FROM CONSUMER WELFARE TO FAIRNESS: A FUNCTIONAL FRAMEWORK FOR CONTROLLING DIGITAL MARKETS AND BEYOND UNDER EU COMPETITION LAW

PEHLIVANLI, AHMED,SAIM

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AHMED SAİM PEHLİVANLI

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LIST OF ABBREVIATIONS

ACM	Authority for Consumers & Markets
AdlC	Autorité de la concurrence
AI	Artificial Intelligence
APIs	Application Programming Interfaces
Bundeskartellamt	Federal Cartel Office
CJEU	Court of Justice of the European Union
CPS	Core Platform Service
DG	Competition Directorate-General for Competition
DMA	Digital Markets Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	Treaty establishing the European Economic Community
EU	European Union
EUCFR	EU Charter of Fundamental Rights
FRAND	Fair, Reasonable and Non-Discriminatory
GMV	Gross Merchandise Volume
LCA	Life-Cycle Analysis
MFN	Most-Favoured-Nation
NCAs	National Competition Authorities
NFC	Near-Field Communication
OECD	Organisation for Economic Co-operation and Development
PISPs	Payment Initiation Service Providers
PSD	Second Payment Services Directive
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the EU
US	United States

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CHAPTER 1: INTRODUCTION

1.1 This Thesis

Digital platforms now influence virtually every aspect of modern life, from search engines and social interactions to logistics networks and payment systems. Yet, the existing legal framework designed to regulate economic power remains anchored mainly in the traditional consumer welfare standard, a concept initially developed around tangible goods and measurable prices. Over the past two decades, decisions by the European Commission, ranging from landmark cases such as *Microsoft*[1] and *Intel*[2] to more recent cases like *Google Shopping*[3] and other digital economy dominance cases, have increasingly strained the conceptual boundaries of this standard. Issues, such as zero-priced services financed through user data, multi-sided markets where users exchange attention rather than money, and algorithmic self-preferencing practices that disadvantage competitors, all present challenges inadequately captured by traditional price-volume analysis. In situations where goods or services are offered at a zero monetary price, classical price-based tools of analysis, such as the SSNIP test, become analytically ineffective. Consequently, European Union (EU) competition policy has increasingly encountered what this thesis identifies as the consumer welfare challenge, arising when the inherently United States (US) centric consumer welfare standard is transplanted, often uneasily, into Europe's distinct institutional and market environment.[4]

This analytical vacuum has accelerated the turn toward fairness in European competition discourse. Increasingly, fairness rhetoric has permeated speeches by EU Commissioners, decisions from national competition authorities (NCAs), and, albeit less frequently, judgments from EU courts. The language of fairness has emerged particularly in addressing several

[1] Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601.

[2] Case C-413/14 P *Intel Corp v Commission* EU:C:2017:632.

[3] Case C-48/22 *P Google LLC and Alphabet Inc v Commission* ECLI:EU:C:2024:726.

[4] The conceptual tensions arising from the transplantation of a US-style consumer welfare paradigm into the EU's multi-value legal framework are examined in Chapter 3. That chapter contrasts the normative foundations and enforcement logics of US and EU approaches and engages with existing critiques regarding the limitations and contextual misalignments of the consumer welfare standard in Europe.

concerns, such as data discrimination, self-preferencing, and ecosystem foreclosure. This shift toward fairness, though swift compared to the earlier embrace of consumer welfare, has reignited a familiar debate. On one side, critics have declared the more economic approach obsolete, welcoming fairness as the new cornerstone of normativity. On the other hand, proponents have emphasised the doctrinal robustness of consumer welfare while dismissing fairness as inherently vague. This renewed debate on the objectives of competition law has intensified precisely at a time when digital market cases and the demand for rapid regulatory response have multiplied.

Against this backdrop, the Digital Markets Act (DMA) has been introduced.[5] Framed around the dual concepts of fairness and contestability, the DMA imposes ex ante obligations on so-called gatekeeper platforms, presenting these concepts as independent objectives, separate from consumer welfare considerations. Although politically advantageous, this separation risks two significant problems. Firstly, it obscures the reality that fairness considerations were already implicitly present within Article 102 of the Treaty on the Functioning of the EU (TFEU) analyses and recent national enforcement practices, thereby inviting redundant interpretations.[6] Secondly, by situating fairness within a distinct legislative framework, the DMA creates the possibility of overlapping investigations and double jeopardy dilemmas, especially when identical platform behaviours fall under both regulatory frameworks.[7] Addressing these risks requires not further proliferation of regulatory objectives, but rather the development of a principled approach that integrates fairness considerations firmly into the core analytical framework of EU competition enforcement.

To resolve these issues and address chronic challenges related to the goals of EU competition law arising within this context, this thesis argues that fairness should not serve as a competing objective to consumer welfare, but rather as a functional analytical tool, an instrument rather

[5] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

[6] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Art 102.

[7] The rationale behind the adoption of the DMA, its core objectives of fairness and contestability, and its positioning as a parallel regulatory framework are examined in Chapter 4. The chapter also addresses key tensions arising from this regulatory design, including overlaps with Article 102 TFEU and the risk of fragmented enforcement.

than an end in itself, capable of addressing harms invisible to traditional price-based analyses, while simultaneously maintaining the structured rigour inherent in EU competition law. Accordingly, the thesis first seeks to empirically demonstrate the extent to which fairness has already been implicitly applied within Commission and NCA investigations, as well as Court judgments.[8] Having established the feasibility of applying fairness within Article 102, the analysis then turns to how fairness can be systematically operationalised. Subsequently, the thesis explores the imperative of approaching fairness as an analytical means rather than an independent goal to ensure effective implementation. It proposes viewing debates on competition law objectives from an alternative perspective.[9] Building upon this foundation, the thesis develops a three-staged functional fairness framework. In the framework's first stage, a proportionality-based fairness test consisting of four sequential steps is proposed. The test examines whether the defendant exercises gatekeeper-like control over a market bottleneck, the legitimate objective purportedly served by the contested conduct, the necessity and proportionality of the means employed in achieving that objective, and the existence of less restrictive alternatives capable of safeguarding competition without unduly sacrificing product quality or innovation incentives. By embedding fairness within a proportionality assessment, this approach maintains analytical consistency with established EU competition law while expanding the evidentiary channels through which harm can be identified and addressed. In the second stage of the framework, the thesis introduces a behaviour catalogue that leverages the DMA to systematically align recurring platform strategies with potential remedies, thereby addressing concerns of definitional ambiguity surrounding fairness. The third stage of the framework proposes a single gateway rule designed to clearly allocate enforcement responsibilities between the DMA and Article 102 TFEU, thereby preventing duplicative proceedings and suggesting amendments to the DMA itself to mitigate the risk of ineffective enforcement in digital market contexts. Moreover, the thesis exemplifies how the functional fairness framework can be extended beyond online platforms to address challenges across other sectors within the scope of competition law.

Thus, this thesis engages simultaneously with three interconnected scholarly debates. The first debate concerns the doctrinal issue of whether the consumer welfare standard requires

[8] For a detailed empirical analysis supporting this reconceptualization of fairness, see Chapter 5.

[9] For a detailed doctrinal analysis, see Chapter 5.

supplementation or replacement within digital markets. The second debate addresses the institutional challenges involved in coordinating ex-ante obligations imposed by the DMA with ex post competition enforcement, aiming to avoid legal overlaps and conflicting remedies. The third debate centres on the methodological question of how doctrinal insights, empirical evidence, and normative theory can be effectively integrated into coherent and viable legal frameworks. Consequently, this thesis aims to inform ongoing EU policy reforms in digital markets and beyond, providing a structured framework that can incorporate fairness considerations into competition analysis without compromising consumer welfare insights, thanks to a new perspective on the objectives of competition law. The following section outlines the research questions guiding this investigation.

1.2 Research Questions

European competition law currently faces a dual impasse. On the one hand, a consumer welfare–only lens struggles to capture various competitive distortions caused by digital platforms, particularly when monetary prices are absent or opaque. On the other hand, the DMA promises more rapid regulatory intervention but achieves this by presenting fairness and contestability as separate objectives, distinct from Article 102 TFEU.[10] This approach inadvertently generates multiple legal pathways, increasing the likelihood of overlapping and potentially conflicting enforcement actions. In light of these challenges, this thesis poses the following central research question:

How can fairness be operationalised as a functional analytical tool within Article 102 TFEU, enabling effective discipline of digital platform conduct that escapes traditional consumer welfare standards, while simultaneously avoiding the duplication risks inherent in the DMA's independent regulatory structure?

This central question is explored through six interconnected sub-questions, each addressing specific analytical aspects of the thesis:

[10] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Report for the European Commission, 2019) available at <https://competition-policy.ec.europa.eu/publications_en> accessed 14 December 2023, 52-53.

- Sub-Question-1: In what precise ways does the consumer welfare standard prove inadequate for addressing issues in digital-platform markets, and what measurable gaps or blind spots result from this inadequacy?

- Sub-Question-2: How has the rhetoric of fairness evolved within European Commission decisions, national competition authority cases, and court judgments over the past fifteen years, and what analytical functions has this rhetoric served?

- Sub-Question-3: Why does the DMA elevate fairness and contestability into independent regulatory benchmarks, and what doctrinal or procedural frictions emerge when identical conduct is investigated under both the DMA and Article 102 TFEU?

- Sub-Question-4: How has the goal and instrument confusion emerged in contemporary digital competition discourse, and on what normative basis can this thesis construct a framework that moves beyond hierarchical objectives toward functional analysis?

- Sub-Question-5: To what extent can a proportionality-based, four-step functional fairness test integrate fairness into Article 102 TFEU analysis in a predictable and administrable manner?

- Sub-Question-6: How effectively do the proposed behaviour catalogue and single-gateway rule mitigate the risks of double jeopardy between the DMA and Article 102 TFEU, and under what circumstances can the suggested framework be extended beyond digital markets?

Collectively, these research questions outline a structured analytical trajectory. This trajectory begins by identifying the limitations of the consumer welfare standard, proceeds to demonstrate the existing implicit fairness analyses, and highlights the regulatory overlaps introduced by the DMA. Subsequently, it redefines the relationship between objectives and tools, develops an analytical test, and finally embeds that test in an enforcement architecture fit for both digital and non-digital markets. By addressing these questions, the thesis aims to enhance the effectiveness of Article 102 TFEU as a precise analytical instrument in digital platform cases, thereby restoring coherence to the overall EU competition law framework.

1.3 Methodology of the Research and Limitations

This thesis adopts a multi-methodological approach to capture the complex relationship between the limitations of consumer welfare reasoning, the emergence of fairness as a guiding principle, and the development of a functional analytical tool within the framework of Article 102 TFEU. Doctrinal analysis, comparative analysis, empirical text-mining, and normative framework design are employed across different chapters, each method carefully selected to address the specific nature of the question under examination. The structure of the substantive chapters follows the progression of these methods, allowing the reader to trace how each analytical tool contributes to the overarching argument.

1.3.1 Doctrinal and Comparative Analysis

To explore the limitations of the consumer welfare standard in digital markets, as formulated in the first sub-question, chapters 2 and 3 adopt a sequential and interdisciplinary methodological design. Chapter 2 begins not with legal doctrine, but with insights from digital economy scholarship to identify the structural characteristics of platform markets, such as multi-sidedness, zero-price monetisation, data-driven network effects, and ecosystem lock-in. Articulating these traits is a necessary first step, as they reveal the structural mismatch between platform dynamics and the assumptions underpinning price-based legal benchmarks, even before any formal legal critique is advanced. Building on this foundation, Chapter 3 shifts focus to the internal logic of the consumer welfare paradigm. It reconstructs the economic reasoning that gave the standard intellectual coherence, particularly in terms of allocative efficiency, marginal-cost pricing, and network effects theory, drawing on both European commentary and key US case law, where the paradigm originated and remains most entrenched. Secondary literature is analysed inductively by first logging the blind spots already acknowledged in the academic debate and then determining whether these stem from doctrinal, evidential, or institutional sources. A qualitative approach is employed, as the aim is not to quantify harm, but to categorise forms of harm that evade price-centred analytical tools.

1.3.2 Regulatory-Policy Analysis

Chapter 4 addresses the second and third sub-questions, which concern the justificatory logic underpinning the DMA and its normative tension with Article 102 TFEU. This analysis is conducted through a regulatory policy lens, drawing on a range of institutional sources, including EU preparatory documents, impact assessments, Council revisions, and European Parliament amendments. These materials are systematically examined to identify the rationales invoked when fairness and contestability are elevated to autonomous regulatory objectives. The chapter then shifts to a doctrinal analysis, performing an overlap assessment that matches individual DMA obligations with the constituent elements of abuse under Article 102 TFEU. This comparison highlights areas of potential regulatory duplication and legal friction, including the risk of double jeopardy in enforcement. The result is not a quantitative model, but a structured conflict matrix that highlights zones of conceptual and functional tension between ex ante and ex post approaches. Given this objective, a qualitative method is adopted as the most appropriate analytical tool, as it is sufficient to expose structural overlaps without relying on econometric modelling or statistical inference.

1.3.3 Empirical Text-Mining of the Fairness Rhetoric

In response to the empirical dimension of the second sub-question, Chapter 5 applies computational content analysis to a curated corpus comprising fifteen landmark decisions concerning digital platforms, issued by the Commission and various NCAs, along with their corresponding appellate judgments. Following standard pre-processing protocols, including tokenisation, stop-word removal, and stemming, fairness and consumer welfare keyword dictionaries are constructed. These dictionaries, derived from doctrinally grounded synonyms and refined through preliminary pilot testing, are used to quantify fairness and consumer welfare related language across the corpus. Two core metrics are computed: the absolute frequency of fairness and consumer welfare-related tokens and their proportional weight relative to total word counts. The chapter then visualises temporal and institutional trends through year-on-year line graphs and comparative heat maps across authorities, illustrating the growing, albeit often implicit, salience of fairness considerations in digital enforcement. The analysis reveals a clear upward trajectory in fairness rhetoric, particularly in more recent

decisions. To ensure methodological rigour and replicability, Chapter 5 includes the complete keyword list and supporting frequency tables.[11]

1.3.4 Normative Framework Design and Scenario Testing

Building on the empirical foundations established in the previous chapter, Chapter 6 addresses sub-questions 4 to 6 by constructing a normative framework that combines doctrinal innovation with practical applicability. The methodology blends elements of legal theory, institutional design, and scenario testing to propose a coherent structure for operationalising fairness within the enforcement architecture of Article 102 TFEU.

First, the chapter introduces the proportionality-based functional fairness test, a structured analytical tool derived from the proportionality doctrine developed in the case law of the Court of Justice of the European Union (CJEU), the Commission and NCAs and further refined by analogy with fundamental rights jurisprudence. The test comprises four sequential components, status, aim, necessity, and proportionality stricto sensu, each translated into operational questions. These are embedded into a decision tree format and applied to stylised case scenarios. This stress-testing approach demonstrates the test's ability to distinguish legitimate business conduct from harmful exclusionary practices while maintaining legal certainty and analytical discipline.

Second, the chapter develops a fairness behaviour catalogue, a forward-looking taxonomy of platform strategies linked to presumptive remedies. This catalogue is constructed through doctrinal clustering of recurring abuse patterns, such as self-preferencing, leveraging, and data siloing, and is cross validated using the frequency data generated in Chapter 5. The taxonomy is deliberately designed to be open-ended, accommodating future additions. The chapter also illustrates this extensibility by sketching hypothetical obligations in emerging domains, such as algorithmic transparency in cloud computing markets, thereby highlighting the framework's adaptability to technological evolution.

[11] The methodology underlying the text-mining research, including corpus selection, keyword construction, and frequency analysis, is explained in detail and in a transparent manner in Chapter 5.

Third, a single gateway rule is proposed as an institutional mechanism for allocating cases between the DMA and Article 102 TFEU.

Where quantitative modelling is unnecessary, such as in the formulation of legal principles, the chapter remains firmly within the bounds of normative-analytical reasoning. However, to ground the framework in practical application, a series of illustrative vignettes is employed. These consist of stylised fact patterns, drawn from real and hypothetical digital market scenarios, demonstrating how the proposed tools (the fairness test, the behavioural taxonomy, and the allocation rule) would function in actual enforcement settings.

1.3.5 Cross-Cutting Reliability and Limitations

The research design underpinning this thesis is grounded in publicly accessible legal sources, ensuring both transparency and compliance with data protection standards. All doctrinal materials, ranging from EU legislation to case law, are drawn exclusively from the public domain, and at no point are personal or sensitive data processed. The empirical corpus used in the computational content analysis is intentionally confined to officially published decisions of the Commission, judgments of the EU Courts, and rulings issued by NCAs within the European Union. Unpublished commitment decisions, ongoing investigations, and provisional findings are excluded, as are decisions from non-EU jurisdictions such as the United States and any other countries. This jurisdictional limitation reflects the thesis's core focus on the internal coherence and doctrinal evolution of EU competition law.

Efforts have been made to mitigate keyword selection bias through iterative dictionary refinement, doctrinal cross referencing, and manual spot checks. However, the representativeness of the corpus, comprising selected platform-related cases, remains inherently constrained, particularly given the evolving nature of digital enforcement. Accordingly, the findings drawn from this dataset should be interpreted as indicative rather than definitive and updated as new decisions become available.

Finally, the scenario testing methodology employed in Chapter 6 serves an illustrative rather than predictive function. While it demonstrates the internal logic and potential applicability of the proposed proportionality-based fairness test and single gateway rule, it does not claim

accuracy of empirical outcomes. Both tools are designed to remain adaptable and responsive to future developments in CJEU jurisprudence and institutional practice, recognising the dynamic and iterative nature of legal reasoning in digital markets.

1.4 Chapter Breakdown

The structure of the thesis follows a deliberately sequential trajectory, designed to guide the reader through a coherent progression from conceptual diagnosis to normative prescription. Following the Introduction chapter, which outlines the central puzzle and sets out the main and subsidiary research questions, the six substantive chapters are arranged to develop the argument in a cumulative manner. The analysis begins by examining why the prevailing consumer welfare standard proves inadequate in addressing the specific characteristics and harms of digital markets. It then advances toward a normative proposal for integrating a more functional understanding of fairness into the interpretation and application of Article 102 TFEU, while also exploring how such an approach can be institutionally coordinated with the emerging framework of the DMA. Rather than treating the sub-questions in isolation, each chapter addresses one or more of them in a way that builds logically upon the previous chapter. This sequential design ensures analytical continuity and prevents the fragmentation of argument into parallel or disconnected thematic silos. The substantive focus of each chapter is outlined below.

1.4.1 Chapter 2

This chapter deliberately moves beyond the confines of black letter legal analysis to examine the structural features that set platform markets apart from the traditional industrial contexts in which the consumer welfare standard was originally formulated. It identifies and analyses key characteristics such as multi-sidedness, zero-price monetisation models, data-driven network effects, and ecosystem lock-in. By demonstrating how these traits distort or suppress conventional market signals, namely, price, output, and quality, the chapter lays the empirical foundation for addressing sub-question 1, which asks why a benchmark grounded solely in price-based reasoning fails to capture the critical dimensions of platform power. In doing so, the chapter provides the necessary factual and conceptual context for the doctrinal critique developed in the subsequent chapter, allowing the argument to unfold on an integrated empirical-legal basis.

1.4.2 Chapter 3

Shifting the focus from market structure to the analytical lens applied within competition law, Chapter 3 reconstructs the economic foundations underpinning the consumer welfare standard, namely, allocative efficiency, marginal-cost pricing, and the assumption of single-market externalities. This reconstruction draws upon both European legal commentary and seminal US case law, where the consumer welfare paradigm was first developed and gained traction. The analysis demonstrates that, once platform specific phenomena such as data externalities and cross side network effects are introduced, the ability to measure harm increasingly relies on unverifiable counterfactual scenarios. This disconnection between doctrinal assumptions and economic realities completes the response to sub-question 1, which concerns the limits of price-based reasoning in digital markets. It also lays the groundwork for the remainder of the thesis by raising a concrete challenge: when traditional welfare metrics prove methodologically unreliable, a supplementary analytical filter becomes necessary to ensure robust enforcement.

1.4.3 Chapter 4

Chapter 4 examines how the European Union legislature sought to respond to the limitations of the consumer welfare standard by introducing a complementary regulatory framework through the DMA. Drawing on official impact assessments, Council negotiation texts, and European Parliament debates, the chapter analyses the legislative rationale behind elevating fairness and contestability to the status of autonomous regulatory objectives. It then undertakes a systematic mapping of individual DMA obligations against the established categories of abuse under Article 102 TFEU. This mapping produces an overlap matrix" that reveals areas of potential legal conflict, including risks of double jeopardy and duplicative remedies. In doing so, the chapter directly addresses Sub-Questions 2 and 3, which concern the justification for and interaction between the DMA and traditional competition enforcement. The chapter concludes by raising the central normative challenge underpinning the remainder of the thesis, questioning whether the concept of fairness can be meaningfully reintegrated into the core logic of competition law rather than left confined to a parallel ex ante regulatory regime.

1.4.4 Chapter 5

Chapter 5 addresses the empirical dimension of the second sub-question by employing computational text-mining techniques on a curated set of landmark decisions issued by the Commission and various NCAs, along with their respective appellate judgments. The analysis, using year-on-year line charts and comparative heat maps across institutions, reveals a clear trend in which fairness-related vocabulary, once peripheral or incidental, is now becoming a consistent and recognisable feature within enforcement reasoning. These empirical findings demonstrate that fairness considerations are already implicit in the practical application of EU competition law. As such, they provide a solid evidentiary foundation for the doctrinal argument advanced in later chapters, namely, that fairness can be systematically reintegrated into the legal framework of Article 102 TFEU without departing from established enforcement traditions.

1.4.5 Chapter 6

Building on the analytical and empirical foundations laid out in Chapters 2 through 5, the final substantive chapter addresses sub-questions 4 to 6 by advancing a normative framework supported by scenario-based testing. The chapter introduces three core components: first, a four-step proportionality-based fairness test, derived from the jurisprudence of the CJEU and structured around the sequential evaluation of status, aim, necessity, and proportionality stricto sensu; second, a behaviour catalogue that classifies recurring platform strategies, such as self-preferencing or data siloing, and links them to appropriate presumptive remedies; and third, a single-gateway rule that offers a case allocation mechanism, assigning enforcement either to the DMA or to Article 102 TFEU, based on a forward-looking distinction between structural and conduct-specific harms. The framework's practical logic is illustrated through stylised fact patterns drawn from landmark digital competition cases and hypothetical scenarios. The chapter concludes by demonstrating the framework's adaptability, showing how the behaviour catalogue can evolve to incorporate new categories of conduct, hereby ensuring its continued relevance in dynamic digital and post-digital market contexts.

1.4.6 Chapter 7

The concluding chapter offers a concise synthesis of the thesis. It distils the thesis's original contributions to the literature on EU competition law, acknowledges methodological and conceptual limitations, and outlines potential directions for future research. By the time the reader reaches this final chapter, the analytical journey, from diagnosing the limitations of the consumer welfare standard to proposing a functional fairness framework, will have been completed in a sequential and cumulative manner. Each chapter contributes a distinct dimension to the central argument: that fairness, when treated not as a competing normative goal but as an operational analytical tool, can restore coherence to EU competition enforcement. It enables Article 102 TFEU to address the challenges posed by platform power more effectively, without necessitating the creation of parallel legal regimes or discarding the valuable insights of consumer welfare analysis.

1.5 Original Contribution of the Research

This thesis contributes to the ongoing debate on digital platforms by making original interventions in three key areas: it develops a new theoretical perspective, introduces a novel methodological approach, and proposes an institutional and policy-oriented framework. Each of these contributions addresses a specific gap that remains largely unaddressed in the existing literature on EU competition law.

First, at the theoretical level, this thesis reconceptualises the notion of fairness not as a competing or substitutive objective to the consumer welfare standard, but as a functional analytical lens that can be activated when traditional price signals become inadequate in detecting harm, particularly in complex digital markets. Rather than engaging in longstanding debates over the normative hierarchy of objectives within EU competition law, the thesis adopts a pragmatic and operational perspective by embedding fairness directly within the legal and analytical structure of Article 102 TFEU. It begins by identifying the recurring phenomenon of goal confusion that emerges whenever new forms of digital harm challenge existing enforcement paradigms. It then offers a principled and coherent response to this problem. In doing so, the thesis provides the systematic reconciliation between the legacy of consumer welfare and the increasing institutional emphasis on fairness, showing that the two can coexist

in a complementary analytical relationship, each serving distinct yet mutually reinforcing roles within a renewed and functionally responsive competition law framework.

Second, at the methodological level, this research introduces a novel interdisciplinary approach by combining analytical tools. It employs a computational text-mining analysis of landmark decisions issued by the Commission and various NCAs in digital platform cases. This empirical inquiry reveals the latent yet growing prominence of fairness-related language in enforcement discourse, offering a data-driven foundation for subsequent normative proposals. The resulting evidence base directly informs the construction of a four-step functional fairness test, grounded in proportionality principles derived from CJEU jurisprudence. This test is coupled with a dynamic behaviour catalogue that links recurring platform strategies to presumptive remedies, thereby bridging the gap between abstract legal doctrine and concrete enforcement practice. Taken together, the corpus analysis, decision-tree model, and behavioural taxonomy form a replicable and scalable research design, one that may be applied to future datasets or adapted to other sectors facing similar challenges. This integrated methodology moves beyond the narrative case studies and doctrinal analyses that dominate the field. Furthermore, while only one previous study has broadly examined the objectives of EU competition law empirically, this thesis engages with that study in a more targeted and in-depth manner, focusing specifically on the evolving tension between consumer welfare and fairness.[12] By incorporating recent court decisions and administrative investigations, this thesis redefines fairness not merely as a rhetorical framing, but as an emergent doctrinal category, offering an original empirical contribution to the EU competition law literature.

Third, at the level of policy design and institutional architecture, the thesis puts forward a concrete enforcement mechanism in the form of a single gateway rule. This rule allocates competition investigations to either the DMA or Article 102 TFEU. By establishing clear decisional criteria and illustrating their application through stylised case scenarios drawn from prominent digital economy investigations, the thesis moves beyond general calls for coordination and offers an operational framework. It also identifies potential areas for

[12] For the methodology and key findings of this empirical study on the objectives of EU competition law, see K Stylianou and MC Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (SSRN Working Paper, 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735795> accessed 16 March 2022.

legislative refinement. It provides concrete suggestions for how the proposed model could inform statutory or regulatory adjustments in other jurisdictions, thereby contributing not only to academic debate but also to the practical evolution of enforcement institutions.

Taken as a whole, these three strands of contribution, spanning theoretical reframing, methodological innovation, and institutional design, shift the debate from abstract discussions of regulatory goals to a more concrete engagement with implementable legal doctrine, empirically grounded evidence, and practicable enforcement mechanisms. In doing so, they equip European Union competition law, and Article 102 TFEU in particular, with a more precise and adaptable analytical framework for addressing the challenges posed by platform power, without discarding the foundational rigour of the consumer welfare tradition.

CHAPTER 2: NEW REALITIES OF THE DIGITAL ECONOMY: CHALLENGES FOR THE EU COMPETITION LAW

2.1 Introduction

This chapter examines the distinctive features of conduct emerging in the digital economy and the challenges these pose to established competition law frameworks. While these features are often technical in nature, understanding them is essential to contextualise the competition law objectives discussed in the following chapters. The shift driven by platform-based business models has called into question the adequacy of traditional enforcement tools and goals, particularly those centred on consumer welfare. As subsequent chapters will show, these difficulties have prompted fragmented interpretations by the Commission and the EU courts, leading to broader criticisms of foundational objectives in EU competition law. Against this backdrop, a clear grasp of the digital economy's behavioural dynamics is indispensable for assessing whether existing legal goals remain fit for purpose.

As this chapter explores in more detail, the digital economy has attracted extensive scholarly attention across legal and economic fields, as well as from other academic disciplines. This sustained interest reflects the complexity and evolving nature of the subject, which requires a broad yet doctrinally grounded analytical approach. Accordingly, the chapter draws on insights from not only legal experts but also economists and other scholars to provide a clear and structured account of the digital economy's key characteristics and challenges. This examination is intended to lay the groundwork for the subsequent analysis of EU competition law objectives, particularly in relation to the concepts of consumer welfare and fairness, which will be critically assessed in the following chapters.

2.2 Characteristics of the Digital Economy

When examining the features of the digital economy, it is essential to recognise that they are interrelated and influence one another in significant ways. Each aspect contributes to the overall digital ecosystem, creating a cause-and-effect relationship that cannot be evaluated in isolation.

Consequently, it is crucial to consider these characteristics as a cohesive unit, taking into account their interdependence. Adopting this perspective will greatly facilitate competition analyses by providing a comprehensive understanding of the dynamics of the digital economy.

It is essential to examine two distinct groups of features to gain a comprehensive understanding of the characteristics of the digital economy. The first set of attributes is associated with the economics of two-sided markets, which underpins the functioning of online platforms. These characteristics include network externalities and critical mass, which have been extensively discussed in the academic literature. However, the second group of features stems from the online nature of the digital economy rather than its two-sided market structure, and it is equally important to consider these characteristics. Furthermore, there is no consensus on how to categorise or identify these features in the literature. While some of these characteristics are attributed to online platforms, others are linked to the broader concept of the digital economy. However, drawing a clear distinction between the two is challenging since online platforms are the driving force behind the digital economy. Consequently, separating the features of online platforms from those of the digital economy is artificial at best. To address this issue, an integrated approach is adopted in this chapter, where the features arising from the two-sided market concept, the online nature of the digital economy, and certain features attributed to the digital economy are discussed collectively. By doing so, this chapter aims to provide a simplified yet comprehensive understanding of the characteristics of the digital economy.

2.2.1 Network Effects

As previously indicated, there is no unanimous consensus regarding the defining features of the digital economy. Nonetheless, it possesses certain fundamental traits attributable to its two-sided market structure.[1] The foremost among these traits is the phenomenon of network effects, which holds significant relevance in the scrutiny of online platforms from the perspective of competition law.[2] Network effects refer to the capacity of a user of a product or service to

[1] OECD, Roundtable on Two-Sided Markets (2009) available at <https://www.oecd.org/en/publications/two-sided-markets_1ab6f5f3-en.html> accessed 13 July 2022.

[2] Jean-Charles Rochet and Jean Tirole, 'Two-Sided Markets: A Progress Report' (2006) Review of Network Economics vol 5 no 2, 161–188.

influence the value of that product or service for other users.[3] Essentially, network effects signify that the demand on opposite ends of a relevant two-sided market is somewhat interrelated.[4] Notably, the mutual dependence of distinct parties within two-sided markets, and subsequently on online platforms, cannot be internalized by said parties. This is precisely why network effects are commonly labelled as network externalities.[5] The theory of network effects was first introduced during the 1980s within the framework of two-sided market investigations aimed at elucidating the conduct of diverse groups engaged in mutual interaction.[6] The fact that the concept was established earlier than that of two-sided markets underscores its significance for both two-sided markets and online platforms.[7] Indeed, certain commentators view network effects as an inherent attribute of online platforms, rather than a mere corollary.[8] Finally, network effects comprise a two-pronged structure encompassing direct and indirect effects.[9]

2.2.1.1 Direct Network Effects

Direct network effects occur when the value of a product or service to a particular group is closely tied to the value of the same product or service to other members of the same group.[10] In such cases, users on the same side of the online platform enjoy positive advantages resulting from a substantial number of users.[11] Examples of direct network effects can be effortlessly

[3] OECD, Rethinking Antitrust Tools for Multi-Sided Platforms (2018) available at <https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/04/rethinking-antitrust-tools-for-multi-sided-platforms_2a887a98/a013f740-en.pdf> accessed 10 July 2021.

[4] Antonio Capobianco and Anita Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' (2018) 9 Journal of European Competition Law & Practice 19, 20–21.

[5] ibid 21.

[6] Dirk Auer and Nicolas Petit, 'Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy' (2015) 60 The Antitrust Bulletin 426, 431.

[7] ibid 431.

[8] Christopher Pickard, 'Competition Policy and the Rise of Digital Platforms' (2019) 40 European Competition Law Review 507.

[9] Arno Scharf, 'Exploitative Business Terms in the Era of Big Data — the Bundeskartellamt's Facebook Decision' (2019) 40 European Competition Law Review 332, 335.

[10] Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 World Competition 473.

[11] Oliver Budzinski and Annika Stöhr, 'Competition Policy Reform in Europe and Germany — Institutional Change in the Light of Digitization' (2019) 15 European Competition Journal 15, 18–19.

observed in traditional communication networks such as telephones, as well as online social communication platforms like Facebook or WhatsApp. Such online social communication platforms are characterised by users attaching significance not only to the content furnished by the opposing business side of the platform but also to interacting with other users. For instance, a primary reason why a significant number of users actively engage on Facebook is that their acquaintances or desired interaction partners also use Facebook. The exponential growth of users on Facebook and similar platforms is the direct consequence of network effects. The presence of direct network effects gives rise to a snowball effect, contributing to the proliferation of online social communication platforms. This effect is exemplified in the statement of Mark Zuckerberg, one of the founders of Facebook, who noted that two-thirds of Harvard University students began using Facebook within two weeks of its launch.[12]

Direct network externalities may not be readily apparent on certain online platforms, as illustrated in the example of social communication networks provided above.[13] For instance, search engine users do not directly benefit from or exhibit observable changes as more individuals conduct searches through the same search engine. Moreover, a user who searches on Google does not necessarily consider the preferences of other users who also use Google for their web searches. However, the absence of observable direct network effects in search engines does not imply their nonexistence. Despite users on the same side of these online platforms not overtly acknowledging each other's presence, having a larger number of users on the same side has considerable implications, including better and more precise search results and the accumulation of more advertisers on the other side of the platform. The popularity of Google and Bing, despite entering the market later, as the most frequently used search engines, is indicative of the importance of direct network effects for search engines.[14]

Finally, it should be emphasised that direct network effects can lead to the emergence of online platforms, such as Facebook, and the demise of others, like Myspace. Thus, direct network effects are vital in the scrutiny of competition law analysis as they enable online platforms to

[12] David S Evans and Richard Schmalensee, 'Failure to Launch: Critical Mass in Platform Businesses' (2010) 9 Review of Network Economics 1, 1–28.

[13] Stephen Peter King, 'Sharing Economy: What Challenges for Competition Law?' (2015) 6 Journal of European Competition Law & Practice 729.

[14] ibid.

maintain a certain standard of quality and profit from user interactions within the group. These effects trigger a snowball effect on the rise of some online platforms, which, in turn, can be detrimental to the survival of other platforms, highlighting the importance of direct network effects in competition law analysis.[15]

2.2.1.2 Indirect Network Effects

Indirect network effects refer to the phenomenon whereby the value of a product or service for one side of the market is positively correlated with the value of the same product or service for the other side of the market.[16] This interdependence results in favourable outcomes for both sides of an online platform. Numerous online marketplaces exhibit the presence of indirect network effects. For example, customers' heavy preference for Amazon indicates the presence of a large number of active sellers on this platform. Similarly, search engines such as Google experience indirect network effects. As more users search on Google, the search engine becomes more appealing to advertisers, leading to an increase in the number of users on the other side of the platform.

Within the context of online platforms financed through advertising, it is contended that indirect network effects may manifest in a unidirectional manner.[17] This argument posits that such effects can elicit divergent outcomes on distinct sides of the platform. For instance, in the case of the search engine example, a high volume of users may be perceived as a favourable indirect network effect for advertisers. However, the same cannot be asserted for the user side of the platform, which may be subject to an overwhelming number of advertisements. Consequently, the impact of indirect network effects on the user side in the search engine example is at best equivocal.[18] However, there are several issues with assigning significance to this argument. Firstly, the relevance of indirect network effects for the analysis of competition law lies in the existence of the concept itself, rather than the positive or negative outcomes that may result from such effects. Additionally, the presence of indirect network effects can be established if

[15] Evans and Schmalensee, 'Failure to Launch' (n 12).

[16] Rochet and Tirole (n 2).

[17] Budzinski and Annika Stöhr (n 11).

[18] Nicolo Zingales, 'Product Market Definition in Online Search and Advertising' (2013) 9 Competition Law Review 28.

at least one party to the platform benefits from the presence of the other, regardless of whether this interdependence is mutually beneficial.[19] Furthermore, the pricing structure of two-sided markets and the growing significance of data in the context of online platforms have noteworthy implications for the operation of indirect network effects in such platforms. Regarding the pricing structure of two-sided markets, the abundance of advertisers on one side of the search engine example means that the other side of the platform can continue to access better-quality services at no additional charge.[20] Moreover, the fact that search engines can access user data through the platform, leading to the display of more targeted and personalised ads, undermines the argument that indirect network effects engender different results for distinct user groups on online platforms that are financed through advertisements.[21]

As previously discussed, online platforms that rely on the interaction of multiple user groups have effectively leveraged the presence of indirect network effects to foster explosive growth. Consequently, many online platforms operating across diverse sectors continue to expand and proliferate at a rapid pace. Such developments understandably give rise to concerns about the potential anti-competitive implications of indirect network externalities within the ambit of competition law. Nonetheless, it is essential to note that several factors counterbalance the impact of indirect network externalities on online platforms. Therefore, conducting competitive analyses that take into account these factors in addition to the indirect network externalities of online platforms can lead to more robust outcomes.

2.2.2 Pricing Structure

The pricing structure of online platforms is fundamentally linked to their two-sided nature, a phenomenon also observed in network effects.[22] This requires online platforms to adopt a pricing structure that differs from that of one-sided markets. Given that online platforms operate

[19] Sebastian Wismer, Christian Bongard and Arno Rasek, 'Multi-Sided Market Economics in Competition Law Enforcement' (2016) 8 Journal of European Competition Law & Practice 257, 258–259.

[20] Pickard (n 8) 508.

[21] OECD, Big Data: Bringing Competition Policy to the Digital Era (2016) <https://www.tralac.org> accessed 13 July 2021.

[22] Daniel Mandrescu, 'Applying EU Competition Law to Online Platforms: The Road Ahead—Part 1' (2017) 38 European Competition Law Review 353.

on two distinct sides, they require differentiated pricing approaches. Therefore, while deciding on the price to be charged to one side of the platform, it is essential to consider the reaction of the other side to this pricing ratio. In other words, the impact of the price determined for one side on the number of users on the other side of the platform should be taken into account.[23] This pricing structure is directly linked to the extent of indirect network effects on the platform.[24] If one side of the platform attributes more significance to the other side's presence, a higher price is charged to that side to attract the more in-demand side.[25] In other words, platforms offer a subsidy to the side with higher network effects by charging a higher price to the side with lower network effects. As a result of adopting this pricing structure, online platforms internalise the indirect network externalities.[26] The pricing structure of online platforms is often asymmetrical, particularly for those that rely on advertising as their primary source of revenue.[27] Online platforms commonly lower the price charged to the more price-sensitive side to attract customers. As the number of users on this side increases, the platform becomes more attractive to the other side, usually the business side. The result of an increase in the number of users on the business side is that online platforms can charge higher prices to this side of the platform. Therefore, one side of online platforms is charged little or nothing, while the other side pays significantly more. This pricing structure has important implications for determining relevant markets and identifying dominant undertakings in the context of competition law.[28] Moreover, the pricing structure of online platforms has become even more complicated for competition law due to the growing importance of the concept of data on these platforms, which is explained in more detail below.

[23] Pickard (n 8).

[24] Marc Rysman, 'The Economics of Two-Sided Markets' (2009) 23 The Journal of Economic Perspectives 125.

[25] ibid.

[26] Budzinski and Annika Stöhr (n 11).

[27] David S Evans, Andrei Hagiu and Richard Schmalensee, 'A Survey of the Economic Role of Software Platforms in Computer-based Industries' (2005) 51 CESifo Economic Studies 189.

[28] Daniela Eleodor, 'Big Tech, Big Competition Problem?' (2019) 20 Quality-Access to Success 49, 51–52.

2.2.3 Critical Mass, Multi-Homing and Switching Costs

Another issue, known as the tipping-point problem or critical mass, must also be addressed in order to ensure profitability in online platforms.[29] This involves attaining a sufficient number of users on both sides of the platform to make it a profitable enterprise.[30] Once critical mass is reached, the online platform is generally regarded as viable and its competitive power is believed to be irreversible due to the presence of strong indirect network effects.[31] However, some scholars have argued that the significance of critical mass attainment by online platforms is often overlooked, resulting in an overemphasis on the role of indirect network effects in assessing these platforms from a competition law perspective.[32]

On the one hand, it has been widely argued that high switching costs among online platforms strengthen the role of indirect network effects, providing an unbeatable competitive advantage to online platforms.[33] Switching costs, a classic economic concept, arise when users find it difficult or expensive to purchase the same product from another seller after regularly purchasing from a particular vendor.[34] Switching costs also occur when maintenance or complementary products of a purchased product are provided by the same vendor.[35] When applied to online platforms, switching costs make it difficult for users to switch from one platform to another since these platforms often offer personalised services and ads based on user data.[36] High switching costs are particularly prevalent for users on social networking online platforms because the biggest motivation for them to continue using a platform is the large number of other users who use the same platform.[37] Combined with indirect network effects, high switching costs result in users being locked into specific online platforms. In Germany, the Federal Cartel Office (Bundeskartellamt) assessed Facebook's various activities as anti-

[29] Mark Armstrong and Robert Porter (eds), *Handbook of Industrial Organization* (Elsevier 2007).

[30] Evans and Schmalensee, 'Failure to Launch' (n 12) 5.

[31] ibid 22.

[32] ibid.

[33] Armstrong and Porter (n 29).

[34] ibid.

[35] ibid.

[36] ibid.

[37] Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?' (2014) 11 International Economics and Economic Policy 49, 51.

competitive as they created a locked-in effect for users.[38] This situation also leads users to become dependent on their initial preferences, which weakens their ability to respond to negative changes in the online platform's performance.[39]

On the other hand, the concept of multi-homing, which refers to the ability of users to utilise alternative platforms for the same purpose, has significant implications for online platforms regarding their ability to achieve and maintain critical mass.[40] The increasing availability of multi-homing options for users demonstrates that the critical mass of online platforms can be easily eroded, even in the presence of indirect network effects. This is evidenced by the replacement of Friendster by Myspace, which was in turn replaced by Facebook. It has been suggested that the differentiation of online platforms operating in the same line of business, even on a small scale, enhances users' multi-homing options.[41] Thus, it cannot be presumed that all online platforms entail high switching costs, as in the case of social networking platforms. Among online platforms, online travel agencies are noteworthy for the multi-homing opportunities available to users. For instance, users do not have to incur significant switching costs when shifting from Expedia to Booking.com, and they can comfortably use both platforms concurrently.

Considering the ease with which users can switch between platforms and the numerous multi-homing opportunities available to them, it can be argued that online platforms may not necessarily acquire a monopoly through the attainment of critical mass and the presence of indirect network effects.[42] Nonetheless, despite the various factors that can potentially limit the anti-competitive power of online platforms, it is crucial to recognize the significant impact of data and innovation on competition in online platform markets when assessing compliance with competition law.

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[38] Scharf (n 9) 333.

[39] Armstrong and Porter (n 29).

[40] Evans and Schmalensee, 'Failure to Launch' (n 12) 3.

[41] Haucap and Heimeshoff (n 37) 52.

[42] S David Evans and Richard Schmalensee, 'The Industrial Organization of Markets with Two-Sided Platforms' (Working Paper, National Bureau of Economic Research 2013) available at <http://www.nber.org/papers/w11603> accessed 13 July 2025.

2.2.4 Reliance on Data

Before delving into the intricacies of the data concept, it is essential to recognise that this notion is what distinguishes digital business models from conventional business models.[43] The data concept is one of the distinguishing features of online platforms, setting them apart from one-sided and other two-sided markets. Indeed, the swift aggregation, analysis, and effective use of data are ubiquitous features of online platforms.[44] Moreover, their extensive use of data has generated an extensive body of literature, which has introduced the concept of data-driven competition. The significance of competing through the adoption of a data-driven business model for businesses can also be grasped through diverse statistical measures. Evidence suggests that companies that adopt a data-based decision-making framework in their industries, on average, are 5% more effective and secure a 6% greater profit margin than their competitors.[45] Additionally, according to the Furman Report, companies that rely on data-driven innovation tend to grow between 5% and 10% more than their competitors.[46] Online platforms are fundamentally different from traditional businesses in that they can access not only basic personal data of their users (name, delivery address, etc.), but also their sophisticated data through advanced customer data processing technologies.[47] For example, information such as users' individual consumption histories, search patterns, online lifestyles, and habits are among the data that online platforms may collect through data processing. The sophisticated user data collected helps online platforms to analyse and identify their users in greater detail compared to conventional businesses.[48]

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[43] Capobianco and Nyeso (n 4) 21–22.

[44] Tânia Luísa Faria and Guilherme Neves Lima, 'Abuse of a Dominant Position in the Digital Economy in the EU and the US: The Big Four and the War of the Worlds' (2020) 41 European Competition Law Review 144, 145.

[45] Andrew McAfee and Erik Brynjolfsson, 'Big Data: The Management Revolution' (2012) 90 Harvard Business Review 68.

[46] Digital Competition Expert Panel, Unlocking Digital Competition — The Furman Report (HM Treasury 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 7 May 2022.

[47] Oliver Budzinski and Björn A Kuchinke, 'Modern Industrial Organization Theory of Media Markets and Competition Policy Implications' (Ilmenau Economics Discussion Papers No 115, 2018) <https://papers.ssrn.com/abstract=3251938> accessed 7 May 2022.

[48] Budzinski and Stöhr (n 11).

The data concept has emerged as one of the primary factors shaping firms' competitive landscape in recent years.[49] The European Commission has placed considerable emphasis on the concept of data in its inquiries into online platforms recently. In a similar vein, the Organisation for Economic Co-operation and Development (OECD) has determined that access to data is a phenomenon that confers significant competitive advantages on companies.[50] Online platforms' collection of user data, which facilitates a better understanding of customers, enables them to both create products and services that cater to the individualised needs of consumers and devise more intricate, innovative products and services.[51] Against this backdrop, concepts like targeted advertising and personal recommendations emerge as critical to the functioning of online platforms.[52]

When considering the data concept in the context of digital businesses, a key point to bear in mind is that online platforms are typically two-sided markets, and as such, data has significant effects on their characteristics stemming from their two-sided nature. As previously explained, online platforms often have a one-sided pricing structure, with one party paying less.[53] Given the importance of obtaining user data, it is common for online platforms to charge zero or negative prices to the user side of the platform.[54] This pricing structure further complicates legal analysis, with some scholars suggesting that data can be viewed as a form of payment on online platforms, as it replaces monetary prices since almost all online platforms collect extensive data in exchange for offering their services to users for free.[55] The characterisation of data as the new currency of the internet by former Commissioner Vestager underscores the significance of

[49] Allen P Grunes and Maurice E Stucke, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' (University of Tennessee Legal Studies Research Paper No 269, 2015) <https://papers.ssrn.com/abstract=2600051> accessed 13 April 2022, 1.

[50] OECD, Supporting Investment in Knowledge Capital, Growth and Innovation (2013) <https://read.oecd-ilibrary.org/industry-and-services/supporting-investment-in-knowledge-capital-growth-and-innovation_9789264193307-en#page1> accessed 13 July 2022.

[51] Capobianco and Nyeso (n 4) 22–23.

[52] ibid 23.

[53] Andres V Lerner, 'The Role of "Big Data" in Online Platform Competition' (Working Paper, 2014) <https://papers.ssrn.com/abstract=2482780> accessed 21 May 2022.

[54] Pickard (n 8) 508.

[55] Budzinski and Stöhr (n 11) 23–24.

this claim.[56] In addition to affecting the pricing structure of online platforms, the data also impacts the broad network externalities observed on online platforms. As previously mentioned, indirect network effects occur when different parties on an online platform benefit positively from each other's existence. User data collected and processed by online platforms makes them more attractive to both parties, serving to accelerate indirect network effects on these platforms.[57] While it is argued that users have high multi-homing opportunities and low switching costs on online platforms, the data has game-changing effects on these characteristics of online platforms, much like on network externalities. It is worth noting that establishing the infrastructure of a data-driven business and collecting and processing data incurs significant costs.[58] Due to these sunk costs, online platforms may attempt to prevent their users from using competing platforms.[59] These initiatives could take the form of not sharing their data sets with their competitors and designing their systems to prevent data interoperability with other online platforms.[60]

Although various theories related to the data concept exist, it is widely believed in academic circles that high switching costs and lock-in possibilities are standard features of online platforms.[61] This is due to the fact that online platforms possess a first-mover advantage that stems from their ability to dominate the data market, leading to significant market power that can potentially be abused.[62] Consequently, the OECD has suggested that the triumph of data-driven online platforms could result in market concentration, which is often referred to as a "winner-takes-all" scenario.[63] In such a situation, one dominant firm can exert significant control over the market, potentially leading to negative consequences such as reduced

[56] James Kanter, 'Antitrust Nominee in Europe Promises Scrutiny of Big Tech Companies' (*New York Times*, 3 October 2014) <https://archive.nytimes.com/bits.blogs.nytimes.com/2014/10/03/antitrust-nominee-in-europe-promises-eye-on-bigtech-companies/> accessed 1 March 2022.

[57] Scharf (n 9) 338.

[58] Haucap and Heimeshoff (n 37) 54.

[59] Grunes and Stucke (n 49) 6.

[60] ibid 3.

[61] Carl Shapiro and Hal R Varian, *Information Rules: A Strategic Guide to the Network Economy* (Harvard Business Review Press 1998).

[62] Grunes and Stucke (n 49) 8.

[63] OECD, Data-driven Innovation for Growth and Well-being: Interim Synthesis Report (2014) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/10/data-driven-innovation_g1g503d8/9789264229358-en.pdf> accessed 22 November 2022.

competition and consumer choice. These issues highlight the importance of considering the potential negative consequences of data-driven online platforms and the need to ensure that market power is not abused to the detriment of consumers and smaller firms.

2.2.5 Diversification of Business Models and Vertical Integration

A notable feature of the digital economy is the source of competitive pressure that established companies face in their respective markets. Such pressure is not only triggered by the emergence of new entrants but also by incumbents that aim to diversify their business models.[64] Online platform giants, in particular, tend to continually expand their business models.[65] For instance, major players such as Google, Amazon, and Microsoft, whose primary focuses are on search engines, e-commerce, and computer operating systems, respectively, also operate in the cloud services sector. Furthermore, it is worth noting that the diversification efforts of online platforms may be directed at existing sectors or those based on emerging technologies.

In general, online platforms exhibit vertical integration to reflect their diverse business activities. This is evidenced by the fact that many online platforms operate in adjacent markets simultaneously, aiming to create added value and strengthen their market positions.[66] An example of this is Amazon, which operates a marketplace platform while also engaging in retail activities within its own marketplace through its AmazonBasics brand. Moreover, some online platforms go beyond basic vertical integration and offer their users a wide range of services, including in-house payment and transportation services. This trend has culminated in the creation of interconnected web ecosystems, which are owned by online platform giants and are based on a business strategy known as "the walled garden," with the aim of reaching as many users as possible.[67] For example, Google's ecosystem includes a search engine, email service, cloud service, video streaming platform, and other similar services. Similarly, the Chinese

[64] Mandrescu, 'Applying EU Competition Law: Part 1' (n 22) 356.

[65] Faria and Lima (n 44) 145.

[66] OECD, Addressing the Tax Challenges of the Digital Economy (2014) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2014/09/addressing-the-tax-challenges-of-the-digital-economy_g1g46cf1/9789264218789-en.pdf> accessed 8 February 2021.

[67] Ben Bloodstein, 'Amazon and Platform Antitrust' (2019) 88 Fordham Law Review 187.

multi-purpose service WeChat offers its users a variety of services to cater to almost all their internet-related needs.[68]

The expansion strategies of online platforms are intricately linked to their reliance on data. The primary objective of online platforms in diversifying their business models is to gather more user data, as this information is an essential resource for determining users' particular preferences.[69] Moreover, various services that are vertically integrated to attain this objective generate the necessary synergy to attract users.[70] Consequently, a growing number of online platforms striving to position themselves as an indispensable entity for users with their diverse range of services have given rise to the concept of "competition for end users."[71] The notion of competition for end users refers to the competition among online platforms to attract more users to their platform by providing a broad range of services that cater to the users' diverse needs.

The trend of online platforms to expand their business models has significant consequences for competition law. Many online platforms hold a gatekeeper position in their respective markets.[72] It is crucial for many businesses to sell on Amazon or be listed in Google's search results to avoid foreclosure from the relevant markets. Therefore, there is a significant economic dependency between online platforms and the businesses that utilise them.[73] This economic dependence raises various issues in the context of competition law, especially in cases where the online platforms have vertically integrated. Vertical integration may compromise the impartiality of an online platform's operation.[74] For example, if Amazon operates as both the owner of the marketplace and a retailer on the platform, conflicts of interest may arise between Amazon's retail arm and other retailers on the platform. In such cases, the platform owner may

[68] Budzinski and Stöhr (n 11) 27.

[69] Eleodor (n 28) 50–51.

[70] Capobianco and Nyeso (n 4).

[71] ibid 24.

[72] Michael R Baye and John Morgan, 'Information Gatekeepers on the Internet and the Competitiveness of Homogeneous Product Markets' (2001) 91 The American Economic Review 454.

[73] Patrice Bougette, Oliver Budzinski and Frederic M Marty, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn from the Industrial Organization Approach?' (GREDEG Working Paper No 2017-37, 2018) <https://papers.ssrn.com/abstract=3086714> accessed 9 February 2021.

[74] Faria and Lima (n 44) 145.

prioritise its vertically integrated business over other retailers.[75] The Google Shopping case concerned allegations of preferential treatment similar to the scenario described. Vertical integration carries the inherent risk that small and innovative companies may have limited market access due to preferential treatment.[76] Furthermore, the fact that a vertically integrated online platform operates through different services in adjacent markets may create significant market power for the platform owner in all the relevant markets.[77] In other words, vertical integration may lead to foreclosure activities by the platform in question.[78]

2.2.6 The Tendency to Grow Over Profits

Digital companies have a unique business approach that prioritises user growth over short-term profitability.[79] In other words, online platforms do not prioritise the purpose of gaining profit by following a different path than conventional businesses. This aspect is closely linked to other defining features of online platforms, including their reliance on data and indirect network externalities.[80] These platforms require a critical mass of users on both sides of the platform to generate the necessary data and benefits for users. This makes the pursuit of rapid user growth a more advantageous strategy than a focus on short-term profits. A noteworthy example of this approach is Facebook's delay in monetizing its platform until it had amassed fifty million users over a period of forty-four months.[81] This illustrates the importance of user growth in digital economy and how it aligns with their overall business model.

2.2.7 Competition for The Market

The features described above lead to the competition for the entire market, rather than a specific segment of it. The tendencies for vertical integration and reliance on data, in particular, promote

[75] Budzinski and Stöhr (n 11).

[76] Eleodor (n 28) 51.

[77] Faria and Lima (n 44).

[78] Bougette, Budzinski and Marty (n 73).

[79] Lina M Khan, 'Amazon's Antitrust Paradox' (2016) 126 Yale Law Journal 710, 747–754.

[80] Evans and Schmalensee, 'Failure to Launch' (n 12).

[81] Facebook, 'Press Release' available at <http://www.facebook.com/press/info.php?timeline> accessed 18 July 2022.

competition for the entire market, which is also known as 'life cycle competition.'[82] Furthermore, the fact that users are restricted to a particular platform encourages online platforms to aim for market power that can support this situation.[83] Hence, the concept of competition for the market emerges in relation to vertical integration, where an online platform leverages its dominance in a particular market to an adjacent market.[84]

2.2.8 Tendency for Oligopoly

Given the distinctive characteristics of online platforms explained earlier, it is evident that there exists a marked proclivity towards market concentration among such platforms within the markets they serve. This is exemplified by the OECD, acknowledging a trend towards a reduction in competitive density in digital markets, with the concentration of market power in the hands of select online platforms serving as supporting evidence.[85] In essence, the propensity of online platforms towards market concentration is a key factor prompting the attention of competition authorities.

While the concentration tendency of online platforms is frequently discussed in economic and legal literature, existing explanations for this concentration tend to focus on specific characteristics of online platforms. For example, some scholars suggest that concentration results from limitations on multi-homing opportunities for users,[86] while others argue that attempts to achieve critical mass are the driving forces behind market concentration.[87] However, this narrow approach fails to provide a complete picture of this complex sector. As discussed earlier, when considering the unique features of online platforms and the broader digital economy, it becomes clear that online platforms tend towards oligopoly. Moreover, all the aforementioned characteristics of online platforms, including their oligopoly tendency, make it challenging to analyse these platforms under competition law.[88] Therefore, a more holistic

[82] Armstrong and Porter (n 29).

[83] ibid.

[84] Capobianco and Nyeso (n 4).

[85] G7 Conference on Competition and the Digital Economy (3 June 2019, Paris).

[86] Mandrescu, 'Applying EU Competition Law: Part 1' (n 22).

[87] Pickard (n 8).

[88] Mandrescu, 'Applying EU Competition Law: Part 1' (n 22) 356.

approach is needed to better understand the challenges posed by online platforms for competition law analysis, which are further explored below.

2.3 Difficulties in the Examination of Digital Conduct

In the context of competition law, investigations targeting digital conduct face several challenges. One of the primary challenges is determining the relevant market, which remains significant but is fraught with complexities. Additionally, the unique characteristics of online platforms further complicate legal analysis. Therefore, it is reasonable to argue that taking a shallow approach to these issues could impede the proper application of EU competition law to online platforms.[89] Instead, a thorough examination of these complexities is necessary to prevent any potential violations of competition law in the context of the digital economy.

2.3.1 Market Delineation

As widely acknowledged, accurately identifying the relevant market is crucial in the application of competition law to ensure the protection of consumer welfare.[90] A failure to accurately delineate the boundaries of the relevant market may result in negative consequences for consumers. Thus, a careful determination of the relevant market is considered the primary step in conducting a competition law analysis.[91] Nonetheless, given the two-sided nature of online platforms, determining the boundaries of the relevant market is a complex undertaking and cannot be viewed as an easy task.[92]

The initial hurdle in establishing the relevant market for online platforms involves determining whether it is crucial to define distinct markets for each of the parties involved.[93] Despite the

[89] ibid 355–356.

[90] Chiara Caccinelli and Joëlle Toledano, 'Assessing Anticompetitive Practices in Two-Sided Markets: The Booking.com Cases' (2018) 14 Journal of Competition Law & Economics 193, 198.

[91] Inge Graef, 'Stretching EU Competition Law Tools for Search Engines and Social Networks' (2015) 4 Internet Policy Review 1, 3.

[92] Daniel Mandrescu, 'Applying EU Competition Law to Online Platforms: The Road Ahead-Part 2' (2017) 38 European Competition Law Review 410, 411–412.

[93] Wismer, Bongard and Rasek (n 19) 259–260.

difficulty in answering this question, focusing solely on one aspect of an online platform in isolation from the other would amount to ignoring reality.[94] Generally, it is accepted that an examination of the relevant market for online platforms should include both sides of the platform.[95] Nevertheless, the Commission failed to address in previous cases whether it is necessary to identify separate relevant markets for various user groups. For example, in the *Microsoft/Yahoo* merger decision, which was the first investigation in which the Commission had to apply competition law to internet search, it was not established whether users searching on the internet constitute a separate market from the determined relevant market for advertisers.[96] Determining the relevant market in online platforms context can be challenging due to the question of whether different parties require separate market identification. However, it is widely accepted that both sides of the platform should be included in the examination. The suggested solution to this issue involves classifying online platforms as either transaction or non-transaction platforms based on whether there is direct interaction between different parties.[97] Transaction platforms entail a single relevant market for both sides of the platform, whereas non-transaction platforms require different relevant markets for each side.[98] For instance, e-commerce platforms like Amazon and eBay are considered transaction platforms, while online newspapers and magazines are non-transaction platforms. The Commission has recently taken this distinction into account in its investigations. In the case of *Facebook's acquisition of WhatsApp*, although the two-sided structure was not explicitly addressed, the Commission identified two distinct relevant markets for users and advertisers.[99] In *Google Shopping*, the Commission has determined that multiple relevant markets exist, considering that competitive pressure on Google's services can arise from other online platforms or unilateral businesses.[100] This determination was made despite the absence of direct interaction between

[94] Alexander M Waksman, 'Multi-Sided Platforms: Three Questions for Antitrust' (2019) 40 European Competition Law Review 207, 210.

[95] Lapo Filistrucchi and others, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) 10 Journal of Competition Law and Economics 293.

[96] *Microsoft/Yahoo! Search Business* (Case COMP/M.5727) Commission Decision C(2010) 1077 final of 18 February 2010 [2010] OJ C16/8, paras 85–87.

[97] Filistrucchi and others (n 95).

[98] ibid.

[99] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017 [2017] OJ C9/11.

[100] ibid.

different parties of Google. However, it is important to note that the above-mentioned distinction may not be applicable in all cases. For instance, users may use TripAdvisor to either book accommodation or simply to gather information about hotels, which creates uncertainty regarding how an online platform will be classified under the transaction and non-transaction separation framework.

In the realm of online platforms, determining the relevant market poses a significant challenge due to the complex nature of assessing substitutability. The Market Definition Notice acknowledges that demand and supply substitution must be considered when defining the relevant product and geographic market.[101] However, there are no specific provisions in the Market Definition Notice that account for the unique characteristics of online platforms.[102] As a result, the determination of substitutability is primarily based on the functionality of the platforms, a trend that has emerged from various decisions of the Commission and the EU courts. For example, in *Microsoft/Yahoo*, *Facebook/WhatsApp*, and *Google Shopping* investigations, the functionalities of these online platforms served as the basis for determining the relevant product market.[103] Despite this approach, an over-reliance on the functionalities of online platforms can lead to several issues. Firstly, many online platforms offer multiple products and services, which creates a challenge in determining which function(s) of the platform should be considered in defining the relevant market.[104] Secondly, the increasing availability of multi-homing opportunities for users, which leads to platform differentiation, has a direct impact on determining the relevant markets. Overemphasizing the functionalities of online platforms may result in identifying numerous relevant markets with extremely narrow limits.[105] For instance, in *Google Shopping*, the Commission identified three distinct relevant markets: web search, search advertising, and comparison-shopping. However, defining the relevant markets based solely on functionality inevitably led to the conclusion that Google is

[101] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5, paras 15–23.

[102] Mandrescu, 'Applying EU Competition Law to Online Platforms: The Road Ahead-Part 2' (n 92) 412.

[103] *Microsoft/Yahoo! Search Business* (Case COMP/M.5727) Commission Decision C(2010) 1077 final of 18 February 2010 [2010] OJ C16/8; *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 final of 3 October 2014; *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017 [2017] OJ C9/11.

[104] Mandrescu, 'Applying EU Competition Law to Online Platforms: The Road Ahead-Part 2' (n 92) 411–12.

[105] Graef, 'Stretching EU Competition Law Tools for Search Engines and Social Networks' (n 91) 5.

dominant in these markets, which has been criticized by some experts.[106] Specifically, Google's web search and comparison-shopping services have many common points in terms of functionality and could be considered interchangeable services. Consequently, while the Commission's analysis of determining the relevant markets in *Google Shopping* decision appears thorough, it remains unclear why Google's web search and comparison-shopping services are distinct markets.[107]

Another obstacle in determining relevant markets for online platforms is linked to the utilization of the SSNIP test provided by the Market Definition Notice.[108] This has been a contentious issue as to whether the small increase in price proposed by the SSNIP test should be extended to the zero-priced aspect of online platforms.[109] The rationale for this scepticism when applying the SSNIP test to online platforms is because data acquisition is crucial for online platforms, hence, they offer products and services for free or at negative prices to attract end-users.[110] As a result, there is a general consensus that the SSNIP test should consider end-users, who are the main subject of competition in online platforms.[111] Nevertheless, it remains ambiguous as to how the small price increase required by the SSNIP test should be implemented on the zero-priced side of online platforms due to the uncertainty of which price the increase will be applied.[112] Additionally, as previously discussed in the data section, even though there is an increasing trend in doctrine suggesting that data should be evaluated as a price, it is still uncertain how to ascertain the monetary value of the data.[113]

[106] Magali Eben, 'Fining Google: A Missed Opportunity for Legal Certainty?' (2018) 14 European Competition Journal 129, 142–43.

[107] Christian Bergqvist, 'Google and the Search for a Theory of Harm' (2018) 39 European Competition Law Review 149.

[108] Market Definition Notice (n 101) para 17.

[109] Wismer, Bongard and Rasek (n 19) 260–61.

[110] Budzinski and Stöhr (n 11) 22–26.

[111] Auer and Petit (n 6) 444.

[112] Budzinski and Stöhr (n 11) 26.

[113] ibid 26.

2.3.2 Assessment of Dominance and Market Power

Many cases regarding competition law in the context of the digital economy are typically focused on allegations of abuse of dominant position as provided by Article 102 TFEU. Therefore, the concepts of dominance and market power are also critical in analysing the behaviour of digital conduct. The CJEU traditionally defines the concept of dominant position as a state where an undertaking can act independently from its competitors and has the power to hinder effective competition.[114] However, determining whether a firm is dominant presents several challenges in practice.[115] The economics literature lacks a direct equivalent of the concept of dominance, and so the term market power is often used in reference to it.[116] In economics, market power refers to the ability of an undertaking to maintain prices above the competitive level for a substantial period.[117] The market power, and hence dominance, as defined in this way, is indirectly measured in EU competition law.[118] The first step of this process involves identifying the relevant market, as explained earlier.[119] Then, the actual and potential competitive market power of undertakings in the relevant market is examined in the subsequent stage.

2.3.2.1 Actual Competition

In determining the competitive power of an undertaking, quantitative indicators are typically examined.[120] According to the Guidance, the first indicator that should be evaluated is the market share of the undertaking, as it is considered a useful initial measure of market power.[121] Although the Guidance views market share as only the first indicator, the Commission and EU

[114] *Hoffmann-La Roche v Commission* (Case 85/76) [1979] ECR 461, paras 38–39.

[115] A Jones, B Sufrin and N Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019), 280.

[116] R Whish and D Bailey, *Competition Law* (9th edn, OUP 2018), 187.

[117] Jones, Sufrin and Dunne (n 115) 301.

[118] ibid 277.

[119] ibid.

[120] Capobianco and Nyeso (n 4) 24.

[121] Communication from the Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings 2009/C 45/02 [2009] OJ C 45/7, para 13.

courts have placed significant importance on market shares in previous cases.[122] In fact, in *Hoffman-La Roche*, the CJEU determined that an undertaking having a very large market share for a prolonged period without the existence of exceptional circumstances is a presumption of the existence of dominance.[123] Furthermore, it was established in *Akzo* that a market share of 50% is indicative of dominance, which was later affirmed in *AstraZeneca* case.[124] While the term "over some time" in *Hoffman-La Roche* was interpreted as a long period, in *AstraZeneca*, a specific time frame was not specified.[125] It has been suggested that holding a 50% market share, particularly in dynamic markets, for less than three years is insufficient to establish dominance.[126]

It has been argued that the utilisation of market share as a determining factor in assessing dominance, as done by the Commission and the EU courts, is insufficient in the context of digital conduct, due to the rapidly changing competitive conditions in the digital economy.[127] Even if an online platform holds a semi-monopoly position, its survival is contingent upon maintaining its innovative character, as it faces a constant threat of innovation.[128] Hence, market power and dominance examination cannot solely be based on market shares, particularly in recent years.[129] For instance, the exceptional circumstances that were stated to be considered in addition to the market share in *Hoffman-La Roche* were handled as network externalities in the *Microsoft* case where Microsoft had more than 90% market share in the relevant market.[130] Additionally, the dynamic nature of the sector has been emphasized in both *Microsoft/Skype* and *Cisco*, where the Commission concluded that high market shares do not have much significance due to the short innovation cycle.[131] Similarly, in *Facebook/WhatsApp*, the

[122] Jones, Sufrin and Dunne (n 115) 339.

[123] *Hoffmann-La Roche v Commission* (Case 85/76) [1979] ECR 461, para 41.

[124] *AKZO v Commission* (Case C-62/86) EU:C:1991:286, para 60; *AstraZeneca v Commission* (Case C-457/10 P) EU:C:2012:770, para 176.

[125] *AstraZeneca v Commission* (Case C-457/10 P) EU:C:2012:770, para 176.

[126] D Bailey and L E John (eds), *Bellamy and Child European Union Law of Competition* (OUP 2018), 10026.

[127] Capobianco and Nyeso (n 4) 23.

[128] C Ahlborn, D Evans and A J Padilla, 'Competition Policy in the New Economy: Is Competition Law Up to the Challenge?' (2001) 22 European Competition Law Review 156.

[129] Jones, Sufrin and Dunne (n 115) 336.

[130] *Microsoft* (Case COMP/37.792) Commission Decision C(2004) 900 final of 24 March 2004, paras 448–464 and 515–540.

[131] *Microsoft/Skype* (Case COMP/M.6281) Commission Decision C(2011) 7279 final of 7 October 2011, para 78.

Commission recognized that market shares have a limited role in measuring the competitive strength of firms.[132]

As demonstrated by the examples above, there is a growing recognition that the significance of high market shares in determining the market power of digital conducts is limited.[133] Nevertheless, it appears that the Commission has recently placed renewed emphasis on the importance of market shares in its investigations targeting digital conduct. For example, in its investigation of Amazon, the Commission highlighted Amazon's market share in the English e-book distribution market across the EEA, which rose from 80% to 100% between 2011 and 2015.[134] Similarly, in *Google Shopping*, it was specifically noted that Google holds a market share of around 90% in the general search market.[135] This shift in the Commission's approach to evaluating market shares may be attributed to a change in policy towards online platforms. The Commission seems to be troubled once again by the persistent holding of a high market share in the context of online platforms. This was especially emphasised in *Google Shopping*, where it was highlighted that Google had maintained a high market share for almost a decade.[136]

Essentially, as previously elucidated, there is a widespread acknowledgement that market shares have diminished in importance in determining market power. Nonetheless, the decline of market shares as a determining factor should not lead to the neglect of actual competition in evaluating market power.[137] While the significance of potential competition, as explained below, in determining dominance cannot be disregarded, an excessive emphasis on this notion could result in the current market power of online platforms being overlooked.[138]

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[132] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 final of 3 October 2014, para 99.

[133] Graef, 'Stretching EU Competition Law Tools for Search Engines and Social Networks' (n 91) 8.

[134] *E-book MFNs and related matters (Amazon)* (Case AT.40153) Commission Decision C(2017) 2876 final of 4 May 2017.

[135] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017 [2017] OJ C9/11.

[136] ibid.

[137] Mandrescu, 'Applying EU Competition Law to Online Platforms: The Road Ahead-Part 2' (n 94) 413.

[138] ibid 413.

2.3.2.2 Potential Competition

As previously mentioned, determining market power for undertakings involves considering entry and expansion barriers, along with other relevant factors, as demonstrated by *United Brands* and *Hoffman-La Roche* cases.[139] Online platforms, in particular, are subject to the influence of potential competition sources, which are more significant in assessing their market power compared to traditional businesses. This is due to the limited significance of market shares in the digital economy, where small-scale innovative companies pose a high innovation threat.[140] Additionally, the prevalence of zero-priced products offered by online platforms has led to potential competition being prioritised over actual competition when determining market power.[141] In *Google Shopping*, the Commission emphasised that rising prices above competitive levels cannot be the sole criterion for determining market power.[142] This is because online platforms, such as Google, can influence product quality without adjusting their prices. Another phenomenon unique to online platforms is the low or negligible turnover, especially during the early stages of their operation, due to their growth-over-profits strategy.[143] Amazon, for example, prioritised expanding its user base over increasing its turnover, which played an important role in its success as the world's largest e-commerce platform.[144] Consequently, alternative indicators such as stock values of undertakings have been suggested for measuring actual market power.[145] However, such factors provide only general information about an undertaking's situation and may not accurately reflect its market power in a specific market.[146]

In light of the aforementioned rationales, it becomes imperative to give special attention to certain impediments to entry when scrutinising the market dominance of digital platforms.[147]

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[139] *United Brands* (Case 27/76) [1978] ECR 207, para 66; *Hoffmann-La Roche v Commission* (Case 85/76) [1979] ECR 461, para 39.

[140] Wismer, Bongard and Rasek (n 19) 261.

[141] Capobianco and Nyeso (n 4) 24-25.

[142] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017 [2017] OJ C9/11, paras 168 and 321–324.

[143] Capobianco and Nyeso (n 4) 24.

[144] Khan (n 79) 746–753.

[145] Capobianco and Nyeso (n 4) 24.

[146] ibid 24.

[147] Mandrescu, 'Applying EU Competition Law to Online Platforms: The Road Ahead-Part 2' (n 92) 413.

As per the Bundeskartellamt's Working Paper on the Market Power of Platforms and Networks, the obstacles to entry that necessitate consideration in the assessment of market power encompass the following concepts: network effects, single or multi-homing of users, platform differentiation, and firms' access to data.[148] Therefore, it is necessary to comprehensively evaluate and understand these factors to gain a detailed understanding of the competitive environment of the online platform market.

As thoroughly expounded above, network effects, a defining characteristic of online platforms, play a critical role in determining their market power. The importance of network effects lies in the significant competitive advantages that an online platform can derive from leveraging network externalities, particularly in comparison to smaller competitors.[149] Thus, markets where network externalities are discernible have remarkably high concentration rates, though not necessarily at the level of monopoly.[150] Indeed, in earlier investigations such as *Google/DoubleClick* and *Microsoft*, the Commission has found that the presence of network effects serves as a significant barrier to entry.[151] However, the Commission has faced criticism for adopting a narrow perspective that only focuses on direct network externalities in its network effects examinations.[152] It is worth noting that the Commission has only examined entry barriers in direct network effects context in investigations such as *Facebook/WhatsApp* and *Microsoft/Skype*, as well as the aforementioned cases.[153] In all these investigations, the zero-priced side of online platforms was ignored, and the paying side was evaluated for network effects.[154] While the Commission has considered the zero-priced user side in its network effects examination in *Facebook/WhatsApp*, it has concluded that indirect network effects do not enhance the dominant position of the investigated undertakings.[155] However, it is a positive

[148] Bundeskartellamt, The Market Power of Platforms and Networks (Working Paper, 2016) available at <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2> accessed 3 March 2023.

[149] Wismer, Bongard and Rasek (n 19) 261.

[150] Caccinelli and Toledano (n 90) 199.

[151] Google/DoubleClick (Case COMP/M.4731) Commission Decision C(2008) 927 final of 11 March 2008, para 304; *Microsoft* (Case COMP/37.792) Commission Decision C(2004) 900 final of 24 March 2004, paras 533-878.

[152] Bundeskartellamt (n 150).

[153] ibid.

[154] Giulia Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's Investigation against Facebook' (2018) 9 Journal of European Competition Law & Practice 213, 214.

[155] ibid 214.

development that the Commission has recently taken into account both indirect network effects and the zero-priced side of online platforms in its analyses of online platforms. For example, in *Google Shopping*, the Commission stated that the provision of a free product does not preclude its beneficiaries from being examined under competition law.[156] Furthermore, the Commission acknowledged that although Google provides its related services to the user side without charge, this does not prevent Google from generating significant revenues from the business side of the platform, comprising advertisers.[157]

In the realm of online platforms, determining market power also requires an assessment of whether users are single or multi-homing. When a user group meets the same demand from another online platform, this is referred to as multi-homing. Multi-homing is generally seen as a mitigating factor against entry barriers as it encourages new entrants to the market and lowers switching costs, a typical characteristic of online platforms.[158] However, the impact of multi-homing opportunities on the market can be variable depending on the platform differentiation concept.[159] This concept acknowledges that different platforms are emerging to cater to the diverse needs of consumers. At first glance, platform differentiation appears to trigger anti-concentration effects, but it may also lead to a concentration of market power in the hands of a few tech giants, due to the existence of numerous small-scale competitors.[160] Therefore, while multi-homing and platform differentiation are often viewed as counterbalancing factors against concentration, they may also increase entry barriers when it comes to market power.

Finally, the data is another factor examined as an entry barrier for potential competition.[161] The analysis includes determining whether online platforms that adopt the data-driven business model receive exclusive competitive advantages from their data.[162] The data concept is one of the most controversial issues in determining the market power of online platforms. Due to its relative novelty, there is no general agreement on the subject, and competition authorities,

[156] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017 [2017] OJ C9/11, para 152.

[157] ibid 158.

[158] Wismer, Bongard and Rasek (n 19) 261-262.

[159] ibid 262.

[160] ibid.

[161] Eleodor (n 28) 51.

[162] Wismer, Bongard and Rasek (n 19) 262.

including the Commission, have limited knowledge and experience in this area.[163] However, some arguments suggest that the data subject has been handled inadequately in competition law, especially concerning markets where data-driven business models are active, where entry barriers are low, and data costs are minimal.[164] These arguments are mainly centred around the idea that competition is only one click away.[165] Criticisms against claims that underestimate the role of data in determining market power seem appropriate since data's competitive power combined with the two-sided characteristics of online platforms can lead to high switching costs and lock-in situations in the digital economy. Therefore, the data can be regarded as a robust entry barrier. Online platforms are already aware of the critical role of data in their business models. For instance, in the merger of Bazaarvoice and its biggest competitor, Power-Reviews, the relevant US competition authority used an external document prepared by Bazaarvoice for its investors.[166] In the document, Bazaarvoice claimed that the data owned by the company is the main strength of the company against its competitors and is a key entry barrier.[167] Moreover, online platforms bear significant costs for collecting, storing, and processing user data. Stucke and Grunes used the analogy that data is not sunlight, emphasising that it is not easy to acquire data for free.[168] Therefore, if data were free, many technology giants would not have to bear such staggering costs to provide free products and services to their users.[169] Similarly, the Commission has adopted the view that data could be a barrier to entry in *Google Shopping*. According to the Commission, users do not pay for Google's search service; instead, they provide their data to Google, which is crucial for generating revenue on the other side of the platform.[170] The Commission also determined that the quality of a search engine is determined by the average accuracy of search results, page load speed, and the real-time relevance of search results. The quality of the search algorithm determines the competence of these three factors.[171]

[163] Grunes and Stucke (n 49) 4.

[164] ibid 4.

[165] David Wismer, 'Google's Larry Page: "Competition Is One Click Away" (And Other Quotes Of The Week)' (Forbes, 14 October 2012) <https://www.forbes.com/sites/davidwismer/2012/10/14/googles-larry-page-competition-is-oneclick-away-and-other-quotes-of-the-week/#27786cd5ea14> accessed 14 July 2025.

[166] United States v. Bazaarvoice, Inc., Case No. 13–cv–00133–WHO, 2014 WL 203966.

[167] ibid.

[168] Grunes and Stucke (n 49) 7.

[169] ibid 7.

[170] Google Search (Shopping) (Case No AT.39740) Commission Decision C (2017) 4444 [2017], paras 152-158.

[171] Haucap and Heimeshoff (n 37) 55-56.

All these factors that determine the quality of search engines are related to the concept of data.[172] The Commission found that Google's big data advantage has a significant impact on the concepts mentioned above.[173] As a result, the Commission's stance regarding the role of data on online platforms contradicts claims that competition is one click away on online platforms.

2.4 Conclusions

Digital-platform markets diverge fundamentally from the industrial-era market structures for which the traditional consumer welfare framework was originally designed. This divergence is not a matter of degree but of kind. The analysis presented in this chapter has demonstrated that certain structural characteristics, namely multi-sidedness, zero-price monetisation, data-driven network effects, and ecosystem lock-in, interact in ways that obscure or suppress the very market signals that classical competition analysis depends upon. Traditional enforcement tools, especially those grounded in consumer welfare and price-based metrics, are ill-equipped to interpret value creation and market power in an environment where services are ostensibly offered for free and value is instead extracted through user data and attention. In such settings, the core assumption underpinning price-centred assessments, that harm can be inferred from a small but significant non-transitory increase in price, is rendered conceptually inadequate.

These digital-era structural features give rise to three major enforcement challenges that undermine the operational capacity of Article 102 TFEU when applied to dominant platform conduct. The first challenge concerns market definition. Multi-sided platforms inherently serve multiple user groups whose interactions generate cross-side network effects. These platforms also tend to evolve rapidly, frequently reconfiguring their business models and user relationships. As a result, static and single-sided market definition tools, including SSNIP and similar price elasticity-based tests, become unreliable or even irrelevant. Attempts to isolate a single market for antitrust purposes may either oversimplify the underlying economic reality or fail to capture its strategic architecture altogether.

[172] ibid 55-56.

[173] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017 [2017] OJ C9/11, para 158.

The second challenge relates to the inquiry into abuse. The economic features of platform markets, powerful network externalities and data accumulation enable firms to achieve and sustain market dominance without traditional symptoms such as reduced output or increased prices. A platform may attain de facto market power long before classical indicators of harm manifest. Nevertheless, Article 102's evidentiary requirements continue to prioritise these classical indicia, thereby distorting or delaying the legal recognition of anti-competitive conduct. In effect, enforcement practice remains tethered to a market model that is increasingly disconnected from the strategic behaviours it aims to regulate.

The third challenge concerns the temporal dynamics of digital harm. The speed at which competitive distortions occur in digital markets, especially those involving self-preferencing, leveraging across markets, or ecosystem lock-in, often outpaces the ability of authorities to respond through ex post mechanisms. By the time a competition authority establishes dominance, identifies abusive conduct, and satisfies the procedural burdens of intervention, the exclusionary effects may already be irreversible. This delay in enforcement effectiveness was one of the primary rationales behind the EU's decision to adopt the DMA, which introduces ex-ante obligations aimed at preventing anti-competitive conduct before it can materialise.

Taken together, these structural enforcement difficulties expose what this thesis terms the consumer-welfare challenge: namely, that the standard analytical toolkit, centred on price and output signals, becomes so attenuated in data-intensive, zero-price ecosystems that it no longer provides a stable anchor for a rule-of-reason analysis, understood in the classical US antitrust sense as a structured balancing framework that weighs pro-competitive justifications against anti-competitive effects. In such contexts, competition authorities are compelled to interpret harms without reliable reference points, resulting in uncertainty, under-enforcement, or inconsistent application of legal standards. It is precisely this analytical gap that has prompted the rise of fairness rhetoric in EU competition enforcement, a phenomenon empirically documented in Chapter 5 of the thesis. Fairness vocabulary has increasingly served as a surrogate for describing and conceptualising harms that are invisible to price-based metrics but nonetheless have significant exclusionary or exploitative effects.

In conclusion, the principal contribution of this chapter lies in establishing the empirical and conceptual foundations upon which the subsequent analysis in the thesis is constructed. By systematically isolating and examining the defining structural features of digital-platform

markets, namely multi-sidedness, zero-price monetisation, data-driven network effects, and ecosystem lock-in, it provides a detailed account of why traditional price-based analytical tools, long relied upon in EU competition law, are ill-suited to detecting and addressing harm in such environments. These features fundamentally alter how value is generated and extracted, often bypassing price as a meaningful signal of market performance or consumer harm. While this chapter has offered only preliminary signposts indicating the stress placed on consumer-welfare diagnostics under these digital conditions, it has deliberately avoided engaging in a full doctrinal or economic critique. That task is taken up in the following chapter, which builds upon the empirical backdrop established here to analyse, in a step-by-step manner, how the consumer welfare paradigm begins to lose its analytical coherence and responsiveness when applied to platform markets. In doing so, the next chapter will reinforce the necessity of constructing a supplementary analytical framework, rooted in the concept of functional fairness, that is better equipped to address the complexities and enforcement gaps identified in this chapter.

CHAPTER 3: THE MAINSTREAM GOAL OF THE EU COMPETITION LAW: FOUNDATIONS AND CRITICISMS OF CONSUMER WELFARE

3.1 Introduction

The consumer welfare standard has become the most frequently invoked evaluative benchmark in contemporary competition law.[1] Yet, paradoxically, it also remains one of the most conceptually unsettled. Originating in the United States during the late 1970s, consumer welfare was introduced as a price-theoretic measure to promote allocative efficiency. Courts and scholars embraced the standard precisely because it appeared to streamline multiple policy goals into a single, seemingly objective measure: lower prices (or higher output) were interpreted as indicators of effective competition, while higher prices (or lower output) signalled market failure. However, this apparent simplicity gave rise to enduring controversy. Within economic circles, debates persisted as to whether "welfare" referred to total surplus or merely consumer surplus. In legal discourse, further questions were raised regarding the exclusion of broader policy considerations, such as innovation, media plurality, or distributive justice, from the scope of analysis.

In the United States, the emergence of the consumer welfare paradigm was not a neutral conceptual refinement, but a deliberate reaction to earlier strands of antitrust thought that emphasised structural concerns, market decentralisation, and broader public interest objectives. Mid-twentieth century US antitrust enforcement was characterised by scepticism towards concentration as such, often relying on formalistic presumptions and multi-goal approaches that prioritised the protection of small businesses and market structure alongside, or even above, consumer outcomes. The consumer welfare turn, associated with the Chicago School, sought to recalibrate this approach by narrowing the normative focus of antitrust law, replacing structural presumptions with efficiency-oriented analysis and price-based welfare assessment.

[1] International Competition Network, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State Created Monopolies' (2007). <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_Objectives.pdf> accessed 8 December 2023 (According to this report, thirty of thirty-three countries identified consumer welfare as an antitrust objective).

This shift was presented as a response to what its proponents viewed as doctrinal overreach, economic incoherence, and excessive intervention in competitive market processes.[2]

These ambiguities were never fully resolved in US case law, and when consumer welfare was later incorporated into the EU's competition framework in the 1990s and early 2000s, the conceptual tensions accompanied it. At first glance, the EU's multi-value legal architecture might have appeared to mitigate these tensions. Articles 101 and 102 TFEU explicitly reference diverse objectives, including consumer interests, market integration, and the preservation of undistorted competition. As such, the consumer welfare standard could be interpreted as one element within a broader, pluralistic framework. In practice, however, its integration sharpened rather than softened the underlying friction. By reframing enforcement priorities predominantly in terms of price and output effects, the consumer welfare approach encouraged competition authorities, and increasingly litigants, to marginalise other Treaty-based policy concerns. This led to a recurring critique: that EU competition law had drifted toward a "more economic approach" that, while analytically structured, sidelines non-price values that remain formally recognised in the EU's legal order.

The emergence and expansion of the digital platform economy have further amplified these structural tensions. Business models based on zero pricing, data-for-service exchange, and cross-subsidisation across multiple user groups disrupt the conventional price signals on which consumer welfare analysis depends. As shown in Chapter 2, when users "pay" not with money but with personal data or sustained attention, price-based indicators cease to function as reliable proxies for harm. Under such conditions, classical competition tools often fail to detect reductions in choice, quality, or privacy harms that are central to consumer experience but lie beyond the reach of traditional metrics. In line with this, recent enforcement practices have increasingly invoked the language of fairness and contestability. This rhetorical shift reflects a broader institutional search for an analytical framework capable of addressing distortions that elude price-focused diagnostics.

Despite being applied for more than four decades in both the US and the EU, there remains no stable consensus on what the consumer welfare standard precisely measures. Courts and commentators continue to oscillate between interpretations grounded in total welfare and those

[2] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press 2005).

focused on consumer surplus, albeit largely at the level of conceptual framing and economic reasoning rather than through the explicit judicial adoption of total welfare as an operative legal standard. At the same time, significant uncertainty persists as to whether and how non-price harms, such as exclusionary effects, data exploitation, or innovation suppression, should be incorporated into the analytical framework. In this context, Chapter 3 pursues three interrelated objectives. First, it traces the conceptual development of consumer welfare in the US, with a particular focus on the unresolved debates that shaped its early formulation and continued application. Second, it examines the transplantation and adaptation of the concept within EU competition law, analysing its diffusion through soft-law guidance, Commission decisional practice, and the jurisprudence of the CJEU. Third, the chapter assesses the criticisms of consumer welfare from both legal-economic theory and, drawing on the empirical analysis in Chapter 2, from the structural realities of the digital economy.

This chapter adopts a selective and functional historical approach to the consumer welfare paradigm in both US and EU competition law, focusing on those strands of the debate that continue to structure contemporary enforcement rhetoric and analytical practice, rather than offering an exhaustive intellectual history. Earlier pre-Borkian traditions of US antitrust law, including public interest–oriented and anti-concentration approaches, form part of the broader historical background. However, they are not re-centred as the organising framework of the chapter, since the aim is not to revive a pre-efficiency normative baseline, but to trace the process through which consumer welfare became consolidated as the mainstream evaluative benchmark against which current critiques, particularly in digital markets, are formulated. An analogous methodological orientation informs the EU analysis. Although the Commission's 2009 Guidance Paper on Article 102 TFEU marked an important milestone in the articulation of a more economic, effects-based approach, and is referred to in this chapter within the context of the modernisation of EU competition enforcement, soft-law instruments are not treated as the primary axis of historical development. Instead, attention is directed towards the gradual diffusion of consumer welfare reasoning through enforcement practice, policy discourse, and judicial interpretation.[3] On this basis, the 2024 Draft Guidelines on Article 102 TFEU is not examined as a distinct stage in the historical narrative.[4] Given its ongoing and non-finalised

[3] '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.
[4] European Commission, *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings* (Communication from the Commission, 2024) (draft, not yet adopted).

character, its relevance as a source of binding or stabilised interpretative guidance remains uncertain, and it is therefore not treated as a consolidated reference point for assessing the historical trajectory of consumer welfare reasoning within EU competition law.

In summary, this chapter outlines the development and raises the controversial issues associated with the consumer welfare standard mentioned above. Crucially, this chapter neither calls for the wholesale abandonment of consumer welfare nor supports its exclusive dominance. Instead, it sets the stage for the development of a complementary framework, elaborated in Chapters 4 through 6, that treats fairness not as a competing objective but as a functional analytical instrument. This reconceptualisation allows fairness to supplement welfare-based analysis by addressing harms that are invisible to traditional price and output screens, without undermining the legal discipline that continues to underpin the system.

3.2 Background

The concepts of consumer welfare and efficiency, which play a dominant role in numerous competition law systems, including the EU, have originated and evolved in the US.[5] Although some argue that the foundations of what would later crystallise into the consumer welfare standard were embedded in US antitrust law from the beginning[6], efficiency-centred concepts have not consistently been the primary focus of competition law in the US. Following various transformations, these concepts evolved into a framework for regulating antitrust activities during the Reagan administration.[7] Along the same lines, the incompatibility of various economics-oriented objectives with US legislative history and court practice is emphasised, and it is argued that they have artificially become mainstream goals.[8] In fact, considering the Sherman Act merely as legislation for regulating competition policy appears inaccurate. The

[5] R J van den Bergh and P D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Antwerp/Oxford: Intersentia/Hart Publishing 2001), 5.

[6] Dylan Matthews, 'Antitrust was defined by Robert Bork. I cannot overstate his influence.' (Washington Post, 20 December 2012) <https://www.washingtonpost.com/news/wonk/wp/2012/12/20/antitrust-was-defined-by-robert-bork-i-cannot-overstate-his-influence/> accessed 23 October 2023.

[7] Eleanor Fox, 'Against Goals' (2013) 81(5) Fordham Law Review 2157.

[8] Dina I Waked, 'Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice' (2020) 65(1) The Antitrust Bulletin.

act extensively engages in the debate on property rights within the context of defining markets and determining legitimate behaviours of market players. Viewing the Sherman Act merely as a competition policy instrument focused on property rights overlooks its deeper structural implications. Instead, the Act is characterised by a conflict between competition policy and property rights.[9]

In this regard, one could argue that antitrust law in the US does not inherently determine competition policy but essentially mirrors the tension between competition policy and property rights.[10] Balancing private property and contract rights with competition policy brings forth the public interest, making competition policy align with public interests. Significantly, the implementation of the Sherman Act, from its enactment until the 1930s, aimed not only to establish a competitive market by balancing private property and contract rights through competition law. During this period, competition law was applied with a focus on public interest, pursuing social objectives like redistribution through restrictions on monopoly prices or compelling the dissolution of dominant mergers, thereby ensuring unimpeded market entry, equal access, and equality of power.[11]

This early formulation of antitrust enforcement aligned with the implementation of other contemporaneous legislations. The period aimed at recovering from the Great Depression of 1929 and addressing issues in industrial organisation is referred to as the First New Deal.[12] This period is frequently linked to the National Industrial Recovery Act and the Agricultural Adjustment Administration. The First New Deal aimed to ensure fairness in prices, wages, and profits. These initiatives resulted in what appeared to be government-sponsored cartels, particularly considering the antitrust exemption for actions taken under the Recovery Act. In summary, this period can be characterised as an era in which public interest, focusing on community well-being and fair competition objectives, held dominance in the realm of competition policy.

[9] Rudolph J R Peritz, 'Foreword: Antitrust as Public Interest Law' (1990) 35 New York Law School Law Review 767, 773.

[10] Rudolph J R Peritz, 'A Counter-History of Antitrust Law' (1990) 2 Duke Law Journal 263, 266.

[11] Waked (n 8) 92.

[12] ibid 93.

In terms of the appearance of economics in competition law, the First School of Chicago, led by Henry Simons, was dominant in this period.[13] As per Simons, aligning with the ordoliberals, prioritizing outcomes that safeguard public interest should take precedence, irrespective of the impact on efficiency.[14] Indeed, the inclination towards protecting public interest objectives beyond efficiency is also discernible in early American antitrust case law. For instance, in its 1897 *Trans-Missouri Freight* decision, the US Supreme Court asserted that the Sherman Act aimed to protect small dealers and worthy individuals, without any reference to efficiency-related concepts.[15] Similarly, in *Alcoa* decision of 1945, the Supreme Court found that the primary objective of antitrust law was to halt large capital accumulations, driven by the desperation of individuals against such accumulations.[16] Moreover, the US Supreme Court, in the famous *Brown Shoe* decision, found that the purpose of antitrust is to protect small and local businesses without any emphasis on efficiency.[17]

Subsequently, the failure of the First New Deal precipitated the advent of the second one. The Second New Deal, instead of centring on corporatism and the community at large as an objective, directed its focus towards competition and identified the consumer as its goal.[18] Indeed, during this period, the fair competition standard was abandoned in *Schechter Poultry*.[19] The concept of the consumer was introduced as a unified economic structure.[20] In this era, there was mention of a strong emphasis on the consumer gaining traction as a new driving force in Congress, the Federal Trade Commission and the Antitrust Division.[21]

This new consumer-oriented foundation was solidified between 1938 and 1942 when Thurman Arnold served as the chief of the Antitrust Division of the Justice Department. Under Arnold's

[13] Frédéric Marty, 'Is Consumer Welfare Obsolete? A European Union Competition Perspective' (2021) 24(47) Prolegómenos 55, 60.

[14] Thierry Kirat and Frédéric Marty, 'The Late Emerging Consensus among American Economists on Antitrust Laws in the Second New Deal' (2019) Cahier Scientifique du CIRANO 12.

[15] *The United States v Trans-Missouri Freight Ass'n*, 166 US 290 (1897).

[16] *The United States v Alcoa*, 148 F.2d 416 (2d Cir. 1945).

[17] *Brown Shoe Co., Inc. v the United States*, 370 US 294 (1962).

[18] Waked (n 8) 93.

[19] *A.L.A. Schechter Poultry v. United States Corp.* 295 US. 495 (1935).

[20] Waked (n 8) 93.

[21] Rudolph J R Peritz, *Competition Policy in America 1888-1992: History, Rhetoric, Law* (Oxford University Press 1996).

guidance, competition was established as the fundamental economic policy of the Roosevelt administration. It is worth noting that this shift towards 'consumerism' had its peculiarities. The fact that Arnold, who strongly criticised the antitrust laws, later became responsible for their enforcement is deemed peculiar, to say the least.[22] Indeed, on the one hand, Arnold advocated for price controls and production quotas due to the lack of competition in the agricultural sector, while on the other hand, he opposed the National Industrial Recovery Act, as he believed businesses were capable of rebounding on their own.[23] In practice, competition enforcement under Arnold's leadership targeted practices that directly impacted American consumers across various industries, including cinema, automobile manufacturing, dairy products, and construction. Antitrust enforcement during this period aimed at benefiting consumers. Indeed, he summarised his purpose as follows: 'The idea of antitrust laws is to create a situation in which competition compels the passing on of savings from mass distribution and production to consumers.'[24] While Arnold believed in the importance of free competition, he was also an avid advocate for consumer benefits. Like the First New Dealers, he unequivocally supported consumer interests over public interests.[25] He favoured any intervention in the market being contingent on passing benefits through to the consumer. With this perspective, he diverges from his predecessors, the First New Dealers, who prioritised the pursuit of public interests that promote the welfare of society in general, even if they don't directly benefit consumers. It is worth noting that Arnold's competition program remained true to its predecessors' emphasis on fair competition, collectivism, equality, and redistribution. Unlike them, however, the competition programme pioneered by Arnold shifted these various objectives pursued by antitrust law from the broad concept of the public interest to one more focused on the consumer concept. In other words, he linked antitrust law to consumer welfare, paving the way for the development of modern antitrust law.[26] This, in turn, set the stage for the emergence of the second Chicago School, which would introduce the concept of consumer welfare based on the economic theory of total welfare.

[22] Ellis W Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Fordham University Press 1995).

[23] Spencer Weber Waller, 'The Antitrust Legacy of Thurman Arnold' (2004) 78 St. John's Law Review 569.

[24] Gene M. Gressley, 'Thurman Arnold, Antitrust, and the New Deal' (1964) 38 Business History Review 214.

[25] Hawley (n 22).

[26] ibid.

3.3 Fundamentals of Total Welfare

In the 1960s, the restriction of public interest to a specific benefit to the consumer from transactions associated with the consumer took a step further. During this period, scholars associated with the Second Chicago School helped to promote the concepts of economic welfare and efficiency. Notably, the perspective that advocates economic welfare as a goal in competition law enforcement has an exclusionary structure. Stated differently, whether competition law adopts the economic concept of total welfare or the diverse definitions of consumer welfare, the shared aspect in welfarist perspectives is the assertion that competition law primarily focuses on efficiency.[27] As will be discussed in the following section, economic total welfare and its core concept of efficiency are closely related to all the different interpretations of consumer welfare. Narrow consumer welfare, grounded in the concept of consumer surplus, the most common form observed in various competition law systems, is essentially aligned with total welfare. In addition, other types of consumer welfare based on choice or consumer sovereignty mainly employ the economic analysis methods of the total welfare. Therefore, understanding consumer welfare, regardless of the jurisdiction in which it is considered, is closely related to familiarising oneself with total welfare.

The underlying principle behind this narrow view of economic efficiency is the notion that the only certainty about people's preferences is their desire to maximise utility.[28] Given the challenges in making interpersonal utility comparisons, welfare economics redefined the concept of utility as welfare and introduced a theoretical framework that does not rely on interpersonal utility, linking the new concept of welfare with efficiency.[29] A distinction is often drawn between Pareto efficiency and Kaldor-Hicks efficiency within the broader economic efficiency framework. Pareto efficiency involves allocating goods among consumers, ensuring that redistributing these goods cannot make one party better off without making at least one other party worse off.[30] Kaldor-Hicks efficiency, also known as the Potential Pareto improvement criterion, is grounded on the notion that social welfare increases during the

[27] Frank H. Easterbrook, 'Workable Antitrust Policy' (1986) 84 Michigan Law Review 1696.

[28] George Stigler, 'The Development of Utility Theory I' (1950) 58 The Journal of Political Economy 4, 307.

[29] Lionel Robbins, 'Inter-personal Comparisons of Utility' (1938) 48 Economic Journal 635.

[30] Herbert Hovenkamp, 'Distributive Justice and the Antitrust Laws' (1982) 51 George Washington Law Review 1.

transition from one state of the economy to another if the gains of one party exceed the losses of the other, even if the winning party doesn't compensate the losing one.[31] In theory, it suffices that the winners have the ability to compensate the losers, and this compensation need not be actually paid; such a Pareto optimal transaction is deemed efficient. Kaldor-Hicks efficiency is based on two theories. The first theory is grounded on the premise that all individuals and producers act as selfish price takers, and any Pareto optimal situation can be favoured by competition if taxes are imposed. It is challenging to assert the effectiveness of this theory today due to the widespread acceptance of concepts such as externalities, market failures, and imperfect competition. The second theory posits that if a certain economic situation is acceptable, this situation can be required in practice through taxes, thus treating efficiency and distribution as separate issues. Consequently, it is argued that distribution should be kept separate as an issue falling within the realm of politics.[32]

The Kaldor-Hicks-style welfarist economic approach does not embrace the utilitarian hedonic approach to preference ordering. Instead, the issue of preference is addressed within the context of choice, as choice is believed to represent utility functions. The interpretation of choice in Kaldor-Hicks efficiency also differs from traditional utilitarianism. Traditional utilitarianism refers to a classical, hedonic form of utilitarian thought that evaluates social outcomes through aggregate welfare maximisation based on interpersonal utility comparisons, rather than through ordinal choice-based or efficiency-oriented frameworks such as Kaldor–Hicks. Instead of assuming that interpersonal utility comparisons are possible, they employed the concept of expected utility, which aims to measure the extent to which one commodity is preferable to another for an individual. This way, they situated preference and choice in a more formal and instrumental context. This concept of ordinal utility assumes that individuals will always choose the option they believe to be the most preferred among all comparable options, as ranked in their preference ordering. Another assumption in this concept is that more of an asset will be preferred over less. In other words, individuals will always act to maximise their utility. This assumption is also grounded on another premise, namely that individuals will shape their preferences within the context of their budget. As can be easily understood from these

[31] J R Hicks, 'The Foundations of Welfare Economics' (1939) 49 Economic Journal 196, 696; N Kaldor, 'Welfare Propositions in Economics and Interpersonal Comparisons of Utility' (1939) 49 Economic Journal 145, 549.

[32] Richard Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 Hofstra Law Review 487.

assumptions, economic thought is based on the assumptions, or in other words, marginal analysis, that people compare the extra costs and the extra benefits that these costs will provide in each decision-making action.

At this point, it is worth noting that another method of examining utility is the revealed preference theory, which deduces individuals' preferences from their actual choices. In competition law practice, welfare analyses typically connect the actions of individuals to choices, which are, in turn, linked to preferences that are further tied to welfare. That is to say, the revealed preference theory recognises that the satisfaction of individuals' real choices in preference orderings constitutes welfare. The reflection of this in competition law is that the purpose of enforcement is to ensure that people attain their revealed preferences at the lowest possible cost. In other words, the goal is to maximise efficiency for all parties (i.e., final and intermediary consumers, producers, and suppliers). This maximisation primarily encompasses allocative efficiency. In terms of allocative efficiency, consumers pay a price for a product that they are genuinely willing to pay, sometimes even less, resulting in consumer surplus. Likewise, efficiency maximization also embraces productive efficiency, allowing producers to leverage scale efficiencies, reducing the cost of their products. In this scenario, producers can sell a product at a price higher than the price at which they are willing to sell it, resulting in producer surplus. Finally, efficiency maximisation also includes dynamic efficiency. In this state, producers employ production methods that enable them to maximise output with a given number of raw materials, while consumers have access to innovative products and services. The utilisation of the Kaldor-Hicks criterion in competition law, as outlined earlier, involves assessing the efficiency of conduct and is referred to as total welfare. In the total welfare standard, the surpluses of producers and consumers are aggregated, and the welfare consequences of the change are assessed. Importantly, even if there is a decrease in either consumer surplus or producer surplus, the crucial point is that the total surplus has increased. To reiterate the famous expression regarding this situation, what matters is the enlargement of the economic pie; its distribution among groups is not paramount.[33] The total welfare and its economic jargon gives the image that competition law enforcement is scientific, apolitical and

[33] Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (CLES Working Paper Series 3/2013, 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875> accessed 12 October 2023, 8.

objective if it is based on the economic analyses mentioned above.[34] This perception is further reinforced by associating the total welfare with the evocative term 'consumer'.

3.4 Different Interpretations of Consumer Welfare

Consumers are widely recognised as playing a central, if not foundational, role in most competition law systems. Yet, the way consumers are conceptualised, particularly through the lens of consumer welfare, complicates their role within the competition law framework. A key complexity lies in the absence of a clear and generally accepted definition of consumer welfare, even in the US, where the concept originated. Moreover, in the US context, consumer welfare, largely grounded in the notion of consumer surplus, shares a complex relationship with total economic welfare. In the EU context, the concept gives rise to further complexity, particularly due to divergences in discourse, soft law, and judicial interpretation. Indeed, the discourse, soft law and court practice on the meaning and scope of consumer welfare in EU competition law stand at quite different points. This conceptual ambiguity is further compounded by the EU's sui generis legal structure and its longstanding commitment to values such as market integration and fairness. Moreover, these issues in the EU regarding the concept have been a subject of speculation in academic debates. A final layer of complexity concerns whether these jurisdiction-specific interpretations of consumer welfare truly differ in substance. Despite their apparent differences, most of them rely, at least in practice, on the analytical tools of the total welfare framework. Accordingly, the following section offers a categorisation of consumer welfare approaches, with particular attention to jurisdictional nuances and interpretative variation.

3.4.1 Consumer Surplus Standard – Narrow Consumer Welfare

The 1960s marked a pivotal shift in competition law, as economic efficiency began to dominate enforcement priorities. This transition reflects a movement away from public interest-oriented goals towards the Arnold era, where the emphasis shifted to consumer benefit, eventually

[34] Albert Allen Foer and Arthur Durst, 'The Multiple Goals of Antitrust' (2018) 63(4) The Antitrust Bulletin 494, 499.

crystallising into a focus on economic efficiency. This viewpoint represents the practical application of the total welfare standard and allocative efficiency, as previously examined.

The essence of this new era in competition law goals is encapsulated in the assertive statements by proponents of the economic efficiency concept: It is widely acknowledged among professionals engaged in competition law that antitrust laws' primary objective is to enhance economic welfare, with a consensus on the economic theorems guiding this pursuit.[35] The imperative of advancing economic efficiency as a goal is underscored by the notion that a business producing at such low costs as to eliminate competitors and monopolise the market is not condemnable; on the contrary, it is a situation that should be encouraged.[36] As wealth maximisation and the influence of the Chicago School gained ground, economic welfare became synonymous with consumer surplus.[37] Under the influence of consumer surplus, competition law enforcement became attuned to firms raising prices, as this could diminish consumer surplus. This practice, considering the achievement of price and money-indexed efficiency goals, is recognized as allocative efficiency. Robert Bork played a pivotal role in elevating the total welfare standard in terms of economic efficiency, making it an integral part of competition law under the guise of consumer welfare.

Bork defined consumer welfare as a concept encompassing the interests of both consumers and producers, i.e., total welfare.[38] It is now generally accepted that the consumer holds no distinct place in Bork's definition, and the pursuit of total welfare should be the overarching goal. As an error of expression by some and an Orwellian artistic tactic by others, Bork employed the concept of the consumer to define the concept of total welfare, with economic efficiency as the goal.[39] Bork's choice of this terminology instead of terms such as total welfare, total utility or total economic efficiency is considered a victory of the only efficiency school of antitrust.[40]

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[35] Richard Posner, Antitrust Law (The University of Chicago Press, 2001); Herbert Hovenkamp, 'Antitrust Policy After Chicago' (1985) 84 Michigan Law Review 213.

[36] Richard Posner, 'Natural Monopoly and Its Regulation' (1968) 21 Stanford Law Review 548.

[37] Waked (n 8) 95.

[38] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books 1978), 90.

[39] John B Kirkwood and Robert H Lande 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84 Notre Dame Law Review 191.

[40] Robert H. Lande, 'Chicago's False Foundation: Wealth Transfer (Not Efficiency) Should Guide Antitrust' (1989) 58 Antitrust Law Journal 631.

Bork's terminology choice is deemed shrewd from a public relations standpoint, as even critics of economic formalism in antitrust find it difficult to challenge when framed as consumer protection.[41] However, Robert Bork has repeatedly stated that the need to increase overall economic efficiency is the sole purpose of competition law.[42] Post-Bork, consumer welfare evolved into the sum of producer and consumer welfare, defining economic efficiency in a way that suggests producers, earning more money, would invest in things consumers desire, ultimately benefiting consumers.[43] Fundamentally, this interpretation equates consumer welfare with the total welfare framework outlined earlier. This stems from the fact that consumer surplus protection constitutes a key element of the total welfare test, addressing the deadweight loss resulting from competition restrictions. In other words, due to a price increase, some customers who would have previously wanted to buy this product or service according to their revealed preferences may no longer be able to buy it. In this context, the additional amount paid by the consumer is merely a transfer of wealth from buyers to consumers, and there is no change in the total surplus. Consequently, there is no need to stimulate competition law. Indeed, producers may be able to compensate for the loss in producer surplus due to volume reduction, and consumers may hypothetically be compensated for the loss incurred. This situation would be Kaldor-Hicks efficient.

This conceptualisation of consumer welfare as total welfare belongs primarily to the intellectual foundations of the Chicago School. By contrast, the subsequent operationalisation of consumer welfare in judicial and enforcement practice has tended to rely on narrower consumer surplus proxies, particularly price and output effects, rather than on an explicit adoption of total welfare as an operative legal standard. In essence, the concept of consumer welfare, as applied in the US, predominantly revolves around the discussion of consumer surplus. Courts generally adopt a price-oriented modified consumer surplus standard.[44] The Supreme Court gradually embraced the consumer welfare concept in the 1970s, introducing the balance of effects and rule of reason tests in *GTE Sylvania.*[45] The significance of *GTE Sylvania* lies not merely in its rejection of per

[41] James Keyte, 'Interview with Professors Eleanor Fox and William Kovacic' (Antitrust ABA, 2017) <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.full_cv&personid=19924> accessed 10 September 2023.

[42] Bork (n 38) 90–91.

[43] Eleanor M Fox, 'The Battle for the Soul of Antitrust' (1987) 75 California Law Review 917.

[44] Herbert Hovenkamp, 'The Rule of Reason' (2018) 70 Florida Law Review 80.

[45] *Continental Television v GTE Sylvania,* 433 US 36 (1977).

se condemnation of non-price vertical restraints, but in its broader reorientation of antitrust analysis towards economic effects rather than formal market structure. By emphasising price, output, and efficiency considerations, the Court implicitly prioritised consumer-facing outcomes over structural presumptions. Although the judgment did not expressly articulate a consumer welfare standard, its emphasis on price effects, output, and efficiency considerations marked an important step towards the operationalisation of consumer welfare through consumer surplus proxies. The Court subsequently articulated the consumer welfare test more explicitly in *Sonotone*.[46] The pursuit of consumer welfare protection in this sense is tangibly manifested in the Court's statement that antitrust law has no role if a producer cannot improve itself while harming consumers through lower production and higher prices.[47] From a policy perspective, the shift towards consumer welfare in the US has been a gradual process. The trend of consumer welfare gaining significance, initiated by the Antitrust Division of the Department of Justice under William Baxter in the early 1980s, was further solidified by the Department of Justice's 2008 Report on Single Firm Practices. This stance was reinforced by the Economic Report of the President published by the Trump administration in 2020.

3.4.2 Extended Consumer Welfare

In competition law, consumer welfare, or more broadly, consumer harm, is interpreted more expansively than in the efficiency-centric framework discussed earlier. This perspective doesn't stray far from efficiency considerations but adds a concern for who primarily benefits from efficiency gains, combining elements of distributive justice with efficiency.[48] The broad view of consumer welfare goes beyond a consumer surplus-oriented concept of efficiency, incorporating parameters like quality and variety in competition analyses.[49] A comprehensive cost-benefit analysis assesses both the loss of consumer surplus and wealth transfers against the broader efficiency gains of producers. The analysis evaluates the welfare effects not just for all actors but specifically for direct and indirect consumers, aiming to determine whether a given

[46] C Hutchinson, 'Law and Economics Scholarship and Supreme Court Jurisprudence, 1950-2010' (2017) 21(1) Lewis and Clark Law Review 145.

[47] *Schor v Abbott Labs,* 457 F.3d 608, 611, 7th Cir., 2007.

[48] Lianos (n 33) 20.

[49] ibid 17.

transaction enhances the ability to satisfy consumer preferences when moving from one situation to another.[50]

Although this broader interpretation may appear conceptually more advanced than the narrower version previously outlined, it is notable that this broader view actually predated the emergence of the narrower interpretation in US competition law. As discussed above, the concept of consumer welfare, which emerged when the public interest was first narrowed by associating it with the consumer, restricted an existing efficiency provided that the consumer benefited from it.[51] As explained above, the narrower interpretation that later came to dominate US practice was primarily shaped by the Second Chicago School.

The claim that distributive justice is fundamentally at odds with an efficiency-based conception of competition law is one of the most frequent attacks on this broad interpretation of consumer welfare. Moreover, it is another notorious claim that distributional issues are not within the scope of competition law and that taxation-related legal grounds can address distributional issues more accurately. By contrast, the view that competition law should address distributive concerns in this matter is more commonly associated with developing countries, particularly those in the global South.[52] Examples such as South Africa and Indonesia come to mind, where competition law systems actively encourage a more equitable distribution of property.[53] However, it's crucial to recognise that, even in developed jurisdictions, pursuing distributive justice and reducing inequality to some extent are goals embedded in EU competition law within the consumer context. As a result, although the emergence of this broader interpretation of the concept occurred in the US, just like the narrower version, it is seen in today's competition law practice that this interpretation has an impact not only in the US, but also in some developing countries and developed jurisdictions such as the EU. This fact should be kept in mind, considering the arguments that consumer welfare in EU competition law originates from the US and that a narrow consumer welfare standard is applied in the US, suggesting that EU competition law likewise adheres to a narrowly defined consumer welfare standard.

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[50] ibid.

[51] Hawley (n 22).

[52] Dina I Waked, 'Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices' (2015) 38 Seattle University Law Review 945.

[53] Eleanor M Fox, 'Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia' (2000) 41 Harvard International Law Journal 579.

3.4.3 Consumer Welfare Focused on the Choice and Consumer Sovereignty

Categorising the various consumer protection theories under the umbrella of consumer welfare is complex, given the plurality of arguments and conceptual distinctions. One interpretative strand introduces an additional layer by prioritising consumers' freedom of choice. This interpretation goes beyond both the narrow, purely economics-oriented view of consumer welfare and the broader view that considers distributional aspects. In this perspective, the emphasis on the ability to make choices adds significance to variety, extending beyond price in the broader interpretation of consumer welfare. Here, consumer choice is defined as a situation where consumers have the power to determine their preferences and satisfy them at a competitive price.[54] Under this view, market outcomes should reflect aggregated consumer demand rather than decisions imposed by firms or state authorities. The social arrangements that support this economic order are referred to as consumer sovereignty.[55] Consumer sovereignty may also be understood as safeguarding consumers' ability to influence product characteristics in line with their hypothetical revealed preferences.[56] Notably, EU competition law has, to some extent, incorporated this interpretation of consumer welfare based on choice and sovereignty. Despite its conceptual appeal, operationalising consumer choice within competition law frameworks remains a significant challenge.[57]

3.5 Criticisms Targeting Welfarist Goals

Efficiency and welfare-based objectives in competition law, adopted globally across both developed and developing jurisdictions, have faced substantial criticism since their inception. These criticisms, however, often exhibit a jurisdiction-specific character. Put differently, arguments that challenge welfarist goals in one jurisdiction may not be applicable or persuasive in others. Therefore, the global acceptance of welfarist goals does not imply uniform criticisms of these goals. Although the consumer welfare objective in the US, grounded in consumer

[54] Robert H Lande 'Consumer Choice as the Ultimate Goal of Antitrust' (2001) 62(3) University of Pittsburgh Law Review 503.

[55] Neill W Averitt and Robert H Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust Law Journal 713, 715.

[56] Lianos (n 33) 17.

[57] ibid.

surplus, differs from the broader conception applied in the EU, both rely on efficiency-based reasoning rooted in the total welfare standard and similar economic metrics. Thus, criticisms targeting the economic theory of these goals tend to address different types of consumer welfare. Despite jurisdictional differences in how consumer welfare is applied, critiques of its economic underpinnings are essentially global in scope.

Indeed, recent fierce attacks on efficiency-centred objectives in the US are somehow related to the broader questioning of competition law objectives, particularly welfarist objectives, in the EU. Another key dimension of this critique concerns whether the consumer welfare standard effectively captures the competitive harms arising from digital economy practices. Although these debates vary in intensity across jurisdictions, the underlying concerns reflect a broader global convergence, albeit with jurisdiction-specific nuances. The globalisation of the digital economy leads to a significant convergence of criticisms of consumer welfare, regardless of the jurisdiction applying a particular consumer welfare standard. Significantly, the implications of these criticisms diverge between the US and the EU. As discussed later, the EU's broader objectives beyond the protection of consumer welfare somewhat mitigate the theoretical and digital economy-related impacts compared to the US. Against this backdrop, this section analyses criticisms against consumer welfare in two main groups. The first group concerns theoretical critiques grounded in economic reasoning; the second addresses challenges arising from the digital economy, with reference to earlier discussions in Chapter 2 where relevant. While theoretical critiques are rooted in economics and digital economy-related concerns are more technical in nature, both warrant close attention given the widespread adoption of the consumer welfare standard, including within the EU.

3.5.1 Criticisms on Economic Theoretical Grounds

A substantial portion of the critiques regarding consumer welfare on economic grounds apply to various forms of consumer welfare. This is because all the diverse approaches to consumer welfare are predominantly rooted in the total welfare standard. Additionally, certain criticisms are aimed at a particular interpretation of consumer welfare. These critiques are examined in distinct categories below.

3.5.1.1 Problems of the Revealed Preferences Theory

Criticisms, spanning all facets of consumer welfare grounded in the total welfare standard and characterised by a rich array of arguments, have been levied against the revealed preferences theory, perceived as notably problematic. An examination grounded in the Kaldor-Hicks standard of economic efficiency employs ex post outcomes to assess policy shifts. This approach suggests that the economic analysis is circular in nature. Thus, according to the Kaldor-Hicks standard, if advancing from one point to another in utility is Pareto improving, regressing from the reached point to the starting point can also be Pareto improving.[58] Therefore, as rankings hinge on wealth distribution, which is policy-dependent, explicit ranking of policy options becomes unfeasible.[59]

The Kaldor-Hicks efficiency criterion connects efficiency assessments to the individual preferences of those affected by economic outcomes. However, in practice, the examination is applied to a specific group and relies on their revealed preferences. As a result, the potential effects on other individuals, especially those outside the assessed market, are often overlooked, on the grounds that competition law primarily concerns direct market participants. Yet this narrow scope becomes problematic when market dynamics evolve, for example, when new actors enter the market or when other related markets are indirectly affected.[60] The economic efficiency theory relies on the premise that augmenting the production of a product or service will result in heightened consumption, enabling more widespread distribution. Consequently, it is acknowledged that an upswing in output is likely to enhance welfare. Building on these assumptions, the theory further suggests that both production and consumption inherently contribute to welfare. Yet this optimistic view overlooks situations where increased output may harm rather than help welfare. A clear example is industrial overproduction, which generates environmental waste and deteriorates long-term quality of life.[61]

The revealed preferences theory, a cornerstone of economic efficiency analysis, appears particularly problematic. This theory assumes that preferences are always exogenous. However,

[58] Tyler Cowen, 'The Scope and Limits of Preference Sovereignty' (1993) 9 Economics and Philosophy 253.

[59] ibid 255.

[60] Lianos (n 33) 9.

[61] ibid 10.

research in behavioural economics indicates that the context in which consumers make choices significantly influences their preferences.[62] Studies have shown that individuals often misjudge the quality of their decisions or overestimate the benefits of certain choices, particularly when influenced by framing effects or cognitive biases.[63] Additionally, individuals may exhibit risk aversion, favouring the status quo even when better options exist. They may also prioritise short-term satisfaction over long-term welfare.[64] Asserting that people's choices are purely analytical and always limited by the social, cultural, and historical context is simply an optimistic fallacy.[65] Furthermore, individual or group choices may lead to the emergence of entirely new consumption patterns, requiring a reconsideration of earlier assumptions. In some cases, choices may be made in contexts with long-term impacts, such as environmental concerns or sustainability objectives, rather than motivated by consumers' desire for lower prices. Successfully conducting the cost-benefit analysis required by the economic efficiency standard in such cases can be a highly challenging task.[66]

Preferences are not always driven by outcomes such as quality, quantity, or price; they may also concern the process through which those outcomes are achieved. For instance, sports fans may derive greater satisfaction from fair play than from record-breaking performances tainted by doping.[67] Welfarist economic analysis, assuming preferences are based on choices, is indifferent to issues shaping people's choices, excluding situations where preferences are related to the process rather than the outcome.[68] It might also be said that inferring preferences from choices, the basic working logic of the theory of revealed preferences, contains an obvious fallacy. Since preferences are limited to choices, without a choice, preferences do not exist.[69] It is also stated that the same choices will reflect different preferences when the beliefs leading to

[62] A Tversky and D Kahneman, 'Rational Choice and the Framing of Decisions' (1986) 59 Journal of Business Studies 251.

[63] Cowen (n 58) 261.

[64] William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1 Journal of Risk and Uncertainty 7.

[65] Virgill H Storr, *'Understanding the Culture of Markets'* (London & New York: Routledge 2013).

[66] Cowen (n 58) 260.

[67] Lianos (n 33) 11.

[68] Daniel M Hausman, *'Preference, Value, Choice, and Welfare'* (Cambridge University Press 2012).

[69] ibid 27.

those choices differ.[70] Moreover, it is emphasised that if inferences are drawn from people's preferences, these inferences should also depend on how people perceive and personalise alternatives at the point of choice and how they make their final decision.[71]

Expected utility theory posits that individuals choose between alternatives by comparing their expected payoffs, assuming that preferences reflect rational, advantage-seeking behaviour. However, a person's preference ordering is not necessarily based on that person's utility expectations; for example, a person may choose in bad faith. As a result, satisfying revealed preferences does not always lead to improved welfare, especially when those preferences arise from flawed or harmful reasoning.[72] This context provides another important ground for criticising expected utility theory, revealed preferences theory, and the total welfare standard. The response to these criticisms has been the inclusion of a laundered set of preferences in welfare analysis, excluding anti-social preferences and cognitive biases.[73] In such a case, laundered preferences, however imperfect actual preferences may be, do not reflect them and lose the character of preferences. Due to the complexity of the assumptions, the assumption that satisfying a preference ordering leads to welfare has been criticised.[74] On this basis, it is argued that although welfare cannot be reduced to the satisfaction of revealed preferences, preferences are at least evidence of well-being, in addition to other evidence.[75] As an alternative to revealed or laundered preferences, there is also an argument for creating an objective list of preferences that can reasonably enhance a person's well-being.[76] Various studies by the OECD and the Commission adopt an objective list approach to identify different aspects of well-being.[77] Critics argue, however, that even if wealth is just one component of well-being, it remains

[70] ibid 28.

[71] Lianos (n 33) 11.

[72] Matthew D Adler and Eric A Posner, *'New Foundations of Cost Benefit Analysis'* (Harvard University Press 2006), 33.

[73] ibid 34.

[74] Joseph Raz, 'The Role of Well Being' (2004) 18 Ethics 269.

[75] Hausman (n 68) 90-103.

[76] Martha C Nussbaum, *'Creating Capabilities: The Human Development Approach'* (Harvard University Press 2011).

[77] The OECD, 'Better Life Index' <http://www.oecdbetterlifeindex.org/> accessed 15 November 2023; J Stiglitz, A Sen and J P Fitoussi, 'Report by the Commission on the Measurement of Economic Performance and Social Progress' <https://ec.europa.eu/eurostat/documents/8131721/8131772/Stiglitz-Sen-Fitoussi-Commission-report.pdf> accessed 15 November 2023.

unclear how such multidimensional lists can be operationalised within competition law.[78] Given the persistent issues with revealed preferences, some welfarist theories endorse a hedonic approach, measuring well-being through reported experiences or emotional states over time.[79] Yet this method, too, presents serious challenges: evaluating the effect of anti-competitive conduct on individual happiness borders on the impossible.[80] It is a well-known philosophical fact that what happiness is, how it is found, or how it is maintained, is a phenomenon that varies from society to society or even from person to person.

The foregoing critiques primarily target the epistemic and methodological assumptions underlying welfarist analysis, particularly the reliance on revealed preferences as reliable indicators of individual well-being. These objections question whether welfare can be meaningfully inferred from observed choices, given the influence of cognitive biases, contextual factors, and non-outcome-oriented values. While such critiques inevitably intersect with broader concerns about distribution and fairness, their analytical focus remains distinct. Rather than challenging how welfare gains are allocated across society, they interrogate the prior question of whether welfare can be coherently identified and measured at all within a revealed-preference framework. The following section therefore turns to a separate, though related, set of criticisms that address the distributive implications of consumer surplus–based enforcement and the normative limits of treating distributional questions as analytically separable from efficiency assessments.

3.5.1.2 The Place of Distributive Justice

Another group of criticisms directly targets both the total welfare standard and the efficiency-based approach, focusing on consumer surplus. These critiques particularly reject the separability thesis underlying the narrow interpretation of consumer welfare, highlighting its neglect of distributive justice. These critiques are primarily directed at the US jurisdiction. As previously noted, US antitrust law aligns with a narrowly defined consumer welfare standard based on consumer surplus. The EU, by contrast, applies a broader consumer welfare standard that also incorporates distributive justice and consumer choice, an issue discussed in further

[78] Lianos (n 33) 12.

[79] Richard Layard, *'Happiness: Lessons from a New Science'* (London: Allen Lane 2005).

[80] Lianos (n 33) 13.

detail below. These critiques, therefore, do not challenge the EU's current approach but argue that a narrow consumer welfare standard is unsuitable for the EU context.

Despite the differing legal contexts of the two jurisdictions, a common criticism is that the narrow consumer surplus standard fails to incorporate any element of distributive justice. The foundation of these criticisms lies in the separability thesis of the Kaldor-Hicks compensation standard. According to this thesis, since the allocation of available resources is defined by justice theories that are not efficiency-oriented, the discrepancy between different groups may result from an initial inequitable distribution of income.[81] Welfarist approaches commonly assert that such initial inequality poses no problem for a competition law system grounded in economic efficiency. In connection with this, the solution to inequalities in the initial distribution is not a matter of competition law, but rather a matter of policy. The argument follows that public policy, particularly tax policy, can correct wealth imbalances through mechanisms such as lump-sum compensation.[82]

The long-standing claim that tax law offers a solution to inequality and redistribution has been subject to extensive criticism, both theoretically and practically. One key argument is that if income distribution is already addressed adequately by the political system and taxation mechanisms, then competition law should focus solely on promoting efficiency. Under this logic, redistribution is considered outside the remit of antitrust enforcement.[83] Additionally, the efficiency of tax law is raised as a separate question. Taxes that are evaded or not passed on to those in need, or subsidies that continue to be removed under the name of privatisation and liberalisation, persist in many jurisdictions as a chronic problem of tax law as well as political systems in general.[84]

Moreover, in the case of the EU, it is much more challenging to exclude income inequality and redistribution issues from the scope of competition law. The wealth gap among the member states of the union is clearly evident. Furthermore, the EU's expansionary steps do not reduce

[81] J Rawls, *'A Theory of Justice'* (Harvard University Press,1971).

[82] A Atkinson and J Stiglitz, 'The Design of Tax Structure: Direct versus Indirect Taxation' (1976) 6 Journal of Public Economics 55; Kenneth G Elzinga, 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?' (1977) 125 University of Pennsylvania Law Review 1191, 1194–95.

[83] Lianos (n 33) 8.

[84] Waked (n 8) 90.

the existing wealth gap among its members, but, on the contrary, increase it. It is noteworthy that economically powerful firms in Europe are not uniformly distributed across the EU, implying that wealth primarily accumulates in those Member States that already have large established firms.[85]

The key points regarding the redistribution-related criticisms of the narrow consumer welfare approach have been outlined above. Today, these criticisms resonate in the US context as a call for a return to the past, as explained in the section on extended consumer welfare. The situation is different in the EU context. As previously discussed, there is general consensus that the EU applies a broader interpretation of consumer welfare. However, scholars differ on the theoretical justifications for consumer protection and how efficiency gains are distributed. These differing perspectives are examined in the following sections. Nevertheless, it can be easily stated here that distributional considerations seem to be a part of EU competition law, regardless of the grounds on which they are based.

3.5.1.3 Applicability of the Choice Standard

Interpreting consumer welfare broadly through the lens of consumer sovereignty significantly expands its scope beyond a narrow economic reading. However, this broader interpretation also brings challenges, particularly in defining the limits of consumer choice and aligning them with practical enforcement in competition law.[86] Indeed, maintaining consumer choice as an objective in itself may imply protecting a market actor solely because it offers a distinct product to consumers, representing another form of competitor protection.[87]

Competition law enforcement may also risk being overly activated in the opposite direction of the scenario discussed above. The theory of hypothetical revealed preferences evaluates a person's choices in the context of what they would choose if they had the opportunity to choose.

[85] Brett McDonnel and Daniel A Farber 'Are Efficient Antitrust Rules Always Optimal?' (2003) Fall Antitrust Bulletin 80, 825.

[86] R. Nazzini, *The Foundations of European Union Competition Law – The Objective and Principles of Article 102* (Oxford University Press 2011), 30-32.

[87] ibid.

In other words, the analysis focuses on a hypothetical rather than an actual consumer choice.[88] In particular, despite the widespread application of consumer choice in EU competition law, the practical function of the hypothetical revealed preferences theory remains controversial. Consumers' choice depends on the options considered. Moreover, additions and subtractions to the options offered to the consumer affect whether the consumer will choose the options that were fixed from the beginning among the options.[89] The most obvious example of this situation is the marketing campaigns conducted by companies. These campaigns often steer consumers toward preselected options, making it less a matter of genuine choice and more a matter of guided selection. Thus, placing excessive emphasis on consumer sovereignty, understood as genuine freedom of choice, could render firms that rely heavily on persuasive advertising potential targets of competition law enforcement.

Finally, the issue of consumer choice also raises some questions about the difficulty of analysing consumers' long-run benefits in terms of innovation and dynamic efficiency relative to their short-run benefits in terms of lower prices and allocative efficiency. This is discussed in the following section.

3.5.1.4 The Interaction Between Different Types of Efficiencies

The total welfare standard, as previously discussed, is built on the goal of enhancing all three types of efficiencies in the outcome. However, trade-offs between different types of efficiencies are not a significant concern within the framework of the total welfare standard. Consequently, it has also been deliberated in the aforementioned sections that diverse interpretations of consumer welfare adopt distinct positions regarding which group should benefit from the resulting efficiencies. Notably, the debates shaping the concept of consumer welfare are confined to maximising the utilisation of limited resources. Even in the contexts of predominantly allocative efficiency and, to a certain extent, producer efficiency, there are substantial differences of opinion, as summarised in the preceding sections. The introduction of another type of efficiency, namely dynamic efficiency, further complicates the determination of rules and boundaries governing the interaction among these three types of efficiencies. Beyond these challenges, the intricate relationship between the emergence of the digital

[88] Hausman (n 68) 31-33.

[89] Eldar Shafir, Itamar Simonson, and Amos Tversky, ‘Reason-Based Choice’ (1993) 49 Cognition 11, 21.

economy and innovation introduces a new layer of uncertainty regarding the types of efficiencies. This section begins by addressing the contentious issues concerning the interaction among different types of efficiencies in economic theory, before proceeding to explore how the digital economy contributes to these debates.

In contrast to static efficiencies, dynamic efficiency aims not to maximise the use of existing resources but to expand the limits of available resources through innovation.[90] This fundamental difference makes it particularly challenging to analyse the effects on consumers, whether related to short-term gains from lower prices and allocative efficiency, or long-term benefits from innovation and dynamic efficiency. In an ideal scenario where all different types of efficiencies can coexist harmoniously within a given industry, dynamic efficiency may hold a more crucial position than other types due to its pie-growing function.[91] Nevertheless, the impact of dynamic efficiency on allocative efficiency fluctuates. In other words, firms involved in innovation and pursuing dynamic efficiency may not aim for prices exceeding their short-term marginal costs, given these expectations. To some extent, this aligns with allocative efficiency, as firms pursuing innovation will provide lower prices to consumers due to this motivation.[92] However, this alignment with allocative efficiency is typically short-lived for innovative firms. Following the initial period, innovative firms strive to sell their innovative products not only at prices above their short-term marginal costs but also at prices higher than those of other non-innovative firms in the market. From the perspective of innovative firms, this is understandable, as the only incentive for sustaining high-cost research and development activities is the prospect of higher profits.[93] Although this situation may result in a decrease in the marginal costs of innovative firms during the process, it may also lead to an increase in the fixed costs arising from research and development due to the long-term competitive return expectations of these firms. From a narrow, total welfare-oriented consumer welfare perspective, this may not be perceived as a major problem, as consumers are typically willing to pay more for new or improved products than for conventional products from other firms.[94]

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[90] Burton Klein, *Dynamic Economics* (Harvard University Press 1977).

[91] Foer and Durst (n 34) 505.

[92] Tepperman and M Sanderson, 'Innovation and Dynamic Efficiencies in Merger Review' (Canada Competition Bureau, 2007) <http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/02378.html#key_concepts> accessed 8 December 2023.

[93] ibid 6-7.

[94] ibid.

It is important to clarify that quality improvements often entail product differentiation, such that consumers may indeed be paying a different price for a different good rather than more for the same product. From this perspective, higher prices associated with improved quality do not necessarily signal allocative inefficiency. However, the difficulty within a consumer welfare framework lies not in recognising quality improvements as such, but in assessing whether, and to what extent, these improvements translate into net consumer benefits that are comparable across consumers and over time. Quality changes are inherently heterogeneous, unevenly distributed, and resistant to precise quantification, making it challenging to determine whether higher prices reflect proportionate welfare gains or instead conceal exclusionary or exploitative effects under the guise of innovation.

Under a narrow consumer welfare approach, the fact that consumers ultimately pay higher prices may initially appear detrimental to allocative efficiency. However, as explained above, it aligns with the Kaldor-Hicks standard in terms of the potential for having superior products. The sacrifice of static efficiency will be compensated by gains from dynamic efficiency, ultimately increasing or maintaining the total surplus.

Although there is no such ideal situation in almost any sector, some views staunchly dedicated to the total welfare standard emphasise the exclusive role of dynamic efficiency, regardless of reality.[95] As a result, these arguments face various criticisms. Firstly, innovation does not always present an issue in the context of competition law, particularly in traditional industries. In such scenarios, dynamic efficiency can be disregarded, and the focus can be on allocative and producer efficiencies. Nevertheless, in competition law cases where allocative, productive, and dynamic efficiencies must all be taken into account, it remains unclear which type should be prioritised and to what degree, particularly when the respective analyses lead to conflicting or inconclusive results.

Additionally, aside from the challenges in assessing the relevance of dynamic efficiency in the present situation, determining the effects of dynamic efficiency in a future scenario becomes

[95] Michael E Porter, 'Competition and Antitrust: A Productivity-Based Approach' in Charles D. Weller (eds), *Unique Value: Competition Based on Innovation Creating Unique Value* (Ashland, OH: Innovation Press 2004).

even more challenging due to the ripple effects of innovation.[96] Furthermore, despite a consensus on the benefits of economic growth, the exact method of triggering innovation positively to catalyse growth remains a matter of speculation today.[97] It is noteworthy that the data on the initiation of positive innovation is still highly uncertain and frequently limited to discussions about the market structure that tends to foster innovations.[98] Moreover, there is also the risk that a narrow focus on innovation alone may result in a monopoly rather than fostering competition. In this context, Joseph Schumpeter, one of the foremost scholars on innovation studies, acknowledges monopoly as a prerequisite for innovation. However, an alternative perspective argues that competition stimulates innovation, while innovating monopolies restrict their innovations to safeguard their position and control new market entrants.[99] This poses a serious problem for the extended consumer welfare standard, which emphasises not the research and development efforts themselves, but the ability to deliver their benefits to consumers. After all, research and development expenditures offer no value to consumers unless they result in tangible benefits, such as the development or improvement of a product.[100] As discussed in the following section, innovation-driven monopolies, particularly big technology firms, complicate the analysis of dynamic efficiency, especially in the digital economy.

Currently, almost all interpretations of consumer welfare in various jurisdictions underscore the importance of dynamic efficiency. Indeed, considerations of dynamic efficiency are also considered in practice. Nevertheless, it remains unclear how allocative efficiency, which forms the basis of all interpretations of consumer welfare, aligns with dynamic efficiency. Innovation and growth are not about maximising the use of available resources but rather about expanding knowledge and subsequently resources. Thus, it is more about the future than the present. Due to this nature, forecasting and subjectivity are essential elements of dynamic efficiency. Even if it is acknowledged that different types of efficiencies are somehow compatible, the absence of a mechanism to determine the proportionality or disproportionality between the benefits of

[96] Foer and Durst (n 34) 505.

[97] 'Economists Understand Little About the Causes of Growth' (The Economist, 12 April 2018) <https://www.economist.com/finance-and-economics/2018/04/12/economists-understand-little-about-the-causes-of-growth> accessed 8 December 2023.

[98] Foer and Durst (n 34) 505.

[99] Tepperman and Sanderson (n 92) 8.

[100] ibid 9.

these efficiencies in the cost-benefit analysis is emphasised as the primary problem.[101] Indeed, it is challenging to assess the predictive evidence for a small dynamic efficiency gain compared to the mathematical evidence for a substantial productive gain. In other words, it is not possible to compare the mathematically calculated deadweight loss data for a product with the belief with the expectation that a product to be launched next year will succeed and transform the market.[102] Concerning this dilemma, it has been theorised that dynamic efficiency should play a supportive role for static efficiency. In this context, it is suggested that competition law enforcement may be relaxed in cases where significant market power exists, and this market power creates a high potential for innovation.[103] In such an approach, however, the recognition of a high potential for innovation would still be speculative. Moreover, even if exploitative behaviour is temporary, it is unclear how long consumers can endure it—particularly if the expected innovation fails to materialise. Such a situation is particularly problematic for the extended consumer welfare standard due to the uncertainty in determining whether the expected benefits of the innovation process can be realised. It seems unlikely that all these uncertain factors can be considered by enforcers, as they will be relying on data based on estimates rather than measurable data. Another theory, known as the tie-breaker, addresses how dynamic and static efficiencies should be balanced when they are roughly in equilibrium.[104] However, similar counter-arguments can still be made in this case. In other words, the initial rough equilibrium of different types of efficiencies is also an assumption, and there is no measurable data available to demonstrate this equilibrium.

Given the rather complex structure of the relations between different types of efficiencies, the concept stands out as one with multiple ambiguities, to put it mildly, in the context of competition law practice. While these ambiguities pose problems for the broad interpretation of consumer welfare, the narrow interpretation is not exempt from issues. As explained below, the fact that the digital economy has a particularly accelerating effect on dynamic efficiencies elevates these uncertainties to a different level in a sense that cannot be described positive.

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[101] Foer and Durst (n 34) 506.

[102] ibid.

[103] Jerry Ellig and Daniel Lin, 'A Taxonomy of Dynamic Competition Theories' in Jerry Ellig (eds), *Dynamic Competition Policy and Public Policy: Technology, Innovation, and Antitrust Issues* (Cambridge University Press 2001).

[104] Foer and Durst (n 34) 507.

3.5.1.5 The Marginalisation of Law

In addition to existing critiques of the economic theory underpinning consumer welfare, another set of striking criticisms pertains to the extent to which this concept is deeply intertwined with competition law. A noteworthy element of these criticisms is that, since they concern the economic essence of consumer welfare itself, they apply to all interpretations of consumer welfare, narrow or broad. Although the motivation behind these criticisms in the context of many different jurisdictions is related to the idea that the concepts of consumer welfare and efficiency were not part of the legislator's original intention, it would be inaccurate to reduce the criticisms solely to this historical fact.

Instead, the main trigger of the criticisms is the tendency of economic thought itself to marginalise the law. The theories behind consumer welfare and economic efficiency rely heavily on theoretical assumptions about consumer behaviour and decision-making. Economic analyses often present expert opinions as unequivocal and mathematically precise, conveying a misleading certainty that adopting scientific methods alone suffices for effective competition law enforcement. This overconfidence of economic thought gives the impression that all that is needed for a properly functioning competition law is to run the numbers to calculate welfare.[105]

However, economic theories that centre on consumer welfare as a metric of efficiency reflect not objective truth but a political choice.[106] This critique does not suggest that consumer welfare is uniquely political in nature, as most regulatory frameworks necessarily reflect underlying political choices. Rather, the distinctive concern lies in the tendency of consumer welfare–based analysis to obscure its normative foundations by presenting value-laden policy judgments as neutral, technical, or economically inevitable. It is this depoliticisation of regulatory choice, rather than political choice per se, that weakens the transparency and contestability of competition law decision-making. Indeed, the so-called objective contributions of political economic theories to competition law involve extensive and costly economic data collection, modelling, and analysis.[107] Even cost-benefit analyses, which evaluate efficiency, have been

[105] ibid.

[106] Peritz (n 9).

[107] Foer and Durst (n 34).

criticised for their inconsistency, ambiguity, controversy, and illusory objectivity.[108] Such analyses often lead to contradictory arguments in court, posing a challenge to judges tasked with navigating these disputes.[109] The complexities and costs associated with these analyses can result in a competition law system that is overly intricate, expensive, and potentially biased toward defendants. These critiques hold true across different interpretations of consumer welfare, provided they are all efficiency oriented. While some suggest that these issues are particularly pertinent to the narrowly applied US context, the broader application of the consumer welfare standard in the EU, emphasising efficiency benefits for consumers, may also lead to misconceptions.[110]

Although the EU's interpretation of consumer welfare encompasses broader elements such as choice and quality, it continues to rely on the same fundamental economic methodologies as the narrower U.S. model. This continuity has often gone unnoticed, as EU competition law tends to treat efficiency and consumer interests as distinct concepts. Nonetheless, it is essential to emphasise that the current understanding of consumer welfare in EU competition law remains rooted in economic thinking centred on efficiency gains. As discussed, this economic focus can overshadow other legal goals and values.

Moreover, as discussed in the following sections, the attempts to interpret the meaning of consumer welfare and related concepts in the EU context, far from being independent of economic thinking, aim to embed this thinking into the systematisation of competition law. The critique of economic thought's dominance in competition law becomes particularly salient when considering its efficacy in addressing digital economy challenges. Therefore, the extensive critique of consumer welfare's role in competition law reflects not merely a conservative resistance but points to a broader issue of law being marginalized by economic reasoning.

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[108] Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 Stanford Law Review 387.

[109] Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' (Columbia Public Law Research Paper No 14-608, 2018).

[110] Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (Oxford Legal Studies Research Paper No 17, 2018) <https://ssrn.com/abstract=3191766> accessed 16 November 2023.

3.5.2 Criticisms on the Digital Economy Grounds

The relationship between conduct induced by the digital economy and scrutiny under competition law is vigorously debated in all jurisdictions. As discussed earlier, despite numerous long-standing criticisms of the consumer welfare concept, the criticisms associated with the digital economy appear to have acquired a distinct position. Even though this holds true across jurisdictions, the foundational reasoning differs in each case. For instance, in the Stigler Centre report on the current state of digital platforms in the context of US antitrust law, US enforcement is criticised for adopting a non-interventionist stance towards conduct based on the digital economy, solely relying on a narrow interpretation of consumer welfare.[111] A contemporaneous report on the EU's approach to digital economy conduct refrains from challenging consumer welfare as the exclusive goal of EU competition law, yet it draws attention to a number of concerns surrounding the EU's interpretation of this concept. Although the scope of these approaches differs, consumer welfare, whether treated as a stand-alone objective or as one among several goals, has become increasingly contested in terms of its adequacy in addressing competition harms in the digital economy. Indeed, as will be discussed below, consumer welfare remains the only competition law objective whose adequacy, and by extension, the EU's competence, in the digital economy context is open to debate. It should be noted that the majority of criticisms of consumer welfare in the context of the digital economy pertain to the characteristics of the digital economy analysed in chapter two and have already been addressed in that chapter. Hence, the criticisms of consumer welfare in the context of the digital economy are briefly discussed below, with references to chapter 2 where appropriate.

3.5.2.1 Fundamental Limits for Capturing Harm to Consumers

Both the narrow and broad interpretations of consumer welfare encounter substantial difficulties in the digital economy, particularly when competition law is applied with this concept at its core. Concerning the narrow conception of consumer welfare, the concept is notably weak in defending its own existence. This is primarily due to the difficulty of proving that the conduct of large firms in the digital economy directly harms allocative efficiency. In the same vein, it is not possible to argue that these behaviours have a detrimental impact on the

[111] Filippo Lancieri and Patricia Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26 Stanford Journal of Law, Business and Finance 65.

end-user experience. Indeed, in this case, the loss suffered by the consumer is unrelated to surpluses, especially consumer surplus. This is because, as explained in detail in chapter 2, the business model of most online platforms, which are the driving force of the digital economy, is generally based on a zero-price model. Even when subsidies for certain equipment and services are included, most online platforms are based on a negative price system.[112] The existence of such competition can quite easily create the illusion of technological turbulence in a relevant digital sector. Accordingly, it can be assumed that market positions in the relevant market will remain contested due to the intense technological competition that a technology company currently faces and will continue to face, regardless of its market power at any given moment in time. In this case, it seems unlikely that final consumers will suffer any short- or long-term losses.

Regarding the zero and negative-price business models of companies in the digital economy, interpretations of consumer welfare that adhere to broad and choice standards are more effectively confronted with these challenges. As previously discussed, these approaches do not treat lower prices as the only relevant factor in assessing consumer welfare. It is argued that the declining significance of price in business models in the digital sector can be compensated by focusing on quality enhancements rather than losses to consumer welfare.[113] It is also noted that the concept of consumer is interpreted broadly in the EU. Indeed, the Commission defines the concept of the consumer to encompass both direct and indirect users of a product in question, including final consumers, as well as producers, wholesalers, and retailers who use the product as an input.[114] Such a broad definition of consumers is particularly effective in the multi-sided market structures on which platforms are based.[115] As explained, the conduct of companies in the digital economy encounters serious problems from the outset when a narrow interpretation of consumer welfare is adopted. On the other hand, a broad interpretation of consumer welfare appears to be more effective in addressing both non-price conduct and conduct that impacts different consumer segments. Still, challenges also arise from the fact that quality-related

[112] Frédéric Marty and T. Warin, 'Innovation in Digital Ecosystems: Challenges and Questions for Competition Policy' (2020) Cahier Scientifique du CIRANO 12.

[113] Ezrachi (n 110).

[114] European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 84.

[115] Ezrachi (n 110) 6.

elements in the digital environment are often immeasurable, and that constant technological developments continually reshape business strategies.[116]

3.5.2.2 Data-Driven Ways for Harm to Consumers and New Entry Barriers

Beyond the issue of whether harm to consumer welfare in the digital economy stems from higher prices, a particularly concerning aspect is the potential reduction in the variety of products and services available to consumers. This type of harm falls outside the scope of the narrow interpretation of consumer welfare and also poses challenges for the broader interpretation that emphasises consumer choice. Similarly, the foreclosure by a dominant firm of a competitor offering different products and services, even if less efficient, may result in a loss of access for consumers in terms of quality and privacy. These scenarios, involving elements such as quality and variety, can be particularly troublesome in the context of the digital economy, both in narrow and broad interpretations of consumer welfare. Indeed, various situations arising from the structure of business models in the digital economy, particularly the role of data, manifest themselves as entry barriers in the context of competition law. The connection between these concerns and consumer welfare may be outlined as follows.

From a consumer welfare perspective, privacy affects welfare through several interrelated channels. First, the erosion of privacy may be conceptualised as a non-price cost imposed on consumers, particularly in digital markets where services are nominally offered for free but financed through extensive data extraction. In such contexts, personal data functions as a form of implicit payment, reducing consumer surplus even in the absence of monetary price increases. Second, privacy may be understood as a dimension of product quality. A deterioration in privacy protections may therefore constitute a qualitative degradation of the service, undermining consumer welfare in ways that are not captured by price-based metrics. Third, the large-scale collection and exploitation of personal data may facilitate behavioural manipulation, discriminatory practices, and lock-in effects, leading to longer-term welfare losses that extend beyond immediate transactional harms. These dynamics illustrate why privacy-related harms, while not traditionally framed within competition law, increasingly intersect with consumer welfare analysis in data-driven markets.

[116] ibid.

In recent years, the privacy implications of the conduct of dominant actors in the digital economy have been widely recognised. While there are arguments that privacy and other legal issues cannot be addressed within the scope of competition law, it is generally accepted that these issues are within the purview of competition law, as they directly affect consumer welfare.[117] Free service providers disproportionately exchange personal data, which is a cost other than the price, in exchange for their services. Consumers are not always aware of this privacy trade-off.[118] As discussed in chapter two, the Commission's approval of Facebook's acquisition of WhatsApp exemplifies this issue. The harm in this merger stemmed from the significant reduction of privacy guarantees rather than the elimination of higher prices.[119] Moreover, confronting consumers who show sensitivity about the protection of their data with consumers who consciously or unconsciously adopt a more reckless attitude in this regard raises the possibility of deconstructing the concept of consumer.[120] Another situation indirectly affects consumer privacy is the increasing use of tracking and third-party tracking services.[121] The concentration of power is closely related to the growing use of these services, which exploit consumers. Clearly tracing the effects of such practices on consumer welfare in general seems challenging. Likewise, many companies in the digital economy collect consumers' personal data on a massive scale. Regardless of the intentions behind these data collection activities, processing the data using advanced analytics raises concerns about consumer welfare. The use of collected and processed data for profiling and discrimination provides asymmetric information and subsequent bargaining power to the parties controlling the data.[122] Such disproportionate advantages may lead to new forms of harm and exploitation of consumers.[123]

Additionally, dominant players, accumulating more power in data ownership, not only engage in abusive activities directly affecting consumers but also wield significant control and

[117] Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil 639.

[118] Marty (n 13) 71.

[119] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 [2014].

[120] Marty (n 13) 71.

[121] Reuben Binns and others, 'Third party Tracking in the Mobile Ecosystem' (2018) WebSci '18: Proceedings of the 10th ACM Conference on Web Science 23.

[122] Ezrachi (n 110) 7.

[123] ibid.

exclusionary power over competitors.[124] Exploitative and exclusionary behaviours in all the contexts mentioned above are unlikely to be captured by the spectrum of both narrow and broad interpretations of consumer welfare.[125] Each method of using data in the digital economy outlined here presents barriers to entry. Today, issues such as data ownership, control of data flows, complex data processing methods, and advanced algorithms are integral to each other. The dominance of a company in the digital economy over these factors enables it to attain gatekeeper or keystone player positions in a certain market, which in turn become barriers to entry for competition law. Companies in such positions may induce various competitive risks. As discussed in chapter two, if companies with such positions lock consumers into a silo, there is a risk of predatory behaviour towards these consumers. This suggests that short-term gains for consumers, such as zero price or similar, may indeed be short-lived, and consumers may suffer losses in the long term due to lock-in effects. The long-term losses from lock-in are also exacerbated by the single-homing incentives for consumers and high switching costs.

3.5.2.3 Competition in Digital Business Models

In addition to behaviours in the digital economy directly affecting consumers, there are also business models that generate behaviours with significant effects on trading partners. In platform business models, the dominant actor may engage in exclusionary and exploitative abuses against the complementors of the ecosystem. In particular, it is debatable whether the platform owner's abusive behaviour of an exploitative nature falls within the scope of both narrow and broad consumer welfare standards.[126] Such abusive behaviour can easily occur when complementors have an economic and technical dependence on the dominant player.[127] These dependency situations often arise with independent traders in e-commerce marketplaces and developers of applications for mobile ecosystems. These actors begin to operate on the platforms where they function due to factors such as contractual incentives, interoperability mechanisms, or data. The next form of such contractual incentives is manifested in the

[124] Marty (n 13) 71.

[125] Ezrachi (n 110) 7.

[126] Marty (n 13) 68.

[127] Guido Smorto, 'Protecting the weaker parties in the platform economy' in N. Davidson, M. Finck and J. Infranca (eds.), *Cambridge Handbook on Law and Regulation of the Sharing Economy* (Cambridge University Press 2018).

dependence of the actors benefiting from them on the platforms in question.[128] Although this business model is based on mutual co-operation, it is inherently unbalanced. The damage to the trading partners within the platform may mean the disruption of competition and damage to consumers who are expected to benefit from competition. However, since such a conduct is an intra-platform situation in relation to contractual restrictive practices within the platform, it is seen that the harmful effects of that conduct fall outside the scope of consumer welfare in both the narrow and broad sense.[129] Moreover, the harm caused to complementors by the dominant platform owner may also result in a significant restriction of consumers' freedom of choice. Such a situation is also problematic for a broad consumer welfare approach focused on choice, but it reflects another situation outside the scope of competition law enforcement. This demonstrates that, despite its wider scope and greater flexibility, the broad consumer welfare standard remains ineffective in addressing conduct rooted in the digital economy. The European Regulation on Platform to Business Relations, adopted in 2019, highlights the seriousness of the issue, as the impact of the aforementioned intra-platform disproportionality on consumers cannot be fully addressed by the consumer welfare standard.[130]

3.5.2.4 Dynamic Efficiencies in the Digital Economy

The preceding sections have demonstrated that positioning different types of efficiencies within consumer welfare standards raises several fundamental challenges. In particular, the relationship between dynamic efficiency and allocative efficiency is quite complex. The dynamic efficiency within the framework of the consumer welfare standard becomes even more complicated in the digital economy. The particular importance of dynamic efficiency in the case of digital markets stems from the nature of the digital economy, which is characterised by innovation. Indeed, innovation stands out in the context of the digital economy as a concept that needs to be preserved and protected, as the innovative process will lead to the formation of

[128] Marty (n 13) 69.

[129] P Bougette, O Budzinski and F Marty, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn from an Industrial Organization Approach?' (2019) 129(2) Revue d'Economie Politique, 261.

[130] Council Regulation (EU) 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services [2019] OJ L186/57.

dynamic markets.[131] For this reason, it is often argued that the advancement of innovation is vital for digital markets.[132]

However, the digital economy adds a new layer of complexity to the already intricate task of understanding dynamic efficiencies in economic theory. This complexity arises from the intricate nature of behaviour intertwined with continuously changing and evolving technology, coupled with the intricate mechanism of dynamic efficiency. In this direction, it is stated that the possibility of clearly determining the effects of the behaviours emerging in the digital world on innovation is weak.[133] This difficulty in identifying effects clearly stems from the lack of a clear definition of the nature of dynamic efficiencies, as evidenced by the plethora of different theories on the functioning of disruptive innovation.[134] Moreover, the difficulty in distinguishing between innovation that will benefit the consumer and innovation that will harm the consumer becomes even more difficult when it comes to digital conduct.[135] This is embodied in the lack of a clear methodology for distinguishing between research and development activities for consumer benefit in the digital economy and innovation that may have exploitative or exclusionary effects on direct consumers or complementary business partners.[136]

In addition to the incompatibilities of dynamic efficiency with the standard of consumer welfare in economic theory, the necessity of innovation in the digital economy can of course be accepted by focusing only on its positive aspects, ignoring the above-mentioned excessive uncertainties. Indeed, some views emphasise the need for caution in enforcement activities by putting these uncertainties in the second plan. These views assume that new waves of innovation may alter the nature of existing and potential competition, as well as the possible actors that will be active

[131] Ezrachi (n 110) 11.

[132] Roger Alford, 'The Role of Antitrust in Promoting Innovation' (2018) Speech delivered at Kings College London <https://goo.gl/kcqtMQ> accessed 23 September 2023.

[133] Ezrachi (n 110) 12.

[134] Josef Drexl, 'Anti-competitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation Without a Market' (2012) 8 Journal of Competition Law and Economics 507.

[135] Thibault Schrepel, 'Predatory Innovation: The Definite Need for Legal Recognition' (2017) 21 Science and Technology Law Review 21.

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

in a given market in the future. Such assumptions are based on the idea that issues related to dynamic efficiencies in the digital economy should be addressed within the context of protecting the competitive process.[137] If the positive aspects of innovation and dynamic efficiencies are assessed through the lens of consumer welfare, it remains uncertain how either narrow or broad interpretations of the concept can effectively manage the numerous uncertainties associated with dynamic efficiencies in competition law enforcement.

The inevitability of such a situation arises from the potential complications of the platform business model of companies in the digital economy. It may be discriminatory for the owner of a platform with critical infrastructure features to have access to this platform. In such cases, discriminatory access may result in unfair access to both related and downstream markets. In this case, complementors will likely be subject to unfair conditions. Consequently, it is more than a small possibility that competition at both the intra-form and market level will be harmed. In this scenario, even if only the positive aspects of the innovation are focused on, there is a possibility of damage to this positive innovation. Indeed, there is a danger of damaging dynamic efficiencies if the platform closes access to avenues of technological benefit.[138] Along the same lines, if a platform engages in such activities to deny its complementors access to innovation, both the motivation and the ability of other actors to engage in disruptive innovation will be significantly hampered.[139] In this case, the possibility of innovation will only be incremental.[140] The prevention of innovation by the platform owner, or at least its confinement to a limited ground, makes sense from their point of view if the complementary parties provide data flow and continue to consume, since such a vicious circle will guarantee the platform's own existence in a sense. As dominant actors are unlikely to undermine their own position knowingly, the likelihood of them permitting disruptive innovation remains minimal. Maintaining the status quo allows these platforms to secure consistent revenue streams, even in the face of significant technological sunk costs incurred over time. Therefore, the harm to innovation will in any case become a harm to competition, and it is a mystery how such a situation can be addressed by the consumer welfare standard.

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[137] Pierre Larouche and Maarten Pieter Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act' (TILEC Discussion Paper No 2013-020, 2013) <https://ssrn.com/abstract=2293141> accessed 20 September 2023.

[138] Marty (n 13) 69.

[139] ibid 70.

[140] Marty and Warin (n 112).

3.5.2.5 Tendency to Bigness and Decreasing Dynamism

There is an unmistakable inclination towards oligopoly when addressing companies rooted in the platform economy. Such a reality arises from the business strategies of online platforms. Accordingly, these tendencies towards oligopoly are generally associated with a certain feature of platform business models. As a result, market concentration in the digital economy can be mitigated by proposing solutions to specific problems, such as enhancing users' multi-homing capabilities or reducing switching costs. Against this background, the effectiveness of proposed solutions addressing the specific business strategies of digital firms, particularly within the framework of the consumer welfare standard, appears increasingly uncertain. This uncertainty stems from the complexity involved in identifying the adverse effects of most digital conduct on consumers, as discussed earlier. Also, there are other characteristics of online platforms, such as the power of network effects, which may cause this to be overlooked. This business model of platforms to attract consumers, as well as a strong belief in the power of disruptive innovation in the context of the digital economy, tends to underestimate the risks posed by the tendency of technology companies to grow in size and the diminishing dynamism of the disappearance or emergence of actors in a given market. Similarly, the economic history of the past two decades in digital sectors corroborates this perspective. Indeed, in the digital economy, many past dominant actors, such as Yahoo! and MySpace, have rapidly lost their market positions.[141] However, it is also possible to read this reality differently. There is less reason to think that past experience in the digital sectors will automatically repeat itself today. While the past two decades have witnessed powerful waves of transformation, it is in the last five years that the very nature of change has undergone a profound shift. Indeed, today's dominant technology companies, which replaced the dominants of the past a long time ago, continue to exist steadily and continuously increase both their profitability rates and their market shares. Despite the abundance of data-based evidence that the size of the digital sectors is increasing day by day, it is not possible to say that evidence to the contrary exists in today's conditions. The strongest evidence available to support this view is the blurred assumptions based on theoretical arguments that focus on the positive effects of dynamic efficiencies and innovation, as discussed above. In addition to this, dominated by trillion-dollar firms, digital markets face inevitably rising entry barriers, and it can be argued that this will make their dominance likely to persist into the future. In this respect, various challenges to the consumer welfare standard

[141] Marty (n 13) 68.

remain valid in the context of the above-mentioned characteristics of the digital economy and entry barriers.

3.6 Interpretation of Consumer and Consumer Welfare Concepts in the EU

The concept of the consumer in EU competition law predates the concept of consumer welfare, which is referenced in EU secondary law sources today. Nonetheless, it must be emphasised that the term ‘consumer’, as used in early Commission policy papers and judicial practice, reflects a markedly different understanding from that of consumer welfare. As explained above, the introduction of consumer welfare into US antitrust law has been a gradual narrowing of public policy. In this context, firstly a broad interpretation of consumer welfare and then a narrower interpretation of consumer welfare were employed for competition law. The transformation of the concept of consumer, which has existed in the EU competition law since the early periods, into consumer welfare has not occurred in an identical manner to the US. As discussed below, an extended interpretation of consumer welfare is applied in the EU. However, this does not mean, as it is sometimes claimed, that there are no Americanisation effects on the introduction of consumer welfare into EU competition law, and that the EU's interpretation of consumer welfare is something unique. Nevertheless, despite the influence of the economic welfarist approach on EU competition law, consumer welfare occupies a different position in EU competition law. This can be explained both by the Commission's broader interpretation of consumer welfare, which it introduced through soft law despite the American influence, and by the reflex of the EU courts to observe other integral values of the EU, notwithstanding the stance of the Commission. Nevertheless, it is also true that the Commission has a more economic stance on the interpretation of consumer welfare in terms of discourse than the soft law instruments it has introduced. Moreover, it remains a fact that consumer welfare, despite lacking a clear definition, has been steadily gaining prominence in EU enforcement practice. Such a complex situation has led to consumer welfare in the EU becoming a concept that has been debated since its introduction into competition law. Under this subheading, the application of consumer welfare in the EU, which has a development course as summarised above, is discussed and the criticism against the concept is examined below.

3.6.1 The Place of Consumers Before the Introduction of Consumer Welfare

It is worth noting that consumers have always been a key concept in EU competition law. This can be explained based on the special importance attached to consumers in the EU as in many other jurisdictions.[142] The legal basis for such special protection of consumers is Article 3(1) of the Treaty on the European Union (TEU), which specifically provides for the promotion of the well-being of the EU's people.[143] The early EU Court decisions clearly reflect the special importance given to consumers. In this respect, it was recognised by the court in *Consten Grundig* that consumers are a group whose interests must be respected.[144] In the same direction, the court has defined the importance of consumer well-being as the importance attached to consumers whose interests should be protected. In this context, the General Court stated in *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft* that "The 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."[145] The danger to the consumer-wellbeing concept, which CJEU has found to be in need of protection, has been conceptualised by the CJEU as consumer harm. Indeed, the court has defined one of the principal functions of EU competition law as to prevent consumer harm and underlined that consumer harm includes not only practices that directly harm consumers but also practices that cause harm to consumers through their effect on competition and that the concept of consumer wellbeing should be protected comprehensively.[146] The EU courts have repeatedly reiterated the point of preventing consumer harm to protect consumer well-being in different judgments.[147] In parallel with the court, different early Commission policy reports also emphasised the special place of consumers in EU competition law. This emphasis was expressed by the Commission as "...protecting the

[142] Laura Parret, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives' in Daniel Zimmer (eds), [2012] *The Goals of Competition Law* (Edward Elgar Publishing 2012), 75.

[143] Consolidated Version of the Treaty on the European Union [2012] OJ C 326/15.

[144] Joined Cases 56/64 and 58/64, *Consten and Grundig* [1966] ECR 299.

[145] 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.

[146] Case C-209/10, *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, para 20.

[147] Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, para 63; Case C-8/08, *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras 31, 36, 38–39; Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, para 24.

consumer by making goods and services available on the most favourable terms possible..."[148] Considering how the courts have positioned consumers in the EU competition law system since very early on and the special emphasis on their well-being, it appears that the prevention of consumer harm in the EU is considered as a component of a holistic structure. It should be noted that, in EU competition law, the concept of the consumer is not confined to natural persons and may extend to business users or intermediate customers, reflecting the functional and market-based understanding adopted in competition law analysis. Undoubtedly, the importance given to consumers in court practice started long before the systematised introduction of consumer welfare into EU competition law. Indeed, the Commission's increasingly radical attempts to put consumers at the centre of EU competition policy have been encouraged and perhaps inspired by the special importance given to consumers by the courts since the earliest days of EU competition law.

3.6.2 Introduction of Consumer Welfare by the Commission

The role of consumers within the EU competition law framework was deliberately reshaped, particularly under the influence of the Commission. This assertive shift by the commission was also notably influenced by American antitrust thinking. Although the impact of the United States on EU competition law is widely acknowledged, it is usually discussed in the context of the modernisation phase of EU competition enforcement. However, the similarities between the US and EU competition systems go back much further. Indeed, the inclusion of competition provisions in the Paris Treaty, which was the predecessor of the Rome Treaty and established the European Coal and Steel Community, was the result of a desire to control the power of the German coal and steel industry and the intentions in this respect are similar to the intentions in the introduction of US antitrust law.[149] Similarly, the principles of the First Chicago School, which heavily influenced early US antitrust policy, were largely aligned with the ideas of European Ordoliberal thinkers.

[148] European Commission, 'Report on Competition Policy' (1971), 11; European Commission, 'Report on Competition Policy' (1976), 9.

[149] David Gerber, *Law and Competition in 20th Century Europe - Protecting Prometheus* (Oxford Clarendon Press 2001), 340.

It is perhaps this shared historical foundation that later enabled the Commission to adopt the concept of consumer welfare into EU competition law with relatively little hesitation. While it is commonly claimed that the modernisation of EU competition law began in the mid-1990s, especially with the procedural reforms introduced by Regulation 1/2003,[150] it would be more accurate to trace its origins back to the adoption of the Merger Control Regulation 4064/89.[151] This is because this regulation made the Commission one of the most powerful competition enforcers in the world. Indeed, the Commission has gradually increased the use of this power.

In the process of introducing this regulation into EU law, the Commission, for the first time, sought the expertise of US experts during the regulation's preparation, which is not surprising for the reasons explained above. The first Treaty of cooperation between the US and the EU was signed in 1991.[152] Apart from this agreement, expert advice was also received on the Commission's policy-making process. The introduction of this US-supported merger regulation into EU competition law is described as the first step in the Americanisation of EU competition law.[153]

In the following period, the Commission began to test the limits of its power under the new Merger Control Regulation, and although it initially acted slowly, it gradually adopted a more interventionist policy over time. Accordingly, it issued five prohibition decisions in 2001.[154] However, three of these prohibition decisions were appealed to the Court of First Instance, and these three appeals were annulled by the Court in 2002. Moreover, two of these three annulment

[150] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2002] OJ L186/57; Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007), 21.

[151] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings; Andreas Weitbrecht, 'From Freiburg to Chicago and beyond - the first 50 years of European Competition law' (2008) 29 (2) European Competition Law Review 81, 4.

[152] Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws of 1991 [1995] OJ L95/47.

[153] Weitbrecht (n 151) 4.

[154] *SCA/Metsä Tissue* (Case COMP/M.2498) Commission Decision of 31 January 2001 [2002] OJ L57/1; *General Electric/Honeywell* (Case COMP/M.2220) Commission Decision of 3 July 2001 [2004] OJ L48/1; *Schneider/Legrand* (Case COMP/M.2283) Commission Decision of 10 October 2001 [2004] OJ L101/1; *CVC/Lenzing* (Case COMP/M.2333) Commission Decision of 17 October 2001 [2004] OJ L82/20; *Tetra Laval/Sidel* (Case COMP/M.2416) Commission Decision of 30 October 2001 [2004] OJ L43/13.

decisions were issued by the court within a short period of three days.[155] The Court of First Instance emphasised in these prohibition decisions that the Commission had made a manifest error of assessment in the economic reasoning. Following these decisions, the Commission's competence in matters of legal certainty was widely questioned. As a result of the Commission's frustrations, then-Commissioner Monti announced extensive revisions to the Commission's merger practice, including the appointment of a chief economist.[156]

This period, which began with the introduction of merger regulation and the shift towards economics, laid the groundwork for the Commission's adaptation of consumer welfare principles based on the Chicago model to EU competition law.[157] Ironically, the Commission's mistakes in economic reasoning after the introduction of the merger regulation in question paved the way for the transformation of the consumer into an economic concept and its association with efficiency and the beginning of a process that resulted in EU competition law taking on a technical face heavily based on economic analysis. Indeed, in the modernisation process that continued after the merger regulation, the importance given to consumer welfare and efficiency concepts continued to be gradually emphasised through soft law instruments.

Although the new concepts of consumer welfare and efficiency were intensively introduced in Regulation 1/2003 and new Merger Regulation 139/2004[158], the beginning of the introduction of a consumer welfare and efficiency-oriented effect-based approach was the 2005 report prepared by a group of experts appointed by Directorate-General for Competition (DG Competition).[159] In particular, the Report justified the application of Article 102 TFEU on the basis of a more economic approach. This notion of a more economic approach was recognised in the Commission's Guidance of 2009.[160] In this Guidance, the Commission insists on the

[155] Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585; Case T-301/01 *Schneider Electric SA v Commission* [2002] ECR II-4071; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

[156] Weitbrecht (n 151) 4.

[157] ibid 5.

[158] Council Regulation (ec) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings.

[159] Economic Advisory Group for Competition Policy, An Economic Approach to Article 82 (July 2005) <https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf> accessed 3 August 2023.

[160] Communication from the Commission, February 2009, Guidance on the Commission's enforcement priorities in applying Article 82 of the ec Treaty to abusive exclusionary conduct by dominant undertakings.

importance of ensuring that the enforcement of competition rules does not lead to excessive protection of an economic operator whose production efficiency is lower than that of the dominant firm.

The introduction of the Guidance puts consumer welfare and efficiency at the centre of enforcement. It is important to note that the concept of economic efficiency has been on the Commission's agenda since the earliest stages of EU competition policy. In fact, the very first Commission Report on competition policy described efficiency as the outcome of a well-functioning competition regime.[161] However, the same report stressed that efficiency should not be viewed as an end in itself, but rather as a by-product of economic freedom, one of the fundamental goals of competition law. Notably, during the modernisation process, when EU competition law underwent substantial transformation under the Commission's direction, the tone and focus of official statements by the Commissioners shifted significantly. Consumer welfare and economic efficiency began to be portrayed as standalone priorities, central to the enforcement rationale of the time.

Former Commissioners Mario Monti and Neelie Kroes explicitly placed consumer welfare and economic efficiency at the core of EU competition policy. They consistently underscored that these two concepts serve as the primary drivers of competition policy.[162] The Commissioners' emphasis on the importance of consumers is quite reasonable since consumers are not a new concept in the EU competition law system. However, an analysis of the Commissioners' statements during this period reveals that the emphasis on consumers was consistently coupled with an underlying commitment to efficiency. Commissioner Kroes' statement to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources, which will also be directly incorporated into the Guidance, demonstrates that the concepts of consumer welfare and efficiency form a cohesive whole in the eyes of the Commission.[163] In the same direction, Kroes stated that competition is not an end in itself, but the purpose of competition law enforcement applied in an effect-based manner

[161] First Report on Competition Policy (1972), 1.

[162] Commission, Proactive Competition Policy for a Competitive Europe COM (2004) 293 final.

[163] Commission, Speech at Competition Day in London (London, 2005) <http://ec.europa.eu/competition/speeches/index_2005.html> accessed 15 September 2023.

based on solid economics is to increase consumer welfare and efficiency.[164] Similarly, Commissioner Monti maintained that one of the primary reasons for introducing the concept of consumer welfare was to clarify the scope and direction of competition provisions.[165] The Commissioner further stated that another reason for the adoption of the consumer welfare concept is the desire to increase convergence and co-operation with the US.[166]

From these explanations made during the modernisation period, it would not be wrong to infer that the modernisation process is essentially an Americanisation process. The characterisation of the process as Americanisation seems to be ironically accurate, as similar to the introduction of an efficiency-oriented consumer welfare concept in the US, contrary to legislative intent and court practice, the same concepts were also introduced in the EU. In fact, contrary to the importance given to consumers in EU competition law, the concept of efficiency has no legal basis in EU law.[167] While Article 120 TFEU reflects efficiency as a broader macroeconomic policy objective, this does not translate into a clear doctrinal mandate for efficiency within competition law itself.[168] This is explained by the fact that EU competition law is essentially a public policy tool. In this respect, the EU courts have not consciously been involved in the debate on the economic objectives of competition rules and the attribution of economic objectives to competition law is a political issue, not a legal one.[169]

Therefore, the introduction of the concepts of consumer welfare and efficiency into EU competition law went beyond the concretisation of the prevention of consumer harm in EU court practice, contrary to what the Commissioners of the time claimed. Although the Commission has the competence to determine policy, pure economics-related concepts were introduced by the Commission through soft law without any public debate and not through the

[164] ibid.

[165] Centre for Competition Law and Policy, CCLP website available at <http://www.competitionlaw.ox.ac.uk> accessed 15 July 2022.

[166] ibid.

[167] Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012), 23.

[168] Anca D Chirita, 'Undistorted, Un(fair) Competition, Consumer Welfare and the Interpretation of Article 102 TFEU' (2010) 33(3) World Competition 417.

[169] Geradin, Farrar and Petit (n 167).

EU legislature.[170] Such an approach clearly indicates the Commission's intention to shift towards economic objectives and reject other public policy goals that have long been taken into account in EU competition law. The whole process of modernisation reveals that the change in EU competition law was essentially a process of Americanisation. In particular, the Commissioner's statements, which can be described as overly passionate during this transition period, directly point to a narrow interpretation of the consumer welfare concept.

3.6.3 Reflection of Consumer Welfare in Soft Law

The modernisation process, shaped and launched with commissioner discourses, was likely followed by uncertainty and ambiguity in EU competition law. Indeed, following the introduction of consumer welfare, scholars have produced many arguments claiming that there is a single objective in EU competition law in the form of economic efficiency-oriented consumer welfare in a narrow sense. However, the concepts of consumer welfare and economic efficiency do not appear in the Commission's legal documents, at least not in a US-oriented manner as much as in the Commissioners' statements. Therefore, it is not possible to justify these arguments on the grounds of soft law.[171]

For example, the Commission understands the concept of well-established consumer harm by the EU Courts[172] as the protection of consumers. Indeed, the Commission has stated that the purpose of competition rules in the context of Article 101 TFEU is to protect competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.[173] The Commission's judgement on the concept of protection of consumers is expressed differently in the context of Article 102 TFEU. In this context, the Commission's objective is expressed as to prevent an adverse impact on consumer welfare.[174] In the same direction, the Commission has reiterated in various decisions that its understanding of

[170] Monti (n 150) 25.

[171] Geradin, Farrar and Petit (n 167) 22.

[172] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] para 20.

[173] European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97, para 33.

[174] '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, para 19.

protection of consumers means protection of consumer welfare.[175] When the Commission's legal documents and various decisions are analysed together, it is seen that the Commission uses different concepts such as consumer harm, detriment to consumers, consumer protection and consumer welfare and moreover, it often uses these concepts interchangeably. This situation has been interpreted as confusion due to the Commission's inability to provide a clear definition of the concept of consumer welfare that it introduced.[176]

The reasons for this situation are that the concept of consumer welfare employed by the Commission is an economic efficiency oriented concept and this concept is not clearly recognised and defined by the EU courts.[177] For this reason, the definition of the EU style of consumer welfare has been a matter of speculation, trying to be made in contexts such as consumer surplus and consumer choice.[178] The existence of such an ambiguous situation has also been interpreted as meaning that consumer welfare in the EU may mean a notion of consumer welfare in the narrow sense described in the sections above.[179] Leaving all these speculative situations aside, it is not possible to say that consumer welfare in the EU is a narrow interpretation of consumer welfare. Although a purely consumer surplus-oriented consumer welfare test and a broadly interpreted consumer welfare test often yield the same result in practice, it is still essential to know which type of consumer welfare standard is adopted.[180]

Although various Commission documents emphasise that the primary and sole priority of enforcement activities is the protection of consumer welfare, there are also principles in these documents that convey a more expansive understanding of the consumer welfare test. Indeed, the fact that consumer welfare may be harmed in terms of quality and choice in addition to

[175] *Microsoft* (Case COMP/C-3/37.792) Commission Decision [2004]; *Microsoft Tying* (Case COMP/39.530) Commission Decision [2012]; *Google Search (Shopping)* (Case AT.39740) Commission Decision [2017].

[176] Lianos (n 33) 15.

[177] Parret (n 142) 77.

[178] K. Cseres, 'The Antitrust Consumer Welfare paradox' (2007) 7 Journal of Competition Law and Economics 133.

[179] Nazzini (n 86) 49.

[180] B. Orbach, 'The Antitrust Consumer Welfare Paradox' (2010) 17(1) Journal of Competition Law and Economics 133.

higher price is clearly recognised by the Commission.[181] This points to a broader standard in the EU interpretation of consumer welfare, where other non-price parameters are also considered. More importantly, the existence of consumers as a well-established concept in EU competition law reflects the distribution ethos of EU competition law rather than a narrow interpretation of consumer welfare.[182] Indeed, Article 101(3) TFEU expresses this situation clearly. According to this, consumers/users should be awarded a fair share of the potential efficiency gains claimed by a producer and resulting from an anticompetitive agreement. All the arguments previously discussed in relation to the broader interpretation of consumer welfare are equally relevant within the framework of EU competition law. Therefore, it can be concluded that the standard of consumer welfare adopted by the EU reflects this broader interpretation, rather than a narrow, price-centric approach. This is also the case in practice and the Commission has adopted a pragmatist stance by employing a broad interpretation in the application of consumer welfare.[183] This position of the Commission was also expressed in the early modernisation periods when the concept was introduced. In this respect, the Commission's 2002 Policy Report generally reflected the Commission's position at the time and strongly emphasised the importance of consumers benefiting from the efficiencies to be created.[184] Finally, as discussed in the following chapters, the EU competition law system also aims to protect some well-established values that are older than consumer welfare. This shows that it is not possible to apply consumer welfare in the EU in a narrowly economic efficiency-oriented manner. This being the case, as explained above, even with broad interpretations of consumer welfare, the concept faces serious challenges in both theoretical and digital economy contexts. These criticisms also apply to the consumer welfare standard in the EU context.

[181] '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, para 19.

[182] Ezrachi (n 110) 11.

[183] Marty (n 13) 64.

[184] In the XXII nd Report on Competition Policy (2002) the Commission already declares: 'One of the main purposes of European competition policy is to promote the interests of consumers, that is, to ensure that consumers benefit from the wealth generated by the European economy,' 12.

3.6.4 Reflection of Consumer Welfare in Case Law

The resonance of consumer welfare within EU court practices has exhibited a notably uneven progression. Although defended robustly in the discourses of Commissioners, this advocacy is not mirrored with equivalent vigour in Commission documents. As for the courts, it is commonly posited that they initially maintained a significant reticence towards the concept, gradually showing openness to embracing at least some facets of it over time. That said, some scholars argue that the EU courts have never formally or explicitly endorsed the concept of consumer welfare. As noted earlier, the way consumer welfare is presented in both Commission documents and Commissioners' speeches is crucial, particularly given the Commission's central role in shaping and enforcing EU competition policy. Nevertheless, how this concept is reflected in court practice remains equally vital. Accordingly, EU case law, particularly after the Commission formally introduced the concept of consumer welfare, is examined here to assess the extent to which the courts have adopted it.

Significant challenges from the outset undoubtedly accompanied the integration of the consumer welfare into EU case law. Initially, both domestic courts and competition authorities struggled to define the concepts of 'consumer' and 'consumer welfare'. These difficulties were particularly apparent in *T-Mobile*, where both the referring national court and the parties involved struggled to define who qualifies as a 'consumer' under the consumer welfare standard.[185] Similar definitional ambiguities persisted in *Sylfait*[186] and *Sot Letos Kai*,[187] further highlighting the conceptual uncertainty surrounding consumer welfare.

Beyond its definitional ambiguities, the concept of consumer welfare has been inconsistently acknowledged by EU courts since its introduction. Before the landmark *GlaxoSmithKline* case, which marked a shift toward greater recognition of consumer welfare, many EU rulings did not require proof of harm to consumers or their interests to establish anti-competitive conduct.

[185] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, para 19.

[186] Case C-53/03 *Syfait and Others GlaxoSmithKline plc and GlaxoSmithKline* [2005] ECR I-4609, para 20.

[187] Joined Cases C-468/06 to C-478/06 *Sot Lelos Kai and Others GlaxoSmithKline AEVE Farmakeftikon Proionton AEVE* [2008] ECR I-7139, para 23.

Often, courts explicitly overlooked the consumer welfare aspect.[188] Furthermore, several judgments have equated the significance of harm to producers or business partners with that of harm to consumers. This was evident in *British Airways*, where the court ruled that harm to final consumers under Article 102 TFEU need not be proven.[189] The court also deemed it unnecessary to demonstrate that the conduct reduced final consumers' choice of travel agents or affected price competition.[190] Instead, it focused on how the conduct distorted competition among upstream market travel agents.[191] This reflects the court's traditional stance of sidelining price and choice impacts, showing that broad consumer welfare is not central in its reasoning.[192] Another critical case is *T-Mobile*, where the aim of the agreement was to lower prices for final consumers, with costs being passed to the upstream market of dealers.[193] The referring court and parties argued that the agreement did not restrict competition since consumer prices were unaffected. Nevertheless, AG Kokott downplayed the relevance of consumer welfare in her assessment.[194] The court concurred with AG Kokott, dismissing the importance of consumer welfare in its judgment.[195]

In 2006, two decisions by the General Court set the stage for the potential adoption of the new concept of consumer welfare by courts. The first step came with *Österreichische Postparkasse*. There, the General Court supported the Commission's view that the main aim of preventing distortions in the internal market is to enhance consumer well-being.[196] Although the term

[188] Case C-95/04 *British Airways Commission* [2007] ECR I-2331; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529; Case T-301/04 *Clearstream Banking Commission* [2009] ECR II-3155; Case C-105/04 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied Commission* [2006] ECR I-8725; Case C-209/07 *Competition Authority Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637; Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG and Österreichische Volksbanken AG Commission* [2009] ECR I-868.

[189] Case C-95/04 P *British Airways Commission* [2007] ECR I-2331, para 107.

[190] ibid para 149.

[191] ibid paras 146-148.

[192] ibid para 100.

[193] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529.

[194] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, Opinion of AG Kokott, paras 55-56, 59.

[195] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, para 36.

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

'consumer well-being' hints at alignment with the economic notion of consumer welfare, especially when considering the French version of the judgment, the Court merely linked the term to Article 101(3). It offered no further clarification on its meaning.[197] The General Court expanded on the concept of consumer welfare more liberally in *GlaxoSmithKline*. Building on *Österreichische Postparkasse*, the court interpreted Article 101(1) TFEU as seeking to prevent restrictions that could harm the welfare of end consumers. This marked a notable step toward incorporating consumer welfare into legal reasoning.[198] This ruling was significant because it held that limiting parallel trade does not automatically harm consumer welfare. In doing so, it placed greater emphasis on protecting consumer welfare than on preserving the internal market. More crucially, the court's interpretation suggests a specific, narrow view of consumer welfare, focusing on consumer surplus: harm is perceived primarily as a price increase affecting the final consumers of the products.[199]

Subsequently, the CJEU overturned the General Court's efficiency-oriented and price-centred interpretation of consumer welfare, which had even surpassed that of the Commission. In doing so, it rejected the need to prove consumer harm in order to establish a competition restriction. It reaffirmed its traditional view that the core aim of competition law is to protect the competitive process itself.[200] Importantly, the CJEU deliberately avoided using the term "consumer welfare," signalling a nuanced stance. One could argue that the court has not entirely dismissed consumer welfare, yet the opposite view is also plausible. What this judgment more clearly shows is the difficulty of prioritising consumer welfare, particularly if defined narrowly as consumer surplus, within EU competition law. The court reinforced this by stating that final consumers don't need to suffer a loss in supply or pricing benefits for a breach to occur.[201] Therefore, although the court has not entirely rejected consumer welfare, its refusal to engage with price effects shows that a narrow, price-focused standard is unlikely to gain traction in EU competition law. Additionally, in cases following the landmark *GlaxoSmithKline*, the CJEU has consistently held that proving damage to consumer interests is not required to label a

[197] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11(1) The Competition Law Review 133, 152.

[198] Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-02969.

[199] ibid para 118.

[200] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] I-9291, para 63.

[201] ibid.

behaviour as anti-competitive. These rulings reaffirm that EU competition law primarily seeks to protect market structure and safeguard competitors.[202]

Despite their stated positions, EU courts have sent mixed signals by occasionally invoking an effects-based approach to consumer welfare. Such ambiguity is especially evident in margin squeeze and predatory pricing cases, which pose challenges to a welfare-based approach, particularly after the Commission formally embraced the concept. For instance, in *France Telecom*, the court acknowledged the short-term consumer benefits of low prices offered by the dominant firm but chose not to explore whether these benefits might ultimately harm consumer welfare in the long run. Instead, the court concentrated on the potential market exit of competitors, viewing it as a likely negative future outcome.[203] In *Deutsche Telekom*, the Commission held that access fees were so high that even equally efficient competitors could not operate profitably. This led the Commission to deem such behaviour as abusive.[204] Although the General Court upheld this reasoning, it did not delve into a detailed analysis of the decision.[205] In contrast, the CJEU adopted a more nuanced tone, relying on concepts like dominance, fairness, and special responsibility, rather than consumer welfare.[206] The court also ruled that proving consumer harm was unnecessary and rejected the claim that avoiding the squeeze would have led to higher prices.[207] Furthermore, rather than reaffirming its earlier stance that a dominant firm must avoid actions potentially excluding competitors, the CJEU clarified that Article 102 TFEU simply prohibits dominant firms from engaging in pricing practices with an exclusionary effect on equally efficient competitors.[208] A similar focus appeared in *Telia Sonera*, where the court held that even the potential for exclusion could qualify as abuse. It reiterated that anti-competitive effects must exist, but they need not be actual; potential exclusion of equally efficient competitors is enough.[209] Although market

[202] Case C-202/07 P *France Telecom SA v Commission* [2009] ECR I-02369; Case C-280/08 P *Deutsche Telecom AG v European Commission* [2010] I-9555; Case C-52/09 *Konkurrensverket v Telia Sonera Sverige AB* [2011] ECR I-527.

[203] Case C-202/07 P *France Telecom SA v Commission* [2009] ECR I-2369, paras 89, 112-113.

[204] *Deutsche Telekom* (COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003 O.J. (L 263/9).

[205] Case T-271/03 *Deutsche Telekom AG Commission* ECLI:EU:T:2008:101, para 237.

[206] C-280/08 P, *Deutsche TelekomAGv. Commission*, ECLI: EU: C:2010:603, paras 170,174, 176, 253.

[207] ibid, paras 165-166.

[208] ibid, para 177.

[209] Case C-52/09 *Konkurrensverket TeliaSonera Sverige AB* [2011] ECR I-527.

effects were mentioned, the judgment relied mainly on the 'as-efficient competitor' test. Ultimately, the court continued to prioritise exclusionary conduct, an approach that sits uneasily with both narrow and broad understandings of consumer welfare.

The 2012 *Post Danmark* ruling, along with later decisions, marked a significant shift in the CJEU's approach to consumer welfare. In this pivotal case, the court explicitly referenced the concept of consumer welfare.[210] It held that establishing abuse required assessing whether pricing had an actual or likely exclusionary effect.[211] Still, the court took a cautious stance toward consumer welfare, unlike the more open approach of the General Court. The reasons behind this cautious stance include the CJEU's reluctance to define consumer welfare in a clear manner. Instead, the court focused on the broader concepts of price, innovation, choice, and quality, collectively referred to as 'consumer interest.' However, it is difficult to draw a clear link between 'consumer interest' and consumer welfare from the court's reasoning. The court described these elements as benefits offered by companies that are essential to customers and advantageous to consumers.[212] The *Post Danmark* suggests a softer stance on consumer welfare. Yet, the court's view still diverges from a narrow interpretation, much like in *GlaxoSmithKline*. The elements the court considered under consumer interest suggest that a broadly defined concept of consumer welfare might be embraced. This judgment somewhat aligns with the assessment that EU courts are gradually accepting the consumer welfare approach outlined in Commission soft law instruments.[213]

However, the stance of the CJEU in *Tomra*, delivered just one month after *Post Danmark*, diverged significantly from the progressive views on consumer welfare and effect-based analysis exhibited in *Post Danmark*. In *Tomra*, the Commission deemed the conduct of the dominant firm abusive due to its practice of granting exclusivity rebates to major customers.[214] The General Court supported this finding, stating that discounts are anti-competitive if they have the potential to exclude competitors, without restricting this criterion to competitors as

[210] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECLI, para 42.

[211] ibid para 127.

[212] ibid para 22.

[213] Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU?' (2012) Journal of European Competition Law and Practice.

[214] *Prokent-Tomra* (COMP/E-1/38.113) Commission Decision.

efficient as the dominant firm.[215] Consistent with its prior rulings, the CJEU concluded that a firm abuses its dominant position by offering exclusivity rebates.[216]
In the subsequent period, EU courts continued to display inconsistency in applying consumer welfare and effects-based approaches. This was particularly evident in *Tomra* judgment, which adopted a conservative interpretation, later reinforced by the court in *Post Danmark II*.

The court's departure from its stance in *Post Danmark* is clearly reflected in *Post Danmark II*, where both Advocate General Kokott's opinion and the judgment itself embraced a markedly more traditional approach. In her opinion, AG Kokott firmly supported a traditional legal framework for assessing exclusionary rebates. She began by cautioning the court against the growing pressure to adopt a more economic approach in EU competition law. Instead, she urged a continued focus on long-standing legal principles governing abuse of dominance, rather than transient economic trends.[217] Her reasoning relied on core EU competition law doctrines, particularly the special responsibility of dominant firms to avoid distorting competition. She pointed out that practices typically acceptable might constitute abuse if conducted by a dominant firm. [218] AG Kokott also critiqued the assumption that excluding a competitor merely as efficient as the dominant firm indicates bad faith. She called for caution in shifting case-law on this point, highlighting the limitations of costly economic analyses due to often unreliable data. She further emphasized that the 2009 Commission Guidelines recommending the AEC test are merely administrative tools and not binding on courts or national authorities.[219] The CJEU echoed Kokott's position, reaffirming the need to assess whether the conduct restricts buyer choice, impedes market access, results in unequal treatment, or reinforces dominance through distortion. The court also clarified that Article 102 TFEU does not mandate an AEC test, treating it merely as a tool for the Commission to determine the anti-competitive nature of rebates.[220] Significantly, the court stated that although anticompetitive effects must not be purely hypothetical, they need not be concrete but should be likely or probable.[221] The court's

[215] T-155/06, *Tomra Systems ASA and Others v. Commission*, ECLI: EU: T:2010:370, paras 216, 242, 259.

[216] C-549/10 P, *Tomra Systems ASA and Others v. Commission*, EU: C:2012:221, paras 59-81.

[217] Case C-23/14, *Post Danmark A/S v. Konkurrenceridet*, ECLI: EU: C:2015:343, Opinion of Advocate General Kokott, para 4.

[218] ibid para 24.

[219] ibid 60.

[220] Case C-23/14, *Post Danmark A/S v. Konkurrenceridet*, ECLI: EU: C:2015:343, paras 57-61.

[221] ibid 63.

reasoning stood in stark contrast to earlier, more progressive rulings that embraced consumer welfare and effects-based analysis. Indeed, this ruling is widely seen as a significant step back in the development of a consumer welfare-oriented legal framework.[222]

The approach of EU courts towards the concept of consumer welfare experienced another shift with the General Court's 2014 and the CJEU's 2017 decisions in *Intel*. This case emerged from the Commission's inadequate consideration of the principles it had established in its own soft law resources. Specifically, during its investigation into the exclusivity rebates offered by Intel, the Commission treated the effects of Intel's practices as ancillary rather than central to its decision-making. The stance of the General Court diverged from both its earlier 2006 judgments and the CJEU's approach in *Post Danmark*. Notably, the General Court ruled that the Commission was not required to demonstrate direct consumer harm or a linkage between consumer harm and the scrutinized conduct.[223] Furthermore, the decision aligned with traditional case law by stating that Article 102 TFEU targets conduct that might not only directly harm consumers but also indirectly affect them by damaging the structure of effective competition.[224] Additionally, the General Court's refusal to consider the significance of consumer harm in setting the fine underscored its deemphasis on consumer welfare in its ruling.[225]

However, the subsequent development in the Court of Justice's interpretation brought a nuanced turn. While the CJEU acknowledged the established rebate-related case law, such as *Hoffmann-La Roche* and *Michelin I*, in its *Intel* judgment, it ultimately required further examination of the defendant's claims. Intel had argued that its conduct did not restrict competition or particularly lead to foreclosure effects. Based on this, the CJEU sent the case back to the General Court for further clarification, indicating a potentially more meticulous consideration of the implications of conduct on competition and consumer welfare.[226]

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[222] James Venit, 'Making Sense of Post Danmark l and II: Keeping the Hell Fires Well Stoked and Burning' (2016) 7 Journal of European Competition Law and Practice 165.

[223] Case T-286/09, *Intel Corporation v Commission* [2014] ECLI:EU:T:2014:547, para 308.

[224] ibid para 105.

[225] ibid paras 1621, 1630.

[226] *Intel v Commission* EU:C:2017:632, para 138.

In *Intel* and several subsequent cases, there has been a noticeable increase in Advocate General opinions emphasising the need for an effects-based examination over discussions on the nature and scope of consumer welfare. Notably, in the Intel judgment, the CJEU endorsed Advocate General Wahl's view, which criticised the lack of an effects-based assessment. AG Wahl argued that the primary focus of competition law should be on enhancing efficiency.[227] He advocated for interpreting Article 102 TFEU to require the Commission to demonstrate the likely effects of exclusivity rebates and their potential to cause anticompetitive foreclosure, ultimately harming consumers.[228] Furthermore, various AG opinions have underscored the importance of an effects-based review. For instance, in *Latvia*, AG Wahl called for a preliminary ruling that dismissed traditional concerns with terms like 'excessive' or 'unfair' prices in favour of a more consumer welfare-oriented approach.[229] Similarly, AG Wathelet, in *Orange Polska*, emphasised the necessity of considering actual damage when calculating financial penalties.[230] The CJEU, following AG Wahl's guidance in *MEO*, stated that mere tariff discrimination by a dominant company does not automatically constitute anti-competitive behaviour; potential anti-competitive effects must be assessed.[231] While it remains uncertain whether the CJEU intended to firmly establish an effects-based approach with its decision in *Intel* or to highlight a procedural oversight by the General Court, the aggregation of these judgments, along with the *Post Danmark*, suggests a tentative move towards embracing consumer welfare and effects-based assessments. However, a definitive stance on the precise definition, content, and scope of consumer welfare by the court has yet to be articulated.

In recent case law from the 2020s, it is evident that the status of consumer welfare remains somewhat ambiguous. When dealing with cases under Article 101 TFEU, courts continue to uphold traditional interpretations regarding object restrictions. For instance, in *Gazdasagi Versenyhivatal v Budapest Bank Nyrt*, the court recognized a high likelihood of observing actual adverse market effects from cartel activities, noting that such behaviours lead to reductions in production and price increases, which in turn result in inefficient resource allocation to the

[227] Case C-413/14 P, *Intel v. Commission*, ECLI: EU: C:2016:788, Opinion of Advocate General Wahl, para 41.

[228] ibid paras 83, 130.

[229] Case C-177/16, *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome*, Opinion of Advocate General Wahl, para 78.

[230] Case C-123/16 P, *Orange Polska SA v European Commission*, Opinion of Advocate General Wathelet.

[231] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia Autoridade da Concorrência* ECLI:EU:C:2018:270.

detriment of consumers.[232] Similarly, in *Generics (UK) Ltd v Competition and Markets Authority*, the court identified behaviours that qualify as object restrictions as harmful to consumers due to reduced production and increased prices, concluding that there was no need for a detailed investigation into the effects of these behaviours.[233] While these rulings align with the principle of consumer welfare by justifying the anti-competitive nature of actions based on their impact on consumers, they essentially repeat an established approach in the context of Article 101 TFEU. Nonetheless, the ongoing validation of object restrictions, which fundamentally clash with the consumer welfare standard, contradicts the standard itself. This tension arises from the methodological logic of the consumer welfare standard itself. A welfare-based approach presupposes an assessment of effects, particularly whether and how a given practice results in consumer harm, typically in the form of higher prices, reduced output, or diminished quality. By contrast, restrictions classified as by object dispense with any requirement to demonstrate actual or likely effects on consumers or the market. Harm is presumed rather than established. As a result, the persistence of object restrictions operates independently of welfare-based reasoning and, in practice, overrides it. This structural feature reveals a fundamental inconsistency: while consumer welfare rhetoric suggests an effects-oriented and empirically grounded standard, the continued reliance on object restrictions reflects a legal technique rooted in form, experience, and institutional distrust, rather than in demonstrable consumer harm. Moreover, in a recent Article 101 TFEU decision, *Sumal SL v Mercedes Benz Trucks Espana SL*, the court continued to distance itself from a strictly welfarist approach. It ruled that appropriate compensation should address not only the direct harm to the involved party but also the indirect damage to the market's structure and functionality, which prevents full economic efficiency, particularly affecting consumer benefits.[234] This decision underscores the court's focus on maintaining the integrity of the market structure and operations.

In cases related to the digital economy, the clarity of the consumer welfare concept remains ambiguous. This ambiguity partly arises from the courts' emphasis on protecting market structure and competition, often viewed as obstacles to consumer welfare goals. Additionally, courts reference a broader and relatively new set of competition policy goals, as will be

[232] Case C-228/18, *Gazdasagi Versenyhivatal v Budapest Bank Nyrt,* EU:C:2020:265, para 36.

[233] Case C-307/18, *Generics (UK) Ltd v Competition and Markets Authority*, EU:C:2020:52, para 64.

[234] Case C-882/19, *Sumal SL v Mercedes Benz Trucks Espana SL*, EU:C:2021:800.

discussed below. Nonetheless, the General Court has not shied away from explicitly mentioning consumer welfare. For instance, in *Google Shopping*, the General Court made a rare direct reference to consumer welfare. It stressed that Google's efficiency claims must be balanced against their potential adverse effects on both competition and consumer welfare.[235] Moreover, while the General Court specifically cited consumer welfare, it also referred to *Post Danmark*, where the Court of Justice directly engaged with the concept. The General Court concluded that Google's actions did not mitigate the detrimental effects on consumer welfare, despite claims that they enhanced user experience on the internet.[236] This judgment highlights the court's willingness to apply the consumer welfare standard. This is notable given the intense debate over theories of harm during the Commission's investigation. However, the court did not solely focus on consumer effects, as suggested by the consumer welfare theory. Rather, it maintained a traditional dual focus, evaluating both consumer welfare and competition effects.[237] Furthermore, AG Kokott's opinion on the appeal of the General Court's decision in *Google Shopping*, issued in 2024, suggests that the CJEU may adopt a similar stance. This stance would not marginalise consumer welfare but would continue to consider overall competition effects. AG Kokott emphasised that Article 102 TFEU aims to protect the entire spectrum of competition, including consumer interests, rather than just individual competitors.[238] While AG Kokott has become more explicit about consumer interests in recent cases, she continues to favour a traditional, competition-focused approach. In the 2022 *Google Android*, the General Court raised concerns about user choice and privacy. It also pointed to harm to pluralism and democratic values as incompatible with fair competition, a relatively novel argument in EU case law.[239] This illustrates the courts' creative turn in digital cases, broadening competition policy goals beyond the traditional consumer welfare versus market structure dichotomy. These diverse focuses will be further analysed in subsequent chapters.

Apart from cases related to the digital economy, recent judgments from EU courts have continued to reflect past practices in addressing consumer welfare. For example, the CJEU explicitly identified the protection of the well-being of both intermediary and final consumers

[235] Case T-612/17 *Google and Alphabet Commission* ECLI:EU:T:2021:763, para 553.

[236] ibid paras 568, 572.

[237] ibid.

[238] Case C-48/22 P, *Google LLC Alphabet Inc v Commission*, EU:C:2024:14, Opinion of Advocate General Kokott, para 87.

[239] Case T-604/18, *Google LLC v European Commission (Google Android),* EU:T:2022:541, para 1028.

as the fundamental goal of competition law interventions under Article 102 TFEU.[240] Additionally, the court noted that situations in which Article 102 TFEU might not be effective are those where the exclusionary impacts of the conduct are offset by benefits to the consumer, or even when its positive outcomes for the consumer surpass the advantages of exclusionary behaviour.[241] These statements from the CJEU are seen as progressive, aligning with the consumer welfare-oriented discourse evident in *Post Danmark*. Notably, the court's emphasis on assessing impacts as not just a counterbalance to exclusionary practices, but also as potentially delivering additional benefits to consumers, represents significant progress in the EU jurisprudence regarding consumer welfare. On the other hand, in the same case, the CJEU clarified that Article 102 TFEU aims to address not only behaviours that directly harm consumers but also those that indirectly cause harm by compromising an effective competitive structure.[242] It is clear from this that the existence of consumer welfare, which is increasingly mentioned in the CJEU's practice, albeit with blurred significance, is accompanied by the traditional statement in the case law that the consumer may suffer indirectly due to the damage to the competition structure. Similarly, in the 2023 *Superleague* judgment, the CJEU maintained a comprehensive approach regarding the protections afforded by EU competition policy. The court articulated that Article 102 TFEU intends to prevent restrictions on competition that detriment the public interest, individual businesses, and consumers by penalising dominant firms whose actions hinder competition on merits, thus potentially causing direct consumer harm or indirectly affecting them by impeding or distorting competition.[243] This statement reveals a nuanced tension in how the court's views align with the consumer welfare standard, highlighting the complexities in integrating this standard with broader competition policy objectives.

3.7 Conclusions

This chapter has examined the evolution and application of the consumer welfare standard, tracing its transatlantic journey from its ideological roots in the US to its incorporation, albeit with critical differences, into EU competition law. It has also explored the difficulties faced by

[240] Case C-377/20 *European Superleague Company Commission* ECLI:EU:C:2023:521, paras 46–47.

[241] ibid.

[242] ibid, para 44.

[243] Case C-333/21 *European Superleague Company Commission* EU:C:2023:1011, para 124.

this standard when confronted with the complexities of the digital economy, where traditional assumptions about price, output, and market behaviour are increasingly challenged. The aim was not only to describe how the concept of consumer welfare has travelled and transformed, but also to assess its current role and limitations within EU competition law, particularly in light of a shifting enforcement landscape. Several interlinked findings emerge from this analysis.

One of the most significant developments is the phenomenon of historical narrowing. Initially, competition law in both the US and Europe pursued a broad set of public interest objectives. In the US, early antitrust enforcement was animated by concerns over political and structural power, decentralised economic control, and economic fairness. This expansive vision was gradually eroded with the rise of the Chicago School, which redefined consumer welfare as a proxy for total welfare and reduced it to a matter of price effects and output efficiency. This was not merely a refinement; it amounted to a conceptual narrowing that restricted the range of harms considered relevant under antitrust law. As long as prices were low or output increased, market power was tolerated. This intellectual turn profoundly influenced EU competition policy, particularly after the 1990s, when the Commission began modernising its enforcement approach. The introduction of Regulation 4064/89 on merger control marked a pivotal moment in expanding the Commission's institutional power while also reflecting a growing openness to American economic thought. Later reforms, such as Regulation 1/2003 and the 2009 Guidance on Article 102 TFEU, further entrenched this economics-driven approach. Yet, as this chapter has demonstrated, the EU never fully abandoned its more pluralistic roots, and consumer welfare was integrated into its legal architecture, but not without resistance, reinterpretation, and compromise.

Compounding this historical shift is the persistent ambiguity that continues to surround the consumer welfare standard. Though the term is now firmly embedded in both US and EU competition discourse, it conceals profound conceptual disagreement. At one end of the spectrum lies a narrow view associated with the Chicago School, focused almost entirely on short-term price and output metrics. At the other lies a more expansive understanding that incorporates non-price dimensions such as quality, innovation, and consumer choice, sometimes even touching on broader social goals like fairness or distributive justice. In the EU, no single interpretation has achieved authoritative status. Soft law documents such as the Commission's Article 102 Guidance suggest a preference for the broader view, and certain General Court judgments appear to affirm it. Nevertheless, no uniform definition has emerged

in formal legal doctrine. This continuing ambiguity has a dual effect: it affords flexibility to adapt to new challenges, but it also weakens legal clarity and consistency. The issue becomes especially acute when novel business models challenge the assumptions underpinning existing welfare-based analysis.

These conceptual difficulties come into sharper relief in the context of the digital economy. The structural features of digital markets, including zero-price models, platform intermediation, data-driven monetisation, and algorithmic sorting, expose the inadequacies of a standard focused mainly on price. Many dominant platforms offer services that are ostensibly free to users, yet they extract substantial costs in terms of privacy, data autonomy, and reduced consumer choice. Such harms often elude measurement within a traditional consumer welfare framework. Even a broader conception struggles to provide clear metrics for evaluating the non-price dimensions of harm that are endemic to digital markets. Meanwhile, the pace and scale of damage in these markets, amplified by tipping points and network effects, can outpace regulatory intervention. Waiting for observable harm, as the consumer welfare standard often demands, may mean arriving too late. As a result, reliance on this framework alone can render enforcement reactive and insufficiently attuned to the structural risks posed by digital platforms.

The judicial interpretation of consumer welfare within the EU legal system reflects a further layer of complexity. Though the concept now appears in a growing number of cases, including *Post Danmark, Intel, Google Shopping, and Google Android,* the actual decisions often focus less on measurable harm to consumers and more on preserving market structure and competitive fairness. This suggests a certain ambivalence. On the surface, the courts echo the language of modern enforcement, aligning with Commission rhetoric and international trends. Yet in substance, their judgments continue to privilege traditional European values: safeguarding the integrity of competitive processes, promoting pluralism, and ensuring open market access. This duality reveals that consumer welfare, while increasingly central in EU competition law discourse, has not supplanted the older doctrinal commitments. Instead, it coexists with them, resulting in a hybrid framework that borrows from US style economic rationality without fully abandoning European legal traditions. The EU's consumer welfare model, in this sense, remains broader and more normative than its American counterpart, though still elusive in definition.

Taken together, these observations suggest that while the consumer welfare standard remains a key reference point, it cannot serve as a standalone tool, particularly in the context of digital

markets. Its conceptual ambiguities, reliance on price-based proxies, and reactive nature limit its effectiveness in addressing the fast-evolving harms characteristic of today's platform-based economy. What is needed is a more robust set of guiding principles, ones capable of capturing non-price harms, structural concerns, and broader social objectives without abandoning analytical rigour.

In light of these limitations, the EU has begun to chart a new course. The DMA represents a pivotal moment in this transformation. Rather than relying exclusively on retrospective harm assessments grounded in consumer welfare, the DMA proactively targets structural risks through its dual emphasis on fairness and contestability. This regulatory shift is not just procedural; it marks a move toward a competition regime that anticipates rather than reacts to harm. The next chapter turns to this evolving framework. It explores how fairness is being operationalised in EU law and how the DMA seeks to institutionalise concerns that have long remained at the margins of traditional welfare analysis. In doing so, it highlights a new direction for EU competition enforcement, one that moves beyond the confines of price and output, toward a more inclusive and forward-looking approach that speaks to the realities of the digital age.

CHAPTER 4: GATEKEEPERS, FAIRNESS AND THE CONCURRENT ENFORCEMENT DILEMMA: A CRITICAL ASSESSMENT OF THE DMA

4.1 Introduction

As demonstrated in the preceding chapter, the consumer welfare standard remains not only conceptually ambiguous but also increasingly ill-suited to the challenges posed by digital platform markets. In markets where many core services are offered at zero monetary cost, traditional price-based analytical tools fail to detect the full breadth of competitive harm. This deficiency is particularly pronounced in the platform economy, where user lock-in, data extraction, self-preferencing, and algorithmic discrimination often cause harm that escapes the narrow confines of consumer surplus analysis. These limitations have led to a growing search for alternative normative benchmarks, tools that can illuminate harms rendered invisible by price metrics.

One such benchmark that has gained increasing prominence is fairness. What initially appeared in isolated references in the legal and policy discourse has gradually taken a more central role. In several landmark investigations, the Commission, courts and various NCAs have characterised the conduct of dominant firms as unfair. These references were not merely rhetorical. Rather, they signalled a deepening institutional discomfort with the adequacy of traditional consumer welfare metrics and a corresponding attempt to articulate a more comprehensive framework capable of capturing exclusionary and exploitative dynamics endemic to digital platforms. In this evolving landscape, fairness emerged as a key conceptual resource, helping to bridge the gap between observable harms and enforceable standards.

The DMA codifies this normative shift. It does so by elevating fairness and contestability to self-standing regulatory objectives, decoupled from the economic efficiency paradigm that has traditionally underpinned competition law. In place of reactive, ex-post intervention grounded in demonstrable harm, the DMA introduces a set of proactive, ex-ante obligations imposed on designated gatekeepers. These obligations aim to address structural risks before they crystallise into market failures, thereby rebalancing the asymmetrical power dynamics that characterise

platform ecosystems. Significantly, the DMA does not merely supplement the existing framework; it reframes the institutional logic of digital market governance.

While fairness and contestability are both elevated to core objectives of the DMA, their respective conceptual roles and their relationship require clarification. In the context of the DMA, fairness should not be understood merely as a distributive or moral notion, but as a normative principle aimed at addressing structurally asymmetric power relations between gatekeepers and dependent business users or end users. It operates as a corrective benchmark through which market conduct is assessed, particularly in circumstances where formal competition parameters fail to capture imbalances arising from platform intermediation, data accumulation, and entrenched economic dependency.

Contestability, by contrast, functions primarily as a structural condition of the market. While the concept may be associated in economic theory with models emphasising potential competition and the disciplining effect of market entry, the DMA does not rely on assumptions such as costless entry and exit or the absence of sunk costs.[1] Instead, contestability under the DMA refers to the prevention of durable market foreclosure by gatekeepers, with a view to preserving real and effective opportunities for market entry, expansion, and innovation. It is therefore best understood as a regulatory concept shaped by institutional design and enforcement objectives, rather than by abstract market-theoretical premises.[2]

Understood in this way, fairness and contestability are neither synonymous nor competing objectives. Contestability supplies the structural preconditions necessary to mitigate entrenched market power, while fairness provides the normative justification for intervention in situations where such power manifests in unequal bargaining positions or exclusionary leverage. The DMA's regulatory architecture reflects this complementary relationship, positioning contestability as an enabling condition and fairness as a guiding normative benchmark within the broader framework of digital market governance.

Yet fairness, as this chapter contends, did not emerge ex nihilo with the DMA. Its ascent has deeper roots within EU enforcement practice. As will be empirically demonstrated in Chapter

[1] William J Baumol, John C Panzar and Robert D Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich 1982).
[2] ibid.

5, references to fairness had already been percolating through Commission decisions and national authority rulings for over a decade before the adoption of the DMA. The regulation, therefore, does not create a new value system from scratch. Instead, it crystallises normative currents that were already gaining force within the jurisprudence. However, the DMA institutionalises these values in a way that formally situates them outside the classical objectives of competition law. This architectural choice raises important structural and doctrinal questions.

Two systemic risks emerge from this bifurcated enforcement model. First, by presenting fairness and contestability as autonomous goals, distinct from consumer welfare and competitive process, the legislation exacerbates the already persistent uncertainty surrounding the hierarchy of objectives within EU competition law. The question of how these goals relate to one another remains unresolved, and the DMA's separation of fairness as a regulatory aim only deepens this ambiguity. Second, the institutional configuration of parallel enforcement pathways introduces practical complications. The same conduct might trigger simultaneous scrutiny under Article 102 TFEU and the DMA, leading to overlapping investigations, conflicting remedies, and the possibility of double jeopardy. Such procedural frictions threaten to undermine the very coherence the DMA aims to restore.

This chapter undertakes a detailed examination of how and why the DMA positions fairness and contestability as stand-alone benchmarks. It begins by tracing the policy debates and legislative negotiations that led to the adoption of the DMA, particularly the tension between the perceived sluggishness of traditional ex-post enforcement and the demand for faster, more effective intervention in rapidly evolving digital markets. It then maps each core obligation under the DMA onto the established categories of abuse under Article 102 TFEU, highlighting areas of overlap and divergence. This comparative exercise is intended not only to clarify the doctrinal intersections but also to expose the emerging contours of a dual-track enforcement regime.

The chapter concludes with a reflection on the normative and structural implications of placing fairness outside the doctrinal core of competition law. It considers whether such an arrangement risks reproducing the same fragmentation and under-inclusiveness for which the consumer welfare standard has been criticised. In doing so, it lays the groundwork for the empirical analysis of Chapter 5 and the normative argument developed in Chapter 6. Those subsequent chapters will contend that fairness, far from being an external add-on to competition law, should

be reimagined as an integral analytical tool. Properly defined and operationalised, fairness can complement consumer welfare and contribute to a more coherent and effective framework for governing digital-platform conduct in the EU.

4.2 Rationale and Goals of the DMA

4.2.1 The Process Leading to DMA

As analysed in detail in the previous chapter, the Commission has persistently defended the concept of consumer welfare despite the EU courts' old case law practice and the reluctance of the courts to adopt this concept in subsequent proceedings. Subsequently, the Commission's determined stance that the protection of consumer welfare is the main objective of EU competition policy has gradually borne fruit, and the concept has started to be accepted by the EU courts, albeit not as passionately as the Commission.

On the other hand, by 2020, the emergence of a handful of digital conglomerates, their size, economic power and societal impact has led to a global debate on whether and how to rein in big tech, and this debate has echoed in all major competition law jurisdictions, including the EU. In parallel with these developments, the Commission has targeted digital economy-based conduct with a consumer welfare-oriented approach to competition law enforcement, particularly in the context of Article 102 TFEU, by conducting thorough investigations and imposing substantial fines on technology giants. However, although the Commission has continued to wage this legal war against technology companies, the adequacy of consumer welfare-oriented competition law enforcement has been increasingly questioned. The main reason for these questions has been the realisation that, for all their severity, these enforcement activities often have insufficient deterrent effect. Problematic behaviour continued to occur in slightly different forms and under various undertakings or for different services. Indeed, service providers continued to consolidate their position and successfully transferred their market power to neighbouring areas.

It is noteworthy that the main focus of criticism of EU competition law enforcement has been the resource-intensive nature of Article 102 TFEU litigation. The case-by-case approach that characterises consumer welfare-oriented enforcement requires the Commission in each case to

define the relevant market(s), establish dominance, show that the challenged conduct may or is likely to restrict competition, and assess the potential efficiency arguments put forward by the respondent. The practice of the digital economy, which has been very stressful for the Commission, has highlighted the fact that the cases tend to be very large and the procedures are lengthy. Although this process has led to the digital economy being recognised by competition law and a substantial body of knowledge on the subject, it has been strongly questioned whether the current situation is satisfactory from a public interest perspective.

While the digital economy is in full swing, it is observed that up to a certain point, the Commission has stood behind the competition policy based on consumer welfare. The main line of EU competition policy remained that the broad and abstract prohibitions contained in Articles 101 and 102 TFEU were still appropriate for the digital age. As Margrethe Vestager, then EU Commissioner for competition, stated in 2018, "The principles of competition rules apply to every market, to what we know today and what we will see in the future. That is why dealing with digital markets is not really about new rules."[3] However, the subsequent process continued to evolve in a different direction, and a consensus emerged that the existing measures of competition law were insufficient to protect society from various types of harm arising from digital business models.

In this process, the Cremer report[4] and various others[5] have further fuelled the existing debate on market failures in the digital economy and the appropriate antitrust and regulatory responses. These reports, analysed in detail multiple aspects, such as the business models of technology giants, generated growing interest in the GAFAM saga. Although the Cremer report did not

[3] Margrethe Vestager, *'Fair Markets in a Digital World'* (Speech at the Danish Competition and Consumer Authority, Copenhagen, 9 March 2018).

[4] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Report for the European Commission, 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 14 December 2023.

[5] Digital Competition Expert Panel, *Unlocking Digital Competition* (Report for HM Treasury, March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>; Stigler Committee on Digital Platforms, *Final Report* (Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business, September 2019) <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf> accessed 14 July 2024.

provide a definitive answer as to whether competition law or regulation is the most appropriate legal approach to controlling the digital economy, it did favour introducing a new regulatory regime in some cases.[6] This intense concern over the digital economy has galvanised policymakers and shaken the belief that dealing with digital markets requires tools other than a consumer welfare-driven competition law.

Accordingly, the Commission took action in 2020 and envisaged enacting a new competition tool to supplement existing competition law to promote effective competition in digital markets.[7] According to the impact assessment report launched by the Commission, the new competition tool allows for the immediate implementation of remedies in markets that exhibit structural competition problems. In this context, the focus is mainly on problems rather than infringements. In this system, which is designed as a mechanism to support competition law, a market investigation is sufficient for the Commission to intervene in digital conduct, and it is not necessary to establish that competition rules have been violated. This investigatory logic departs from the traditional infringement-based model of Article 102 TFEU enforcement, which requires the Commission to define the relevant market, establish dominance, identify abusive conduct, and demonstrate actual or likely anti-competitive effects in each individual case. By contrast, a market investigation–based procedure enables intervention on the basis of structural features of the market, such as entrenched power or systemic entry barriers, thereby reducing evidentiary burdens, shortening enforcement timelines, and allowing earlier and more targeted remedies in fast-moving digital markets. However, the Commission, which has experienced a rapid shift from the thesis of the adequacy of competition law based on consumer welfare to this system that envisages the practical support of competition law, has experienced another paradigm shift.

The Commission did not base its final proposal on controlling digital markets on Article 103 TFEU, which authorises the Council to adopt regulations or directives that apply to the principles laid down in the EU competition rules. Instead, the Commission chose to base its choice on Article 114 TFEU, which authorises the Council and the European Parliament, as co-

[6] Crémer, Montjoye and Schweitzer (n 4) 52–53.

[7] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a New Competition Tool* (2 June 2020) Ares(2020)2877634 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM:Ares(2020)2877634> accessed 17 May 2023.

legislators, to adopt regulations for the approximation of national law to establish and safeguard the integrity of the internal market.[8] Although this issue examined in detail below, the Commission's decision to pursue this path appears to reflect its intention to avoid directly interfering with the existing consumer welfare-oriented competition law framework. It also signals a recognition of the gradual entrenchment of this approach in the case law of the EU courts. The ambiguity surrounding the role of consumer welfare is further illustrated by the difficulty in clearly defining the objectives of the proposed regulation. This point is revisited in the following sections.

In the final analysis, the Commission favoured a DMA that combines an ex ante regulatory approach and a market research tool in a single instrument. The Commission published its proposal for the DMA on 15 December 2020.[9] 11 months after the Commission published its legislative proposal, the Council published its general position on the DMA. It proposed several amendments to the Commission's first draft.[10] Legislative work on the DMA in the European Parliament was assigned to the Committee on Internal Market and Consumer Protection in November 2021. The Parliament approved the prepared text in the December 2021 Plenary Session and then started negotiations with the Commission and the Council.[11] A provisional political agreement was subsequently reached on 24 March 2022.[12] Parliament and the Council

[8] J Nowag, 'When the DMA's ambitious intentions interact with the EU's constitutional set-up: A future drama in three acts' (2024) 12(2) Journal of Antitrust Enforcement 302.

[9] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* COM(2020) 842 final, subsequently adopted as Regulation (EU) 2022/1925.

[10] Council of the European Union, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) – General Approach* (16 November 2021) 2020/0374(COD).

[11] European Parliament, *Amendments adopted on 15 December 2021 on the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (COM(2020) 842, C9-0419/2020, 2020/0374(COD)) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021AP0499> accessed 18 October 2024.

[12] European Parliament, *Digital Markets Act (DMA): Agreement Between the Council and the European Parliament* (Press Release, 25 March 2022) <https://www.europarl.europa.eu/news/en/press-room/20220325IPR26528/digital-markets-act-agreement-between-the-council-and-the-european-parliament> accessed 4 September 2024.

gave their formal approval to the text in July 2022.[13] The final step in the legislative process was taken in July 2022, enabling the DMA to enter into force. After a six-month transition period, the rules took effect on 2 May 2023.[14]

As can be seen from the DMA's legislative timeline summarised above, the entire process was completed in less than three years. This speed is not common in the EU law-making process. Moreover, the regulation in question is not an update of existing legislation, but the creation of a completely new regulation. Moreover, it is relatively rare to see the Commission building a regime based on autonomous legal concepts completely from scratch.[15] This enthusiasm and bold step of the Commission is also evident from the fact that, as mentioned above, it quickly lost confidence in its ability to control the digital economy through a consumer welfare-orientated competition law. The fact that the DMA was introduced as a result of such a loss of confidence and the desire to quickly regain control can be easily understood from the following statements of Thierry Breton, the then internal market Commissioner, who made a statement after the consensus on the DMA had emerged among the EU bodies: "It used to be the Wild West. Now, that's no longer the case. We're taking back control."[16]

As previously discussed, the DMA primarily seeks to address structural concerns arising from the digital economy. Traditionally, distortions such as those observed in digital markets have fallen within the purview of competition law and have been addressed through its enforcement tools. It is not new for EU law to regulate and control an issue that is dealt with under general law rules, with a regulation, such as the DMA, to be precise, with a sector-specific regulation. Indeed, there are many examples of similar regulations in sectors such as health, IT and energy. In contrast to general legal frameworks such as competition law, regulatory instruments like the DMA explicitly articulate their rationale and objectives. This is particularly important when multiple legal instruments address the same subject matter, as it helps clarify their distinct

[13] European Parliament, *Digital Services: Landmark Rules Adopted for a Safer, Open Online Environment* (Press Release, 5 July 2022) <https://www.europarl.europa.eu/news/en/pressroom/20220701IPR34364/digital-services-landmark-rules-adopted-for-a-safer-open-online-environment> accessed 4 September 2024.

[14] Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (hereafter DMA), Art 54.

[15] Pablo Ibañez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 Journal of European Competition Law & Practice 561, 572.

[16] Nielsen, "EU ends 'Wild West' of Big Tech", EUobserver (25 March 2022).

purposes and scopes. These objectives of regulations often constitute the legal basis for their existence and demonstrate the necessity of regulation. This is no different in the case of the DMA. Indeed, as analysed below, the DMA contains explicit provisions regarding its objectives, especially in its interaction with competition law. The primary justification for this approach in the context of objectives is that various problems may arise if different legal regimes regulate a common subject. As a solution to these potential problems, the DMA is justified in terms of its objectives. The first of these problems is that the principle of ne bis in idem may encounter double jeopardy.
Another potential problem is the risk of marginalisation of general law rules depending on the design and implementation provisions of the sector-specific regulation. In this respect, the following section first examines the possibility of violating the ne bis in idem principle since the digital economy falls within the scope of both competition law and the DMA. Then, the justification of the DMA on the grounds of its objectives and the risk of marginalisation of competition law are also examined.

4.2.2 The right Not to Be Prosecuted and Punished Twice

The rhetoric of the legal basis on which the DMA is established and the different purposes employed in this process have been chosen by considering the issues related to the current approach to the right against double jeopardy. For this reason, the foundations of the principle of non-double jeopardy in general EU law and in the context of competition law in particular, its development in the process and its current state are set out below.

The EU competition law framework has long accepted the possibility of parallel investigations into the same or related infringements, and such practice is neither unusual nor legally prohibited. Multiple investigations of an existing conduct may be based on one of the scenarios where national and Union competition laws coexist, and NCAs and the EU Commission may have separate or joint jurisdiction.[17] The possibility of parallel investigations and sanctions was established by the CJEU in its early judgement in *Walt Wilhelm*. In this case, the court stated that there is no obstacle for the EU Commission and NCAs to investigate and sanction the same

[17] Wouter P J Wils, 'The Principle of Ne Bis in Idem in EC Competition Enforcement: A Legal and Economic Analysis' (2003) 26(2) World Competition 131.

undertaking for the same conduct under article 85 of Treaty establishing the European Economic Community (EEC) (Article 101 TFEU) and national competition law, respectively. It is based on the fact that the Union and national competition rules look at the same conduct from different perspectives.[18] In the same judgment, a limitation was also introduced to this principle. Indeed, it was stated that, once a sanction has been imposed, the acting authority must, as a general requirement of natural justice, consider any previous punitive action in determining any sanction to be imposed.[19] This approach continued to be applied in different cases in the process.[20] The CJEU's approach to the conditions for the application of the principle of non-double jeopardy was applied in the context of EU competition law in *Toshiba*. In this preliminary ruling, it was assessed to what extent the fact that the Slovakian competition authority had already imposed a fine on a conduct that took place in the Czech Republic before it joined the Union, and that the Commission subsequently investigated and sanctioned the same conduct, was compatible with the principle of ne bis in idem. The CJEU found, in line with its previous judgments, that the applicability of the ne bis in idem principle is subject to the triple condition of identity of the facts, identity of the infringer and identity of the legal interest protected.[21] The court's application of the principle of non-double jeopardy in a relatively recent decision, in a manner that preserves the old case law, has been widely criticised. At the core of these criticisms are the allegations that the conditions of the *Walt Wilhelm* case of the 1960s, in which the conditions for applying the principle were set out, do not correspond to the realities of the modern EU competition law system. In this context, it is increasingly recognised that the condition requiring different legal regimes to pursue identical objectives has become less relevant, as Union and national competition laws are now largely aligned, both in substance and in purpose.[22] In the same line, Council Regulation 1/2003 places a strong emphasis on the decentralised application of Articles 101 and 102 TFEU, resulting in increased uniformity in decision-making practices.[23] The criticisms made on these grounds appear to be generally justified, and to argue that different investigations have different purposes for the application

[18] Case 14/68 Wilhelm v Bundeskartellamt EU:C:1969:4, para 10.

[19] ibid 11.

[20] Case C-204/00 *Aalborg Portland A/S v Commission* EU:C:2004:6; [2005] 4 CMLR 4, para 338.

[21] Case C-17/10 *Toshiba Corp v Urad pro ochranu hospodářské soutěže* EU:C:2012:72, para 97.

[22] Baptist Vleeshouvers and Thomas Verstraeten, 'The Postman Always Rings Twice … On the Application of the Ne Bis in Idem Principle in Competition Law' [2017] European Competition Law Review 305, 309–10.

[23] ibid, 308-309.

of the principle of non-double jeopardy would be to significantly reduce the scope of application of the principle of non-double jeopardy on the wrong grounds.

The provisions in the EU Charter of Fundamental Rights (EUCFR) and the European Convention on Human Rights (ECHR) on the place of the ne bis in idem principle in the EU law system have also raised questions about the interpretation of the CJEU, which has adopted a narrow approach in line with its previous case law on the application of the principle in competition law. As such, Article 50 EUCFR precludes the imposition of criminal sanctions for offences for which the accused has been tried and charged in any of the Member States.[24] This provision should be read in conjunction with Article 52(3) of the Charter, which sets out the minimum standard of protection for rights enshrined in the ECHR and common to both the Convention and the Charter.[25] Article 50 Charter should therefore be given the same meaning and scope as that given to the right against double jeopardy by the Convention. In this respect, the European Court of Human Rights (ECtHR) interprets the principle of ne bis in idem very broadly. Accordingly, the principle of non-double jeopardy must be understood as preventing the prosecution or trial for a second offence as long as it arises out of the same or substantially identical facts.[26] The term offence here should not be interpreted as a concept of domestic law but in the light of the requirements for criminal charges under Article 6(1) ECHR.[27] In this context, the concept of a criminal charge encompasses not only definitive allegations of criminal offences which must be decided by a court, but also accusations or allegations which, although not decided by a judicial authority, retain their criminal character. For these reasons, the Court of Human Rights has held that the right against double jeopardy applies where the accused is threatened with new sanctions for events of which he or she has already been convicted, and which have a sufficiently close connection in time and place with the offence.[28]

Notably, the ECtHR's interpretation of the ne bis in idem principle explained above has significantly changed the CJEU's interpretation of the same guarantee in Article 50 Charter in favour of the principle of non-double jeopardy. For example, in its recent *X* judgment, the CJEU

[24] Case C-601/15 *PPU N v Staatssecretaris voor Veiligheid en Justitie* EU:C:2016:84; [2017] 1 CMLR 42, para 45.

[25]Case C-524/15 *Menci v Procura della Repubblica* EU:C:2018:197; [2018] 3 CMLR 12, para 22.

[26] *Mihalache v Romania* App no 54012/10 (ECtHR, 8 July 2019), para 67.

[27] ibid 54.

[28] *Nilsson v Sweden* App no 73661/01 (ECtHR, 13 December 2005) (decision).

held that, under Article 50 EUCFR, a person cannot be prosecuted before a criminal court in respect of an offence for which he has been acquitted or convicted in another Member State of the EU.[29] Moreover, the court confirmed in *Fransson* that the principle of ne bis in idem would preclude not only parallel or successive criminal proceedings but also administrative proceedings concerning the same facts.[30] The CJEU ruled in the same vein in *Garlsson*, where it considered the combined application of criminal and administrative penalties for breaches of obligations imposed on the applicant by financial regulations under the Charter.[31] It found that the fact that parallel investigations into the conduct sanctioned in that case were based on criminal and administrative law amounted to an interference with Article 50 Charter. Accordingly, Article 52(1) Charter provides that any limitation on the exercise of the rights and freedoms recognised must be prescribed by law and must respect the essence of those rights and freedoms. Limitations may only be imposed if they are necessary and genuinely required, i.e. in accordance with the principle of proportionality, to meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[32] Having made these observations, the court considers that the imposition of an administrative penalty on top of the criminal sanction does not comply with the proportionality requirement of Article 52(1) EUCFR and that the regulatory sanction replicates the penalty already imposed on the applicant by the criminal courts.[33]

The CJEU's more recent judgements on the application of the ne bis in idem principle in the context of Charter Article 50 EUCFR, rather than its earlier case-law, have been considered as a more active application of the principle.[34] In this respect, it is stated that it would be more appropriate to apply the principles determined in the light of the cases explained above, rather than the strict principles set forth in decisions such as *Walt Wilhelm* and *Toshiba*.[35] It is conceivable that the imposition of heavy financial penalties with a sufficiently severe and

[29] Case C-638/16 *PPU X v Belgium* EU:C:2017:173, [2017] 3 CMLR 15, para 51.

[30] Case C-617/10 *Åklagaren v Fransson* EU:C:2013:105, [2013] 2 CMLR 46, paras 34–36.

[31] Case C-537/16 *Garlsson Real Estate SA v Consob* EU:C:2018:13, paras 1–3.

[32] ibid.

[33] ibid 59-61.

[34] Arianna Andreangeli, 'The Digital Markets Act and the enforcement of EU competition law: some implications for the application of articles 101 and 102 TFEU in digital markets' (2022) 43 European Competition Law Review 11.

[35] ibid.

repressive purpose may be considered to be of a criminal nature, according to the court's judgments having regard to the Charter. In this context, in the *Garlsson,* the CJEU went beyond the limits of the traditional, clearly strict reading of the requirement of ne bis in idem, which also takes into account the common purpose, relying on the triad of the conditions of necessity, legality and proportionality in a democratic society set out in Article 52(1) EUCFR.[36]

The CJEU's innovative approach to interpreting the ne bis in idem principle was not limited to the above cases. In *Menci*, directly inspired by the ECHR, the CJEU found that any limitation of the ne bis in idem principle must be provided for by law. In this respect, it was found that it was not sufficient for domestic law to sanction the possibility of repetition of proceedings explicitly, but also to set out comprehensively the conditions governing repetition, thus emphasising the necessity of protecting the essence of the right against double punishment.[37] In that case, the Court analysed in detail the conditions it had set out, in particular the existence of a coordination mechanism for the joint application of criminal and administrative proceedings and, in the case of two sanctions, whether the sanctions were excessive and disproportionate.[38] This broader interpretation of the principle of non-double jeopardy was reiterated by the court in the context of competition law in the recent *bpost* decision of 2022. In that decision, the court assessed the legality of imposing competition sanctions in a case where the investigated undertaking was already subject to an investigation by the competent sector regulator.[39] In the decision, the question of whether the traditional approach to ne bis in idem in *Walt Wilhelm* can be applied, in particular, whether the identity of the protected objective should be considered as a requirement, and therefore whether new sanctions for the same conduct are permissible under competition law, was discussed. The court has recognised the applicability of the ne bis in idem principle to concurrent proceedings which, although not considered criminal in domestic law, have a criminal essence under the criteria of the intrinsic nature of the offence and the gravity of the penalty to which the person concerned is likely to be subjected.[40] Parallel to its recent proceedings, the court examined the legality of the concurrent proceedings in question in the light of Article 52(1) Charter, namely on the basis of

[36] Michiel Luchtman, 'The ECJ's Recent Case Law on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order' (2018) 55 Common Market Law Review 1717, 1734–35.

[37] *Menci v Procura della Repubblica* EU:C:2018:197, para 38.

[38] ibid 55.

[39] *bpost SA v Autorité belge de la concurrence* (Case C-117/20) EU:C:2022:202 [2022] 4 CMLR 10, paras 2–3.

[40] ibid 25.

the triad of requirements of legality, legitimate aim and necessity in a democratic society.[41] The court also found that a legitimate interest can be protected against the principle of non-double jeopardy only if the law foresees the possibility of repetition of proceedings and sentences under different legislation.[42] The court recognised that different investigations conducted in the light of these principles protect different objectives. It added, however, that the double jeopardy of these concurrent proceedings may allow for the repetition of sanctions for the same conduct, as long as they do not undermine the essence of the right against double jeopardy and, in particular, do not impose a disproportionate burden on the accused.[43] In this respect, it stressed that the national court should take into account factors such as the existence of rules ensuring coordination between the competent authorities, a sufficiently close time frame for a final decision to be taken and the need to take into account other previous penalties for the same conduct when imposing a sanction.[44] In sum, determining whether each set of proceedings pursues different legitimate policy objectives constitutes another essential element of the test of the necessity in a democratic society of interfering with the rights of the accused under Article 50 EUCFR.[45]

The evolution of the conditions for applying the principle of ne bis in idem has been summarised above. As discussed, the early CJEU case law relied on a rather formalistic set of criteria. Over time, however, the court's approach has become more aligned with the jurisprudence of the ECtHR, particularly in light of the EUCFR. In particular, the recent *bpost* judgment has given the conditions for applying the principle a clearer and more modernised view, considering the harmonisation of EU competition law. Nevertheless, the judgment retains the issue of determining whether different investigations pursue different legitimate policy objectives, which was included in the previous case law. This broader application of the principle will nonetheless have important implications for applying the DMA in conjunction with both EU and national competition law. As will be discussed below, the DMA endeavours to provide a solid basis for regulation by including explicit provisions on these interactions.

[41] ibid 40-41.

[42] ibid 43.

[43] ibid 49.

[44] ibid 51.

[45] ibid 55.

4.2.3 Complementary Nature and Objectives of DMA

4.2.3.1 Positioning of the DMA

As discussed in the previous section, the CJEU has significantly softened its traditionally strict interpretation of the ne bis in idem principle in recent rulings, bringing it largely into line with the case law of the ECtHR. In particular, the court's interpretation of ne bis in idem in the 2022 *bpost* reflects a notable shift towards a more innovative and human rights-oriented approach. In that case, the court decided whether it is compatible with the ne bis in idem principle for a national competition authority to re-impose a fine on a commercial behaviour previously investigated and fined by a sector regulator. In this judgment, which is detailed in the above section, the court, although adopting a more modern approach than in its previous case-law, found that parallel investigations are permissible to the extent that they are mandated by separate laws pursuing different legislative objectives. The court found that the objective of the sectoral rules in question was the liberalisation of the internal market for postal services and considered them to be distinct from, but complementary to, the objective of competition law.[46]

Although this ruling significantly broadens the conditions under which the principle of double jeopardy may apply, it also opens the door to duplicate investigations and double punishment. This is particularly true in cases where different legal regimes are deemed to pursue distinct policy objectives. While this jurisprudence of the court allows sector-specific regulations, including the DMA, to be applied in a stand-alone manner, the CJEU's broad interpretation in favour of non-double jeopardy also poses a significant danger for such regulations. This is because the DMA is framed by a wide network of legal instruments with the potential for simultaneous application. In the context of regulating digital markets, Articles 101 and 102 TFEU, along with national competition laws, play a direct role within this overlapping framework.

For this reason, the court's recognition of differing legal purposes appears to have been fully leveraged in shaping the legal foundation of the DMA. This is primarily evident from the legal basis on which the DMA is based. As a matter of fact, the Regulation was enacted on the basis

[46] ibid 43-50.

of Article 114 TFEU instead of Article 103 TFEU, which is for the enforcement of competition provisions, and the DMA was evaluated on a different legal ground from competition law. This logic is also reflected in the Recital of the Regulation.

Recital 11 DMA makes it clear that the objectives of regulation are different from those of competition law. Accordingly, the stated aim of the DMA, as distinct from preserving undistorted competition in any market, is to ensure that the markets in which gatekeepers operate are and remain contestable and fair, irrespective of the actual, probable or presumed effects of a particular gatekeeper's behaviour.[47] Thus, it emphasises that the legal interests protected by DMA are different. Nevertheless, the provision does not contain a clear statement of the substance of this difference of purpose, which is expressed in a very straightforward manner.

Recital 11 explicitly refers to the definitions in the Commission's Guidance and Guidelines to Articles 101 and 102 TFEU. This clearly shows that the Commission considers competition law to be directly indexed to consumer welfare. It should be noted that this interpretation of the DMA has also been appreciated by scholars who argue that the sole purpose of EU competition law is consumer welfare, and that the DMA objectives stated in the Recital are not really relevant for competition law, and that they are, at best, anachronistic objectives of competition law.[48]

Recital 11 DMA also makes clear the relationship between regulation and competition law. Accordingly, the DMA nominally states that it aims to complement competition law enforcement.[49] In the same direction, Recital 10 DMA clearly states that the Regulation is intended to complement competition law enforcement and that this does not preclude the application of Articles 101 and 102 TFEU, as well as national competition law legislation.[50] In the meantime, Article 1(6) DMA confirms that the application of the regulation is without prejudice to the application of EU and national competition law. Accordingly, a gatekeeper's

[47] DMA, Recital 11.

[48] Anne C. Witt, 'The Digital Markets Act – Regulating the Wild West' (2023) 60 Common Market Law Review 625, 650.

[49] DMA, Recital 11.

[50] DMA, Recital 10.

behaviour subject to DMA is not immune from liability under Articles 101 and 102 TFEU or its equivalent in national law.[51]

When considered alongside the objectives of the regulation, these provisions, defining the relationship between the DMA and both Union and national competition law, clearly establish a legal basis for the DMA to be applied concurrently with existing competition law. This framing of the DMA is intended to pre-empt objections regarding its implementation and enforcement under the principle of non-double jeopardy.

4.2.3.2 Goals of DMA

As mentioned above, Recital 11 DMA outlines the regulation's primary aim: to ensure that markets where gatekeepers operate remain competitive and fair, regardless of any misconduct or structural changes resulting from corporate reorganisation. In addition, Article 1(1) DMA expresses the same concepts characterised as objectives. Accordingly, the objective of the Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring competitive and fair digital markets throughout the EU.[52] The Recitals also provide guidance on the meaning and scope of the core objectives, fairness and contestability, referred to throughout the Regulation. Accordingly, contestability relates to the ability of undertakings to overcome barriers to entry and expansion and to challenge a gatekeeper on the merits of their products and services.[53] The concept of unfairness is also explained in the Recital. This concept is defined as an imbalance between the rights and obligations of business users where gatekeepers gain a disproportionate advantage.[54]

The regulation does not clearly specify the types of competitive dynamics in digital markets to which its objectives apply. However, the competitive relationships addressed by the DMA's objectives can be broadly categorised into three types. Such a distinction is necessary for a clearer understanding of the obligations imposed by the DMA. Inter-platform competition can be mentioned as one competitive situation that DMA regulates. The competition here is usually

[51] DMA, Art 1(6).

[52] DMA, Art 1(1).

[53] DMA, Recital 32.

[54] DMA, Recital 33.

between providers of a particular core platform service (CPS). In addition, inter-platform competition between different CPS providers may also occur. In line with its contestability objective, the DMA primarily seeks to encourage the entry of new competitors into a given service area, rather than facilitating the expansion of existing CPS providers into adjacent services. Accordingly, the DMA's obligations are also intended to limit the ability of gatekeepers to leverage their power in one CPS to gain dominance in another. Another competitive situation regulated by the DMA is intra-platform competition. This type of competition occurs between commercial users of a core platform service. In addition, gatekeepers competing with their own users as a result of vertical integration tendencies are also within the scope of intra-platform competition. Accordingly, various obligations of the DMA are intended to prevent distortions in this type of competition. Finally, another competitive situation regulated by the DMA can be called off-platform competition. This type of competition may occur between gatekeepers and third parties for interests outside a particular CPS. This type of competition is subject to the DMA because the regulation recognises the conglomerate corporate structure of gatekeepers.[55] For example, gatekeepers on online marketplaces offering fulfilment and delivery services or payment services may compete with third parties. Accordingly, a relatively small number of DMA obligations target distortions of such competition.

However, a closer examination of these obligations reveals the absence of any clear distinction or categorisation in terms of their underlying purposes. Given the potential for future objections based on the principle of non-double jeopardy, as previously discussed, it would have been reasonable for the DMA to explicitly categorise the purposes of its obligations. In order to avoid the constraints of this principle, the DMA stipulates that its intervention must be proportionate in accordance with the case law of the courts and clearly defines its objectives in this respect, which is not common in competition law. Given the potential for future objections based on the principle of non-double jeopardy, as previously discussed, it would have been reasonable for the DMA to categorise the purposes of its obligations explicitly. Beyond clarifying the alignment of each obligation with the DMA's stated objectives, it is also crucial to assess whether these objectives genuinely differ from those of traditional competition law. This assessment will inform whether the ne bis in idem principle, as discussed above, should apply. For these reasons, the obligations imposed by the DMA will be analysed below in the context

[55] DMA, Art 3(8).

of the different objectives introduced by the Regulation and their equivalents in competition law.

As stated above, there is no clear information on which provision is shaped for which purpose in the DMA, nor are the DMA obligations categorised in terms of their purpose. In this respect, the DMA seems to have adopted a different attitude from competition law. In other words, there is no clear distinction between the main objectives of the DMA, namely fairness and contestability, and their counterparts in competition law, namely the prevention of exclusionary and exploitative behaviour, or an attitude such as giving more weight to a group, which exists in competition law.[56] On the contrary, the DMA emphasises that their objectives are intertwined.[57] In this logic, through fairness and contestability, the DMA aims both to increase the ability and incentive of firms to compete and to promote competition by ensuring that they receive a greater share of the value derived from their activities. This is even more evident in some of the DMA's obligations. It may be the case that a fairness-motivated obligation also contains an equal or close motivation for contestability, or vice versa. For example, an obligation to share data with any willing third party necessarily has distributional effects, as well as creating opportunities for competitors to compete and expand their activities to the detriment of gatekeepers. Similarly, the ban on self-preferencing seems to serve two main objectives of the DMA at the same time. On the one hand, it seeks to prevent competitors from increasing their costs, while on the other hand, it also raises concerns about rent redistribution.

The main reason is that the regulation aims not only to protect competition but also to reshape digital markets and to ensure a more equitable distribution of the benefits they generate. While this hybrid approach of the DMA may have advantages, it will also have various and serious disadvantages, especially if the DMA is challenged in the context of the principle of non-double jeopardy after a certain period of implementation. Interestingly, despite its hybrid design, many DMA provisions still align closely with the classical objectives of competition law. Most of these obligations correspond to Article 102 TFEU's approach to exclusionary or exploitative behaviour. However, among the obligations introduced in the DMA, especially those shaped around the concepts of unfairness and transparency, have an innovative approach compared to the categories of exclusionary or exploitative behaviour considered in the competition law

[56] DMA, Recital 7; DMA, Art 1(1).

[57] DMA, Recital 34.

system. In light of the above, although the DMA's obligations are designed to serve both of its stated objectives, their alignment can be categorised as illustrated in Table 1 below.

Table 1: Alignment of the DMA Objectives with its Obligations

DMA Goal	Obligation	Editing Logic
Fairness	Art 5(3)	Ensuring the prohibition of MFN
	Art 5(4)	Ensuring the right to highlight offers via alternative channels
	Art 6(9)	Ensuring data portability
	Art 6(13)	Ensuring proportional termination
	Art 5(7)	Ensuring no additional registrations
	Art 5(8)	Ensuring no additional registrations
	Art 5(5)	Providing access to services outside the platform
	Art 6(10)	Providing access to produced data
	Art 6(6)	Providing the ability to change services on the platform
	Art 5(9)	Ensuring advertisers are informed about prices and fees
	Art 5(10)	Ensuring publishers are informed about prices and fees
	Art 6(8)	Ensuring access to performance assessment methods
	Art 6(12)	Providing FRAND access to the platform
	Art 5(6)	Ensuring guaranteed access to courts and public authorities
	Art 14	Ensuring transparency in informing the relevant authorities
	Art 15	Ensuring transparency in informing the relevant authorities
Contestability	Art 6(2)	Prohibiting the use of non-public data
	Art 6(3)	Enabling removal and allowing default setting
	Art 6(5)	Ensuring the prohibition of self-preferencing
	Art 5(2)	Limiting the exploitation of scale and scope economies
	Art 7	Organising horizontal interoperability
	Art 5(7)	Ensuring segregated access to the services of business users
	Art 5(8)	Ensuring segregated access to the services of business users
	Art 6(4)	Ensuring that side loading is permitted
	Art 6(7)	Ensuring vertical interoperability
	Art 6(11)	Providing access to search data by other search engines

4.2.3.2.1 Contestability Driven Obligations

Some of the contestability-oriented obligations in the DMA contain the most radical obligations of regulation. The main reason for this is that the relevant digital economy market characteristics to be controlled are seen as wild. Accordingly, the relevant obligations are designed in a very generous manner to smooth out the dynamics of the functioning of the relevant market. The regulation targets network effects and returns to scale and scope. In the context of targeting network effects, the DMA's provisions on interoperability come to the fore. According to Article 7(1) DMA, a provider of number-independent interpersonal communication services that qualifies as a gatekeeper must ensure interoperability between the core functions of its services and those of any other provider offering, or intending to offer, such services within the Union. Upon request, the gatekeeper must also provide, free of charge, the necessary technical interfaces or equivalent solutions to facilitate interoperability. At least the main, if not all, features of the gatekeeper's relevant service should be made available to competitors, to prevent tipping in favour of the gatekeeper in the relevant market resulting from network effects. Article 7(2) provides for a phased implementation process. Following the designation of the platform as a gatekeeper, only basic functionalities should be made interoperable (end-to-end text messaging, sharing of images, voice messages, video and other attached files between two individual end users). In the following two years, interoperability should be provided for end-to-end text messaging within groups of individual end users and for sharing images, voice messages, video and other attached files between a group chat and an individual end user. Within four years, the gatekeeper should provide interoperability for end-to-end voice and video calls between two end users and between a group chat and an individual end user. This intervention's ultimate benefit is enabling other players to benefit from the gains of a service that has already achieved its current position through network effects. In this context, this competitiveness provision also has a fairness-oriented reference to the distribution of benefits in the relevant market.

Similarly, certain provisions that prevent gatekeepers from leveraging their structural advantages are particularly significant in addressing issues related to economies of scale and scope. Such provisions, unlike other provisions of the DMA, are not substantially similar to competition law. For example, according to Article 5(2) DMA, as long as data is part of the monetisation strategies of firms in their core business, it prevents these firms from taking advantage of economies of scale and scope. In other words, the utilisation and processing of the

data owned by firms is restricted. This provision, which aims to increase contestability in the relevant market, also has a hybrid structure and seems to serve the fairness purpose of the regulation. This is because the same provision prohibits the merging of personal data from different services and the use of such data between different services if the end-users do not give consent in the sense of other relevant provisions of the DMA or if they are not given a choice. Data may also not be merged through the automatic login of end-users to different gatekeeper services. However, all these restrictions can be overridden if the end-user gives consent. In this context, it can be said that the fairness-oriented aspect of this provision aims to increase the costs of end-user profiling for technology giants. Article 5(2) DMA has even more fairness-oriented elements, which can be justified by restricting exploitative behaviour in the context of competition law.

Accordingly, a gatekeeper may not process personal data from third-party services to provide online advertising services without user consent. This restriction appears to be aimed at combating what is typically called targeted advertising. That is, online user activity is known to generate and enable access to personal data that can be employed to serve adverts to users. While this can lead to a more efficient use of advertising resources, it can also feel intrusive to users and create a sense of vulnerability.[58] It should be noted that the intervention with this targeted advertising practice, a well-known business model, was also a subject of discussion during the preparation process of the DMA. Although there was no provision on this issue in the first draft, and the relevant provision in the final version of the DMA does not directly cover targeted advertising, Article 5(2) includes the obligation to target these behaviours. However, some of the issues regarding the implementation of this obligation are reflected in Recital 37, not in the relevant Article. Accordingly, a less personalised but qualitatively equivalent alternative should always be offered by the gatekeeper to those users who do not consent.[59]

In addition to the motivation mentioned above to control market characteristics, various provisions of the DMA also aim to increase contestability, in particular by intervening in the business models of the gatekeepers operating an ecosystem. In this context, not opening certain ecosystem levels to third-party business users is a standard business strategy in digital markets.

[58] Beata Mäihäniemi, 'Enhancing Autonomy of Online Users in the Digital Markets Act' in Annegret Engel, Xavier Groussot and Gunnar Thor Petursson (eds), *New Directions in Digitalisation* (Springer 2024) 165.

[59] DMA, Recital 37.

The primary motivation for such strategies is usually that gatekeepers want exclusive access to the material value generated by the relevant ecosystem. However, closing certain levels of the ecosystem to third parties may also be adopted to maintain the overall quality level of the ecosystem. The DMA's interoperability obligations, which challenge such business models, are identical to the prohibition of exclusionary abuses in current competition law practice, which is intended to enhance contestability in the digital economy. The DMA's obligations towards gatekeepers who adopt them are noteworthy. Firstly, the DMA obliges gatekeepers to allow the installation and effective use of third-party applications and app stores.[60] For example, Apple can no longer explicitly refuse to make app stores other than its own Apple App Store available on iOS devices. Along the same lines, ensuring that mobile apps are also accessible outside the app store operated by the gatekeeper is also regulated by the DMA.[61] Moreover, the DMA dictates vertical interoperability requirements and recognizes that software and hardware developed by third-party providers have the right to communicate effectively with those of gatekeepers.[62]

Instead of guaranteeing third parties' access to the ecosystem, the DMA sometimes forces gatekeepers to share specific values directly with them. In this context, the DMA obliges online search engines to provide search-related ranking, query, click and view data to a third party.[63] This obligation is also hybrid and serves the regulation's fairness objective by forcing gatekeepers to compete on equal terms with competitors offering search engine services to end users. Finally, in pursuit of the contestability objective, the DMA reflects an approach that aligns more closely with the prohibition of exclusionary conduct under competition law than with a purely sector-specific regulatory model. In other words, the DMA contains provisions preventing gatekeepers from using their position in CPSs to gain an advantage in different service areas. Therefore, linking a CPS with identification services, web browsers, search engines, and payment services is prohibited[64], as is linking two or more CPSs in the same direction.[65]

[60] DMA, Art 6(4).

[61] ibid.

[62] DMA, Art 6(7).

[63] DMA, Art 6(11).

[64] DMA, Art 5(7).

[65] DMA, Art 5(8).

There are also various DMA provisions for gatekeepers that are not as innovative as the above and are intended to increase contestability by restraining technology giants in the context of the terms and conditions of their relationships with business users and end users. These provisions aim to control the competitive advantages of the gatekeepers, which are mainly vertically integrated, and through this control to reduce the barriers for others to compete against them. In this respect, the DMA's prohibition on self-preferencing stands out. Accordingly, gatekeepers are prohibited from giving advantages to their activities in neighbouring segments when ranking and indexing products and services.[66] More strikingly, the same obligation explicitly pursues the regulation's fairness objective. Indeed, this obligation requires the relevant gatekeepers to apply transparent, fair, and non-discriminatory criteria when listing their own and others' products and services.[67] In particular, the same provision imposes additional obligations regarding data use in this context, fulfilling both contestability and fairness objectives. For example, gatekeepers may not use non-public data from their core platform services to gain a competitive advantage over commercial users in a neighbouring segment.[68] Article 6(3) DMA explicitly targets gatekeepers' status quo advantages. Accordingly, gatekeepers must make it technically feasible for end users to uninstall any software application in their operating system.[69] The obligation includes, but is not limited to, requiring gateway providers to allow and technically enable end users to easily change default settings or redirect to the original product or service.[70]

4.2.3.2.2 Fairness Driven Obligations

As explained above, fairness, one of the DMA's main objectives, is in most cases a natural consequence of or complementary to the other objective of ensuring contestability in digital markets. However, certain obligations under the DMA are explicitly designed to achieve fairness, with contestability expected to follow as a natural outcome of their implementation. Moreover, some of the fairness-related obligations in the DMA are far from the provisions

[66] DMA, Art 6(5).

[67] ibid.

[68] DMA, Art 6(2).

[69] DMA, Art 6(3).

[70] ibid.

prohibiting exploitative or exclusionary abusive behaviour in competition law. They can at least be characterised as more unique.

Some provisions aimed at increasing cross-platform competition are hybrid, oriented not directly towards contestability but towards fairness. In this context, the DMA aims to eliminate the impositions on the grounds of equality imposed by gatekeepers for commercial users to interact with end-users elsewhere. In this line, the DMA prohibits provisions restricting commercial users from selling their products or services to end-users on other platforms or in their own direct online sales channels on better terms in their favour, other than through the gatekeeper's platform.[71] Building on this logic, the Regulation also prohibits anti-steering provisions that limit commercial users' ability to connect with end users outside the gatekeeper's platform.[72] This obligation is particularly relevant in cases of intra-platform competition. A scenario where the gatekeeper is a multi-sided platform may be an example of a situation where this obligation would be effective. For instance, in the case of an app store, the platform acts as an intermediary between app developers and end users, while simultaneously competing with these developers through its own proprietary applications. In such a case, app developers would not be able to offer end users services related to their apps, such as premium usage options, at a more favourable price on their own websites in the absence of Article 5(4) DMA.

Some of the DMA's fairness-oriented obligations are more original and less inspired by competition law than others. These provisions are shaped around the concept of unfairness, so they have a more specific character. In this context, the DMA deals with restrictions on users' freedom to leave a gatekeeper's CPS. Accordingly, gatekeepers are obliged to allow users to move the data provided to them or generated during the use of their service to another location.[73] This obligation is intended to prevent or weaken gatekeepers from coercively imposing certain services on businesses and end-users. Along the same lines, gatekeepers are also prohibited from making the termination conditions of their services disproportionate or complicated to enforce.[74] This provision is intended to prevent user abuse by imposing unfair conditions.

[71] DMA, Art 5(3).

[72] DMA, Art 5(4).

[73] DMA, Art 6(9).

[74] DMA, Art 6(13).

The same motivation of the DMA concerning unfairness can be seen in the various obligations imposed to ensure that users' free choice is preserved. The obligations on tying prohibitions in Articles 5(7) and 5(8) are also intended to prevent the coercive imposition of certain services on businesses and end-users. Likewise, various obligations such as Articles 5(5), 4 and 6 of the DMA, which focus on software applications and software application stores, aim to protect free user choice. For example, Article 5(5) prohibits gatekeepers of an app store service from preventing end-users who receive an upstream service from the app developer's own website from using that service in the relevant application. For instance, under this provision, Apple may no longer prevent Spotify users who have purchased a subscription outside the Spotify iOS app, hence, outside Apple's ecosystem, from using that subscription within the Spotify app on iOS devices.

Furthermore, the DMA wants to pass on to commercial users a fair share of the data resulting from their interactions with gatekeepers. Accordingly, Article 6(10) provides that a gatekeeper may not withhold from commercial users data that they (or their end users) provide or generate when using any of the gatekeeper's services. Finally, as a further obligation of similar logic, gatekeepers may not restrict the ability of end-users to switch between and subscribe to different applications and services accessed through their CPS.[75] As an example, Apple will not be able to prevent iPhone users from subscribing to a banking application other than the banking application with which Apple may have an exclusive agreement. Although the focus of all obligations in this context is the fairness objective of regulation, these provisions are not very different from the regulatory logic of exclusionary provisions in competition law.

Some other obligations, where the realisation of fairness is the main objective again, include transparency-related concerns. This is reflected in the issues governing the relationship between gatekeepers, advertisers, and publishers. In this context, Articles 5(9) and 5(10) DMA require gatekeepers to provide daily information on prices and charges free of charge, in favour of the weaker party. The primary purpose of the provisions is to ensure transparency for the benefit of business and end users. Similarly, the burden is on gatekeepers to provide access to performance measurement tools and data to enable business and end users to conduct their

[75] DMA, Art 6(6).

independent analyses of the advertising inventory.[76] These obligations encouraging transparency also provide indirect controls against negative exclusionary effects. Increased transparency in the provision of advertising intermediation services will enable advertisers and publishers to compare alternative advertising platforms and make more informed decisions about which one to use.

There are a number of other obligations where the fairness objective of regulation manifests itself, particularly in terms of the redistribution of power or output. For example, when it comes to business users' access to software application stores, online search engines and social networking services, gatekeepers must ensure that this access is provided on fair, reasonable and non-discriminatory terms. According to this provision, gatekeepers may not treat different commercial users differently, at least directly.[77] Concerning fairness, transparency should be ensured at the point of access and dispute resolution, and gatekeepers should provide for this in the access conditions.[78] The weakness of the causal link of obligations in the context of unfair and non-transparent conduct with a competitive rationale seems to have caught the legislator's attention, which is clarified in Recital 72.

According to Recital 72, transparency puts external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or start-ups will not have access to data to the same extent and depth and on a similar scale. Increased transparency should allow other undertakings providing core platform services to better differentiate themselves by using superior privacy guarantees. Finally, concerns about transparency are reflected in the DMA in a context different from the above. Even though the DMA, by adopting an ex-ante approach, seeks to bypass the more economic approach of competition law, it could not ignore that investigating market realities is still crucial for its implementation and adaptation. Accordingly, various obligations have been introduced to ensure transparency between gatekeepers, the Commission, and the courts. To this end, gatekeepers are prohibited from preventing end-users from contacting the EU authorities on the grounds of non-compliance with the relevant EU legislation.[79] In the same respect, the Regulation obligates gatekeepers to

[76] DMA, Art 6(8).

[77] DMA, Art 6(12).

[78] ibid.

[79] DMA, Art 5(6).

submit to the Commission an independently audited explanation of the consumer profiling techniques they use.[80] Finally, gatekeepers must inform the Commission of any merger or acquisition where the target offers a digital service or enables data collection.[81]

4.3 DMA's Approach to Structural Failures

The DMA was designed as a direct response to the persistent structural failures of EU competition law in addressing the dynamics of the digital economy. These failures include protracted enforcement processes, disproportionately high intervention standards, and the limited effectiveness of remedies in restoring market contestability once harm has occurred. This section examines how the DMA attempts to remedy such deficiencies by reshaping the framework of intervention. In doing so, it highlights the extent to which the Regulation reflects both continuity with and departure from the logic of Article 102 TFEU.

4.3.1 Background of DMA Implementation Standards

Understanding the DMA's implementation standards requires an appreciation of the legal and policy debates that shaped its drafting. The Regulation was informed by numerous reports, enforcement experiences, and academic critiques emphasising the limitations of ex post competition law in digital markets. These debates revealed how fact-intensive analyses, lengthy proceedings, and uncertain outcomes had undermined the effectiveness of Article 102 TFEU in practice. Against this background, the DMA introduced new concepts such as gatekeepers and core platform services, coupled with lower intervention thresholds, in an attempt to secure faster and more predictable enforcement. The following subsections analyse these foundations, beginning with the issues of high intervention standards and procedural inefficiencies.

4.3.1.1 High Intervention Standards and Efficiency Issues in Finalisation

This section addresses the distinctive nature of the DMA, which complicates efforts to clearly categorise it within existing legal frameworks. Nevertheless, despite the often speculative and

[80] DMA, Art 15.

[81] DMA, Art 14.

complex debates surrounding the DMA's legal classification, it is evident that its origins lie in EU competition law. Although the DMA does not have detailed provisions regarding its relationship with EU competition law, it contains a provision that complements it. A clear conclusion is that this regulation is explicitly based on EU competition law and aims to overcome its inherent shortcomings.[82] Clearly, the part of competition law that the DMA aims to complete is the notion of abuse of a dominant position regulated in Article 102 TFEU. A broader analysis of the DMA reveals that it seeks to introduce both substantive and procedural enhancements to several dimensions of Article 102. In other words, the DMA's role in complementing Article 102 extends beyond addressing any single or narrowly defined issue. This is due to the fact that many of the DMA's provisions are designed to provide immediate remedies for the conduct of major technology firms, while simultaneously enhancing procedural efficiency. It is understood that the primary justification of the DMA is the intention to restore the slowness of Article 102 TFEU, as evidenced by the studies prepared during its preparation and the reports prepared in the early stages of competition law interest in the digital economy. Perhaps the Commission has echoed these reports numerous times, following in the footsteps of an impending regulation. Vestager, then-responsible competition commissioner, complained in a 2020 speech that although flexibility makes competition law effective, another group of characteristics renders it ineffective in the face of online platforms.[83] Similarly, during the DMA's preparation period, academic circles mentioned the ex post approach to competition law, which involves extensive analysis, and the long and inconclusive proceedings caused by this approach as arguments in favour of a possible ex ante regulation.[84] Various academic comments on the DMA draft have criticised it for failing to sufficiently include the speed aspect, the paramount raison d'être of regulation.[85] In this context, it is emphasised that an ex ante regulation such as the DMA should have a structure that eliminates competition law problems, such as slowness and cumbersomeness.

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[82] Friso Bostoen, 'Understanding the Digital Markets Act' (2023) 68 The Antitrust Bulletin 2, 265.

[83] Margrethe Vestager, 'Keeping the EU Competitive in a Green and Digital World' (Speech at the College of Europe, Bruges, 2 March 2020) <https://ec.europa.eu/newsroom/comp/items/670949/en> accessed 12 March 2023.

[84] Laurine Signoret, 'Code of competitive conduct: a new way to supplement EU competition law in addressing abuses of market power by digital giants' (2020) 16(2) European Competition Journal 220–240.

[85] Luís Cabral and others, *The EU Digital Markets Act: A Report from a Panel of Economic Experts* (European Commission, Joint Research Centre Report JRC122910, 2021) 10.

During the drafting of the DMA, the Commission used the findings of numerous reports analysing the relationship between EU competition law and the digital economy as the basis for the regulation. These reports are also included as a basis in the DMA Impact Assessment Report.[86] Produced during the early stages of the clash between technology giants and EU competition law, these reports focus on features of the digital economy, an area examined in detail in Chapter 1. These reports discuss many features of the digital economy, particularly those related to online platforms, in terms of their potential impact on competition law. As previously noted, Chapter 1 has already examined the various features of the digital economy and online platforms that may influence competition law. Therefore, only the most critical points will be briefly reiterated here. The most important of these crucial aspects is that the market power obtained in digital environments has a long-lasting effect. Due to network effects, it is almost impossible to challenge a dominant position achieved by a player.[87] The natural consequence of such a situation is that the effects of the harm caused by anticompetitive conduct will be much greater and more permanent than in a traditional market.[88] Moreover, once competitors of dominant firms have been driven out of the relevant market, it becomes virtually impossible to adapt and implement remedies to re-establish competition in that market, even if those competitors have promising business models.[89] Indeed, *Google Shopping* is a classic example of the almost irreversible damage to the market structure caused by digital conduct. The EUR 2.42 billion fine imposed by the Commission and upheld by the General Court and the CJEU in that investigation was insufficient to prevent fierce criticism from consumer associations and Google's competitor price comparison providers because the intervention came too late, and market conditions had already changed.

All these reports, which also form the basis for DMA in digital markets with such dynamics, emphasise the necessity of rapid intervention.[90] It is a fact that this speed requirement emerges in the case of digital markets and challenges the enforcement system of competition law. The

[86] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (Impact Assessment Report, part 2/2)* SWD(2020) 363 final, 2–4, 9–14.

[87] Crémer, Montjoye and Schweitzer (n 4) 42.

[88] Commission 'Competition Law 4.0: A New Competition Framework for the Digital Economy' (Report for the Federal Ministry for Economic Affairs and Energy, 2019), 70.

[89] Unlocking Digital Competition (n 5) 104.

[90] Crémer, Montjoye and Schweitzer (n 4) 52-53.

main reason is that, as discussed in the section on consumer welfare, especially after the EU competition law modernisation process, enforcement has become increasingly fact intensive. As is well known, Article 102 TFEU requires the assessment of market power and dominance. This assessment presupposes a detailed definition of the relevant market. Such an examination also requires an enormous number of resources. Beyond this, determining whether dominance has been abused requires a case-by-case, fact-based analysis. This examination includes the possibility that behaviour that satisfies all these conditions may nevertheless be justified. The investigations conducted by the Commission against Google and brought to court clearly illustrate this situation. In each case, the defendants have made a considerable contribution to the protracted nature of the proceedings, both at the investigation and at the trial stage, by challenging the substantive and procedural aspects of the proceedings comprehensively. While there is nothing more normal than the exercise of the defendant's right of defence, the result of the enormous exercise of this right regarding all the technical details has been that the case file has also been enormously long and complex.[91] As such, it has become commonplace to emphasise how cumbersome Article 102 TFEU enforcement is compared to any other regulatory legal instrument. In this context, it is often stated that the case-by-case analysis approach, which is the cornerstone of modern competition law, requires a great deal of energy in terms of both time and resources regarding the digital economy. Determining the relevant markets, especially in the rapidly changing business models of the digital environment, whose boundaries are not clearly defined, poses a serious challenge for competition law.[92] Moreover, market power, which is relatively easy to identify in a classical business industry, can also be intermediation power, bottleneck power or strategic market status in the digital world, posing a significant challenge for EU competition law enforcement.

Clearly, competition law enforcement has been heavily criticised, mainly on procedural grounds, because of the Commission's recent Article 102 TFEU enforcement against Google. While the case law of the EU courts and Commission is analysed in detail in the following chapter, it is necessary to take a brief look at the procedural and temporal aspects of these activities to understand the rationale of the criticisms. A temporal anomaly stands out in the

[91] European Court of Auditors, Special Report 24/2020: European Commission’s Merger Control and Antitrust Proceedings: A Need to Scale Up Market Oversight (19 November 2020) <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=57275> accessed 24 March 2022.

[92] Crémer, Montjoye and Schweitzer (n 4) 47.

Commission's investigations against Google, which is the focus of the DMA. The *Google Shopping* investigation holds the record for slowness and was finalised in 77 months in total.[93] *AdSense*, another investigation targeting Google, was concluded in 32 months,[94] and *Android*, another Google investigation, was concluded in 25 months.[95] From a practical and result-oriented point of view, these periods can be characterised as an anomaly by a wide range of circles. These periods constitute the basis of the arguments against the length of digital litigation and stand out as a decisive argument that interrupts the examination of issues such as the theoretical height and complexity of the intervention standards of competition law and the adaptation of these standards to the digital world. However, from these arguments and the existence of the DMA, one promising observation can be made regarding the future of competition law in the context of the digital economy: the criticisms generally focus on the procedural aspects of competition law. At this stage, the intermediate conclusion drawn from the case law of the EU courts is that, despite all its sophistication and usefulness, the application of Article 102 TFEU to the digital economy has, in a way, cornered itself in the context of the digital economy and has also given itself a new adjective of being too slow.

Various reports based on the DMA also propose possible solutions to the speed-indexed problems mentioned above that arise at the intersection of the digital economy and competition law. One solution concerns the relevant market definition and can be summarised as the need to reduce the emphasis on market definition in EU competition law and focus on the harm caused by firms' anti-competitive strategies.[96] This does not imply that market definition has become irrelevant or dispensable in competition law analysis. Rather, the shift observed in the context of digital markets reflects a recalibration of its role. Market definition continues to perform an important framing function by identifying the economic context and the boundaries within which conduct is assessed. However, its function is increasingly treated as instrumental rather than determinative. In highly dynamic and data-driven markets, rigid market definition may delay intervention and obscure competitive harm that materialises before market structures stabilise. Accordingly, recent regulatory and policy approaches do not reject market definition as such, but seek to avoid its elevation into a procedural bottleneck that conditions the

[93] *Google Search (Shopping*) (Case AT.39740) Commission Decision C(2017) 4444 final of 27 June 2017.

[94] *Google Search (AdSense)* (Case AT.40411) Commission Decision C(2019) 2100 final of 20 March 2019.

[95] *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 final of 18 July 2018.

[96] Crémer, Montjoye and Schweitzer (n 4) 3-4.

possibility of enforcement. Another suggestion in the context of restraining tech giants is the acceleration of competition law enforcement, not by itself, but through various means. This proposal suggests the adoption of broader, more flexible and conduct-specific competition provisions, rather than an effects-based and detailed review, thereby eliminating the possibilities where the conduct of technology companies is likely to cause harm.[97] With the rise of the digital economy, it is easy to determine that the problem of competition law's slowness is at the centre of almost all of the various solution proposals summarised above. These proposals have been put forward in parallel with the increasing interaction with competition law. This observation is reflected in the DMA in almost the same way. Indeed, Recital 5 DMA explicitly states that the scope of competition law is limited to a limited notion of market power, such as anti-competitive behaviour and dominance in certain markets. In the same vein, the disadvantages of competition law enforcement's ex post nature, which limits its evaluation of highly complex cases case by case, are also mentioned. Moreover, the Commission has emphasised the inadequacy of the structural elements of competition law in the case of digital conduct more explicitly. In the DMA Impact Assessment Report, the procedural aspect of the relationship between digital markets and competition law was emphasised as one of the problematic elements of this relationship. It was stated that competition law intervention tends to be delayed regarding digital conduct, which requires highly complex legal and economic analysis. This situation highlights the inability to take action until tipping occurs in the relevant market.[98]

It is understood from the points mentioned above that the structural slowness of competition law was seen as a source of concern and this concern was one of the critical factors in the introduction of the DMA. The DMA has adopted a new methodology by removing the essential elements of competition law such as market definition and market power. This methodology includes new terms, such as gatekeepers. It introduces critical innovations in terms of procedural and substantive content against the conduct of technology giants operating in the digital economy. Both procedural and substantive aspects of the DMA have considerably widened the debate on the future of the digital economy in the context of both regulation and

[97] Competition Law 4.0 Report (n 88) 49-54.

[98] European Commission, *Impact Assessment Report, Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), Part 1/2* SWD(2020) 363 final, 118–121.

competition law. The details of these new approaches introduced by the DMA, the extent to which they are effective, and their potential are examined in the following sections.

4.3.1.2 Inadequacy of Remedies

Another procedural issue in competition law that has paved the way for the DMA and significantly contributes to the challenges of speed and timing discussed above, is the design and implementation of remedies in Article 102 TFEU cases involving technology giants. It is well-known that the remedies applied in cases dealing with digital conduct add extra years to the already lengthy preparation and trial process. Moreover, the effectiveness of these remedies is still a matter of great debate. In the case of the digital economy, the effectiveness of remedies is much more critical than in any other investigation conducted by the Commission. This is because, as discussed in Chapter 1, in the event of tipping in digital markets and excluding efficient competitors, it is very challenging to adopt and apply remedies in a way that restores competition and monitor their effectiveness.[99] It is noteworthy that during the DMA drafting process, the tech giants also showed great interest in this issue, even though the debate on how effectively they are implementing the remedies they have committed to implement is raging. This attention is further evidenced by the lobbying efforts of several tech giants, who invested heavily in trying to persuade the Council and the European Parliament to water down the Commission's draft.[100] Comparing the draft and final versions of the DMA, it is easy to observe that these efforts were fruitless. Legislators have shown at least as much interest in the issue of remedies as the tech giants, and their input has significantly shaped the Commission's draft. Indeed, the amendments to many of the stricter provisions in the DMA coincide with the European Parliament's proposals stage of the process. The obligation on the Commission to monitor and report on the effectiveness of remedies in the event of systematic non-compliance, along with many other provisions, is indicative of this.

There are various reasons for the importance of remedies in shaping the DMA. Indeed, since the early days of competition law practice and remedies, the test of remedies against the digital economy can best be characterised as a back-and-forth relationship. Since the early 2000s, various acts of technology giants have been on the EU Commission's radar. The Commission

[99] Competition Law 4.0 Report (n 88) 70-74.

[100] Lombardi, "Big Tech boosts lobbying spending in Brussels", Politico (22 March 2022).

has not hesitated to use the instruments of competition law generously against these companies by imposing heavy fines and remedies. However, it is difficult to say that these interventions were equally successful or unsuccessful in the final analysis.

For example, as a remedy in the first *Microsoft* case, the Commission ordered the company to break the link between the Windows operating system and the Windows Media Player and make a Windows operating system available to consumers without the media player.[101] It is difficult to say that this remedy has succeeded since Microsoft released a Windows operating system version with its own media player programme at the same price as the untethered version. This did not incentivise consumers to purchase a Windows operating system without the Windows Media Player. Moreover, from the period until the conclusion of this case, Microsoft successfully transferred its power in the operating system market to the media player market, and Windows Media Player became dominant in the relevant market. The natural consequence is that an operating system without Media Player has no appeal to users. The remedy applied in this case can be characterised as a failure in general.[102]

The outcome was not significantly different in the case of another abuse that was interfered with in this case, the refusal of Microsoft to provide interoperability information. Microsoft did not fully provide the requested information for four years, despite being fined a record fine.[103] In the second *Microsoft* case, another of the Commission's early cases targeting digital giants, the company undertook to remedy the link between its operating system and the Internet Explorer web browser by providing users with a selection window. Although this promised remedy resulted in a high fine for non-compliance, the Commission was relatively successful in this case. Indeed, in the period following the remedy, there was a major change in the market for internet browsers, and Google's Chrome browser overtook Internet Explorer.[104] In the following period when Google Chrome dominated the relevant market, studies that reveal that the product's success has little to do with the selection screen offered by Microsoft may

[101] *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 24 March 2004, para 1011.

[102] Nicholas Economides and Ioannis Lianos, 'A Critical Appraisal of Remedies in the EU Microsoft Cases' (2010) 2 Columbia Business Law Review 346.

[103] *Microsoft* (Case COMP/C-3/37.792) Commission Decision of 24 March 2004.

[104] Michael Cusumano, Annabelle Gawer and David Yoffie, *The Business of Platforms* (Harper Business 2019) 127–29.

overshadow the victory of the successful competition investigation and litigation.[105] Chrome's success is probably based more on successful marketing and Google's ability to introduce a better-quality product into the market.[106] However, the second Microsoft case targeting Microsoft's anti-competitive conduct can be characterised as a noteworthy success in setting a precedent for national competition authorities across the EU and bringing similar cases against Microsoft.

The test of competition law with the remedies of technology giants does not seem to paint a favourable picture regarding the recent sensational cases. *Google Shopping* is a striking example of the remedies applied in the recent period. The 2017 decision of the Commission required Google to use the same processes and methods for the positioning and display of its own comparison-shopping service in its general search results pages as it does for competing comparison shopping services, in other words, ensuring equal treatment.[107] Google then implemented an auction system where both Google Shopping and its competitors could bid on equal terms to appear in shopping units.[108] The effectiveness of Google's remedy continues to be debated, and strong arguments exist.[109] It is stated that only a few of the users who click on Google's new design are directed to rival comparison sites.[110] Moreover, Google's competitor comparison services have to pay Google even for this slight possibility. In a nutshell, it would be somewhat optimistic to say that any improvement can be observed in the situation of competitors regarding Google's conduct in question.

The effectiveness of the remedies applied in *Android*, another sensational case targeting Google, does not seem very different from *Google Shopping*. In summary, the case in question

[105] Omar Vásquez Duque, Active Choice vs. Inertia? An Exploratory Analysis of Choice Screens Applied in the European Microsoft Antitrust Case (2021) <https://ssrn.com/abstract=3766468> accessed 6 February 2023.

[106] Bostoen (n 82) 272.

[107] *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017, para 700.

[108] Olivier Heckmann, 'Changes to Google Shopping in Europe' (*Google Ads & Commerce Blog*, 27 September 2017) <https://adwords.googleblog.com/2017/09/changes-to-google-shopping-in-europe.html> accessed 2 July 2019.

[109] Thomas Höppner, 'Google's (Non-) Compliance with the EU Shopping Decision' (2020) <https://ssrn.com/abstract=3700748> accessed 14 July 2025.

[110] Philip Marsden, 'Google Shopping for the Empress's New Clothes—When a Remedy Isn't a Remedy (and How to Fix it)' (2020) 11 Journal of European Competition Law and Practice 553.

was about Google linking its Chrome internet browser and Google Search engine to Google Play, also its application store. In its decision, the Commission imposed a record fine of 4.34 billion euros on Google. The sanction for the conduct in question was not limited to this. As a result of negotiations between the Commission and Google, Google has pledged to offer a setup screen that lets users choose between Google search and other search services when they initially set up an Android device.[111] Initially, places on the selection screen were allocated through an auction, but this approach was intensely criticised for allegedly exacerbating Google's financial disparity with its competitors.[112] It has also emerged that Google has begun charging a licence fee of $40 per device for its previously free suite of applications, which includes the Play Store, Gmail, Maps and YouTube. In connection with this, mobile device manufacturers were reportedly offered a discount of about the same amount on the package's purchase price, provided that they set the Chrome browser and search service as the default.[113] This means that Google has created a new business model for itself in exchange for the promised compensation, since a mobile device manufacturer has to pay a penalty of $40 per device when it chooses a rival search engine by default. Following criticism from rival search engines and intense negotiations with the Commission, Google recently announced that it would stop charging rival search engine providers for placement in a selection list on Android devices in Europe. Furthermore, the list will grow from 4 to 12 services, with the five most popular search engines in each country (including Google) being shown first in a randomised shuffled order. Other providers will fill the remaining seven spots. In addition, specialised search engines focusing on specific queries, such as travel or price comparison, will be excluded from this selection.[114]

Although Google's remedies in *Android* seem more robust than in *Shopping*, when both cases against Google are considered together, a restlessness against Google's commitments can be

[111] *Google Android* (Case AT.40099) Commission Decision of 18 July 2018, paras 1394–1397.

[112] Natasha Lomas, 'Google's "no choice" screen on Android isn't working says Ecosia—querying the EU's approach to antitrust enforcement' *TechCrunch* (30 July 2020) <https://techcrunch.com/2020/07/30/googles-no-choice-screen-on-android-isnt-working-says-ecosia-querying-theeus-approach-to-antitrust-enforcement/> accessed 4 January 2021.

[113] The Verge, 'Google is changing Android's licensing terms in response to the EU's $5 billion antitrust fine' (19 October 2018) <https://www.theverge.com/2018/10/19/17999366/google-eu-android-licensing-terms> accessed 7 January 2025.

[114] *Android*, 'Choice Screen' <https://www.android.com/choicescreen/> accessed 6 January 2025.

observed. Several of Google's search rivals criticised the Android no choice screen for not functioning as intended.[115] Looking at these two cases, Google's remedy designs are generally far from satisfactory.[116] As seen from the table briefly sketched above, applying Article 102 TFEU in the digital economy does not have a long history. Still, it has drawn a pattern that reminds the saying that history repeats itself. It would be optimistic to say that the effectiveness of remedies in interventions against similar anti-competitive practices in different cases (e.g. tying in the *Microsoft* and *Android* cases) has significantly improved despite a long period between the cases in question. On the contrary, as stated above, the effectiveness of remedies in the *Microsoft* case is more concrete than in the *Google Android* case, although it may be based on different grounds.

Of course, it may not be accurate to characterise this situation as a regression, but there are some realities that competition law practitioners see when they target technology giants. The first of these is the inadequacy of remedies. This lack of deterrence naturally leads to the recurrence of problematic behaviour in one form or another. The same undertaking can sometimes repeat these behaviours. Still, other undertakings can also adopt them due to high copying methods in digital markets or complex business model details that enforcers would find challenging to anticipate.

At the same time, anti-competitive practices often reappear in slightly altered forms or through different services, making them inherently persistent. Therefore, any cease-and-desist decision made by the enforcer is, in one way or another, limited to the context of the conduct in which the decision is made. Remedies of questionable competence adopted due to lengthy negotiations are not binding for existing or potentially similar situations other than the concrete case in which they are applied. As noted, this lack of enforceability if the same or similar remedy is adopted by the same or another undertaking means a significant problem for the effectiveness of the

[115] Natasha Lomas, 'Google's EU Android choice screen isn't working say search rivals, calling for a joint process to devise a fair remedy' (TechCrunch, 30 July 2020) <https://techcrunch.com/2020/07/30/googles-no-choice-screen-on-android-isnt-working-says-ecosia-querying-the-eus-approach-to-antitrust-enforcement/> accessed 16 December 2021.

[116] Frédéric Lambert and others, 'Open Letter to Commissioner Vestager from 14 European CSSs', letter of 22 November 2018, RE: AT.39740—Google Search (Comparison Shopping) <http://www.searchneutrality.org/google/comparison-shopping-services-open-letter-to-commissioner-vestager> accessed 5 January 2025.

remedies. In the case of many technology giants, such as Google, to which the Commission has paid particular attention in applying Article 102 TFEU, competition law enforcement seems to lose its effectiveness even more, especially when they create huge ecosystems. Thanks to the barriers to entry that these companies have built in their home markets, the effects of their behaviour continue to have an impact even when a particular anti-competitive behaviour is terminated. This typically occurs when a player leverages its power in its home market to another market. In such cases, it becomes increasingly difficult for a consumer welfare-oriented competition law enforcement to distinguish whether the effects in this other market where market power is leveraged are efficient, pro-consumer, or anti-competitive. This uncertainty and the inadequacy of remedies, the effects of which are highly controversial, always pose a serious risk rather than a hypothesis that the markets where market power is leveraged will be closed to competition as in the main markets of the technology giants.

It would be inaccurate to claim that the Commission's alleged failure to understand digital markets or to take appropriate measures is the reason for the unfavourable picture described above. Although these cases are analysed in detail in the following sections, it is worth noting here that the Commission's overall approach to remedies has generally aligned with the proportionality principle under EU law, despite the criticisms discussed above.[117] For example, in *Google Android*, the Commission did not formally require Google to implement the specific measures set out in its decision. Instead, it prohibited specific behaviour and reserved the right to impose proportionate and necessary remedies if Google failed to stop the infringement effectively.[118] In addition, the Commission has set a 60-day deadline for Google to notify them of its planned enforcement measures and a 90-day deadline for these measures to take effect. The Commission has also informed Google that it will supervise the implementation process.[119] In this respect, the judgment is consistent with the decisions of the European courts. The CJEU clarified that under EU law, remedial measures, whether behavioural or structural, can only be imposed on companies if they are proportionate to the infringement and necessary to stop it effectively.[120] Accordingly, the General Court held that it is not the role of the Commission to

[117] Philipp Reinhold and Thomas Weck, 'Data-related Abuses under European Law' (2021) 5 Business and Economic Law Review 136.

[118] *Google Android* (Case AT.40099) Commission Decision of 18 July 2018, paras 1393–1397, 1403.

[119] ibid 1404.

[120] *Commission v Alrosa Co Ltd* (C-441/07 P) EU:C:2010:377; [2010] 5 CMLR 11, 39.

dictate to the parties concerned its preferred option from among the various possible courses of action compatible with the Treaty.[121] Thus, under EU law, the authorities and courts' primary concern is that any remedy imposed does not unduly restrict the freedom of the companies concerned beyond what is necessary for the restoration of competition. Although this is the case about the remedies applied in the case of the conduct of the technology giants, the existence of a pattern of such conduct, as explained above, seems to have caused the Commission to be uneasy that they may face similar consequences in the new steps they take. This is also reflected in the statements of the Commissioner regarding remedies in the *Google Shopping* case: "We still do not see much traffic for rival competitors when it comes to shopping comparison."

As explained above, one of the main objectives of the DMA is to improve the effectiveness of remedies. This objective emerged in response to the recurring patterns of remedies applied under Article 102 TFEU to digital economy conduct and the limitations of the Commission's intervention powers. Indeed, during the drafting process, the provisions concerning non-compliance and the Commission's power to impose remedies were tightened compared to the initial draft of the DMA. However, the following sections examine whether the Commission's approach to remedies under competition law is, in fact, limited to what has been described above. Likewise, the extent to which the provisions of the DMA on remedies differ from the promises of competition law and their potential for success are analysed below.

4.3.2 Solutions of the DMA

4.3.2.1 Lower Intervention Standards and Expected Procedural Improvement

The DMA's design to address the above-mentioned competition law deficiencies is most evident because it significantly lowers the threshold for intervention. In this context, the need for an economic examination of market structure or the underlying facts of commercial behaviour has been largely eliminated. This radical change is related to the personal scope of regulation. Accordingly, the DMA provisions do not apply to every digital platform; they only apply to CPS providers and gatekeepers.[122] Both concepts that determine the limits of

[121] *Lietuvos Geležinkeliai v European Commission* (T-814/17) EU:T:2020:545; [2021] 4 CMLR 8, 312.

[122] DMA, Art 1(2).

application of regulation are not competition law based but are regulation-specific terms. The Regulation does not provide a general definition of CPS. Instead, a limited number of specific services are characterised explicitly as CPSs. In this context, CPS includes online intermediation, online search, online social networking, video-sharing platforms, number-independent interpersonal communications, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services.[123] The recital recognised that these services currently pose the most serious threat to the DMA's objectives of contestability and fairness.[124] The CPS definitions in the Recital and Articles reflect a preference for high technical precision and specificity. While this approach to core services guarantees a certain degree of legal certainty, it is equally clear that this certainty means sacrificing legal flexibility. Moreover, the language used in the definitions seems to recognise broad rather than narrow categories. For example, although not explicitly referred to in the CPS list, there is no doubt that the category of online intermediation services includes app stores. The DMA also provides a detailed explanation of why CPS is targeted, explaining the characteristics of these platforms such as extreme scale economies, strong network effects, data-driven advantages and the resulting user lock-in and absence of multi-homing.[125] The Commission may not add to these services on its own initiative. If it is determined that this is necessary, a market study may be conducted to determine whether the new service qualifies as a core platform service. Any resulting addition to the CPS must be submitted to the European Parliament and the Council.[126]

Offering a CPS is not enough for an undertaking to fall within the scope of the DMA; it must also be a gatekeeper. This concept refers to an undertaking that fulfils three criteria.[127] Firstly, the firm should have a significant impact on the internal market. Secondly, the core platform service should be an important gateway for commercial users to reach end users. Finally, the firm must have an established and permanent position in its operations, or it must be foreseeable that it will have such a position in the near future.[128] The determination of a firm's gatekeeper status based on these criteria is quite complex. In general, it can be said that the DMA has

[123] DMA, Art 2(2).

[124] DMA, Recital 13.

[125] DMA, Recital 2.

[126] DMA, Art 19.

[127] DMA, Art 3 (1).

[128] ibid.

adopted two techniques in this regard. According to the first technique, gatekeeper qualification is based on a rebuttable presumption. Accordingly, Article 3(1) criteria are mapped to certain quantitative thresholds in Article 3(2). The first threshold relates to the firm's turnover in the EU and the number of Member States in which it makes its CPS available. The second threshold relates to the number of monthly and annual active users of the CPS. Finally, the third threshold is a final control mechanism, and it is concerned with whether the first two thresholds have been met in each of the last three financial years.[129] These requirements represent the DMA's response to competition law's concerns about speed and efficiency. They eliminate the need for a market definition based on detailed economic analysis. This determination is evident from the finding that firms' submission of an economic justification based on a market definition may be disregarded in the context of the rebuttable presumption right.[130] If a firm meets these three thresholds, it must notify the Commission.[131] This notification obligation also demonstrates the DMA's speed focus. If the undertaking fails to do so, the Commission may designate it as a threshold gatekeeper based on the information available to it.

Although firms must make such a notification, this does not mean they must recognise their gatekeeper status simply by making a notification. However, it seems complicated for any firm to rebut this presumption of gatekeeper status. The DMA contains language that heavily burdens the notifying firm to persuade the Commission to investigate a possible invalidity of the presumption. Arguments must be sufficiently substantiated, clearly question the presumption and relate to the circumstances in which the relevant core platform operates. The Commission has considerable discretion regarding whether a rebuttal application merits further scrutiny. If the rebuttal application is successful, the Commission should open a market investigation to investigate in more detail whether the firm fulfils the Article 3(1) criteria.[132] However, in this case, again to avoid unnecessary delays due to the DMA's speed concerns, the Commission is given the right to reject this rebuttal without conducting further market research if the arguments do not clearly question the presumption.

[129] DMA, Art 3 (2).

[130] DMA, Recital 23.

[131] DMA, Art 3 (3).

[132] DMA, Art 3 (5); DMA, Art 17 (3).

The second technique for determining a firm's gatekeeper status arises where a firm fulfils the requirements of Article 3(1) without exceeding the quantitative thresholds in Article 3(2). In such a case, the firm concerned does not have to notify the Commission. In this case, the Commission may open a market investigation to analyse whether the firm meets the three qualitative gatekeeper criteria and, in a positive case, designate the platform as a gