions on the cross-border sale of licensed merchandise (Cases AT.40436 *Nike*, AT. 40432 *Sanrio* and AT.40433 *Universal Studios*).

¹³¹ Note the ongoing investigation in Case AT.40428 *Guess*; also see, Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419, para 46 and contrast with Case C-230/16 *Coty Germany* [2017] electronic Report of Cases, paras 30-36. See also comments by former competition commissioner Almunia stating that '[t]he Pierre Fabre ruling underlines the need for a strict application of Single Market imperatives' (Joaquín Almunia, 'Competition – What's in it for consumers?' (2011)).

¹³² See the ongoing investigation in Case AT.40428 *Guess*. According to the Commission's press release (IP/17/1549), '[t]he Commission will investigate information indicating that Guess' distribution agreements may restrict authorised retailers from selling online to consumers or to retailers in other Member States. They may also restrict wholesalers from selling to retailers in other Member States.'

- Contractual obligations requiring permission for online sales from one Member State to another, are used to discourage exports and reinforce market partitioning.¹³³
- Technological specifications are used to reduce or eliminate interchangeability between digital products for the purpose of geo-blocking.¹³⁴
- Warranty restrictions are used to create a de facto separation between national markets and prevent parallel imports.¹³⁵
- Online platforms implement geo-filtering; discriminatory practices aimed at charging different prices from users in different jurisdictions.¹³⁶
- Dual pricing schemes are used to restrict competition between Member States.¹³⁷
- Limitations on broadcasting and access to pay TV are implemented.¹³⁸

IV. Economics and Law

As evident from the multitude of goals and values explored, competition law forms an integral part of the legal, social, and political fabric and ‘cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.’¹³⁹ Inevitably, the pluralism of values described above, which underpins EU competition law, may create friction with economic theory to the extent that such theory supports a

¹³³ *PO/Yamaha* (Case COMP/37.975) Commission Decision of 16 July 2003, paras 107-109.

¹³⁴ See for example the ongoing review of sales of PC video games in cases AT.40422 *Bandai*, AT.40424 *Capcom*, AT.40413 *FocusHome*, AT.40414 *Koch Media* and AT.40420 *ZeniMax*. According to the Commission’s press release (IP/17/201), the Commission is concerned that selective use of activation keys for the purpose of geo-blocking, could restrict parallel trade within the EU single market.

¹³⁵ Case C-31/85 *ETA Fabriques d’Ébauches* [1985] ECR 3933 holding that ‘A guarantee scheme under which a supplier of goods limits the guarantee to customers of his exclusive distributor places the latter and the retailers to whom he sells in a privileged position as against parallel importers and distributors and must therefore be regarded as having the object or effect of restricting competition within the meaning of [Article 101(1) TFEU].’

¹³⁶ See ongoing investigations involving Meliá Hotels’ agreements with *Kuoni* (Case AT.40527), *REWE* (Case AT.40524), *Thomas Cook* (Case AT.40526) and *TUI* (Case AT.40525). According to its press release (IP/17/201) ‘[f]ollowing complaints from customers, the Commission is investigating agreements regarding hotel accommodation concluded between the largest European tour operators on the one hand (Kuoni, REWE, Thomas Cook, TUI) and hotels on the other hand (Meliá Hotels). The Commission welcomes hotels developing and introducing innovative pricing mechanisms to maximise room usage, but hotels and tour operators cannot discriminate against customers on the basis of their location. The agreements in question may contain clauses that discriminate between customers, based on their nationality or country of residence – as a result customers would not be able to see the full hotel availability or book hotel rooms at the best prices.’

¹³⁷ *GSK* (n 7), para 61, holding that ‘... an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty’s objective of achieving the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that article of the Treaty...’

¹³⁸ Case AT.40023 *Cross-border access to pay-TV*.

¹³⁹ European Commission, ‘XXIInd Report on Competition Policy’ (1992) 13.

narrower analytical approach. Indeed, the interface between economics and law has been subjected to considerable public and academic debate.¹⁴⁰

In this regard, a broad consensus exists as to the crucial role that economics plays in shaping competition enforcement and intervention.¹⁴¹ It is widely recognized that the centrality of economic analysis provides a valuable prism which helps ensure the compatibility of decision-making with the overall aims of competition. However, controversy remains as to the extent to which economisation may substitute legal norms and lead to the erosion of non-efficiency objectives.¹⁴²

On one hand, some have argued that economic theory should delimit the scope of competition enforcement. Accordingly, ‘the only goal of antitrust laws should be to promote economic welfare.’¹⁴³ While the concept of ‘economic welfare’ may carry differential weight,¹⁴⁴ this view of competition enforcement has often led to arguments favouring a narrow utilitarian approach that invariably marginalises other values.¹⁴⁵ Such an approach discounts the (sometimes inconsistent) norms advanced in legislation and case law, viewing them as undesirable outcomes of political compromise which should be expunged from antitrust discourse.¹⁴⁶ Conversely, it vaunts the merits of quantifiable economics, as consistent and predictable benchmarks. According to this approach *what counts is what is countable*. Other values, even if forming part of the EU Treaty or case law, should be discounted at the level of implementation and enforcement.

By contrast, others take exception to the supposedly monolithic¹⁴⁷ and value-free nature

¹⁴⁰ Contrast Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law. An Analysis of Antitrust Principles and Their Application* (rev edn Wolters Kluwer 1978), para 112, advocating for an exclusively economic approach, with Edwin J Hughes, ‘*The Left Side of Antitrust: What Fairness Means and Why it Matters*, [2009] Marq L Rev 265, 282ff, arguing that the neoclassical economic approach is undesirable because, amongst other things, it expunges antitrust of the values that inherently support it, namely individual autonomy, dignity and formal equality.

¹⁴¹ William E Kovacic, ‘The Influence of Economics on Antitrust Law’ [1992] Econ Inquiry 294; William E Kovacic and Carl Shapiro, ‘Antitrust Policy: A Century of Economic and Legal Thinking’ [2000] J Econ Perspectives 43; William E Kovacic, ‘The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix’ [2007]. Colum Bus LRev 1.

¹⁴² David J Gerber ‘The goals of European Competition Law – some distortions in the literature’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012) 85.

¹⁴³ Richard A Posner, *Antitrust Law* (2nd ed, University of Chicago Press 2001).

¹⁴⁴ As commented by Werden: ‘Every favoured policy is said to promote “consumer welfare” [...] [b]ut the superficial consensus on this point masks a deep disagreement about what “consumer welfare” means and especially about what policies best to promote it.’ Werden (n 33) 15.

¹⁴⁵ E.g. Christian Alhborn and A Jorge Padilla, ‘From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law’ in Claus-Dieter Elhermann and Mel Marquis (eds) *European Competition Law Annual 2007 – A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 76.

¹⁴⁶ Hyman and Kovacic (n 28), 2167 stating that ‘[i]n many countries, the non-efficiency objectives remain in the statute because their presence is a precondition for a coalition that will support enactment’.

¹⁴⁷ While neoclassical (Chicago School) economics is often presented as the only strand of economic theory, it is one of several strands of economic theory. Other schools of economic thought include the Austrian, Ordoliberal, Behaviourist, Classical, Developmentalist, Institutional, Keynesian, Marxist, and Schumpeterian. See Ha-Joon Chang, *Economics: The User’s Guide* (Bloomsbury Press 2014), Ch. 4; John J Flynn, ‘Misuse of Economic Analysis in Antitrust Litigation’ [1981] Sw U LRev 335, 340-410; See also Ronald M Dworkin, *Taking Rights Seriously*, (Harvard University Press 1977) Ch 6; and C Edwin Baker, ‘The Ideology of the Economic Analysis of Law’ [1975] Philosophy and Public Affairs 37.

of the economic enterprise.¹⁴⁸ They argue that one should not assume that current economic analysis is free of normative and political influence. A modern economic approach is not the result of inevitable higher powers or accurate science, but the outcome of evolution, and to some extent, selective cultivation driven by interest groups.¹⁴⁹ According to this view, economics in its current manifestation reflects an ideology, and as such embodies no superior analytical purity over other intervention benchmarks. Furthermore, economic models and theories of harm are often rooted in unrealistic assumptions.¹⁵⁰ Consequently, economic theory should not eradicate the wider goals of EU competition law, nor should it strip it from its constitutional values and moral norms. The marginalisation of competition law's societal role, by means of economics, should be opposed. Use of the latter, so the argument goes, should be limited to: (i) assisting enforcers and courts in their assessments and interpretation of the law, (ii) reducing the risk of Type I and Type II errors, and (iii) safeguarding from protectionism or industrial interests.

Different competition agencies and scholars across Europe may well have different views on the optimal balance between law and economics, as well as on the latter's ability to fully reflect the goals and values of European competition law. This multitude of views is inevitable and not unique to Europe. It may be further subject to transformation as competition policy adjusts over time, constantly attempting to keep pace with new political and global realities, as well as with evolving economic and legal theory.

Importantly, however, as one sets to form her or his view on the optimal balancing point, one ought to remember that one's ideology, and any subsequent balancing, should take place within the legal framework set by the EU Treaties in accordance with their interpretation in case law. It cannot take place in abstract, nor should it reflect values or law which are set in other jurisdictions. One should not eradicate the democratic foundations of a regime and replace them with technocratic control. This is so, in particular, when considering that the EU's current constitutional framework is the product of modern negotiation and design and provides a detailed account of the norms advanced by the legislator, and by extension, the people of Europe.

V. Concluding Remarks

This paper set out to clarify the scope of European Union competition law and to expound on the values and goals with which the discipline has been entrusted. In so doing, it pointed to the relevant contact points between competition law and the digital economy – identifying areas which may fall within its jurisdiction.

¹⁴⁸ Maurice E Stucke, 'Occupy Wall Street and Antitrust – Postscript (response)' [2013] S Cal LRev 33; Michael E Porter and Mark R Kramer, 'Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth' [2011] Harv Bus Rev 89.

¹⁴⁹ James Kwak, *Economism: Bad Economics and the Rise of Inequality* (Pantheon, 2017); On the pluralism of views, see for example: Oliver Budzinski 'Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity' [2003] Available at SSRN: <https://ssrn.com/abstract=452900>

¹⁵⁰ Its application on a case-by-case basis may be at times inconsistent, as economic experts may display 'a tendency to become an advocate for the party by which he was instructed.' Justice Peter Roth commenting on the diverging views presented by economic experts as part of a hot-tub process conducted in the *Streetmap v Google* hearing (*Streetmap v Google* [2016] EWHC 253, para 47).

As evidenced by the preceding discussion, clarifying ‘what is a competition law question?’ under European Union law, leads to a multidimensional answer which reflects the multitude of values and goals of the European Union. The answer to this question feeds from the Treaties and their interpretation by the European Court and the Commission. It reflects a multitude of primarily interdependent and consistent goals which culminate in, but are not limited to, the protection of consumer welfare.

The European discipline, while evolving over the years, has displayed, overall, stable characteristics. The role and tasks entrusted to competition law have been set in the European Treaties since their inception and go beyond a pure efficiency analysis. They have been set within an analytical framework enshrined in provisions such as Articles 101 and 102 TFEU, which clarify their scope. On the other hand, by its nature, competition law evolves over time and so is the Court’s and Commission’s understanding of its scope. Inherent to the discipline is its evolutionary nature and the lack of sole permanent benchmarks for intervention.

As illustrated, the goals and values advanced by EU competition law provide for a flexible enforcement tool which can be used to address many of the evolving dynamics in digital markets. These goals may be wider than what some may favour. Furthermore, they may embed normative values and flexibility that run against the interests of some groups. Yet, that reality constitutes a reflection of both a unique constitutional process and the societal context in which they operate.

This multitude should not be seen as an invitation for broad and unpredictable discretion. Furthermore, it does not preclude one from arguing in favour of limited intervention or challenging the use of European competition law in different market settings. Such arguments may often have merit and contribute to the development of European jurisprudence.

The key issue lies in the understanding that these claims (on the desirability of intervention) must be apprehended within the framework of goals.

Against this backdrop, one may indeed challenge the wisdom of intervention and its effects on legal and business certainty, competition dynamic and innovation. One may argue for different weighing of goals and values, challenge the choice of cases, theories of harm, standard of proof or evidence on which a decision is founded. One may, moreover, promote a ‘more economic approach’,¹⁵¹ or to the same extent, question whether economic analysis provides the ultimate prism through which enforcement of competition law is assessed.¹⁵² And of course, one can explore other means for enforcement, notably regulation. On point are the EU General Data Protection Regulation

¹⁵¹ Note for instance the Guidance Paper (n 19).

¹⁵² Spencer Weber Waller ‘The law and economics virus’ [2009] *Cardozo LRev* 367; also see generally Ezzachi (n 23).

(GDPR),¹⁵³ EU Platform-to-Business Regulation,¹⁵⁴ and the proposed EU ePrivacy Regulation.¹⁵⁵ Regulatory regimes may offer a valuable complementary pre-emptive tool which can help clarify the boundaries of acceptable commercial strategies.

¹⁵³ Regulation (EU) 2016/679 of the European Parliament and of the Council 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 (General Data Protection Regulation) OJ L 119, 4.5.2016.

¹⁵⁴ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services PE/56/2019/REV/1 OJ L 186, 11.7.2019.

¹⁵⁵ "Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC.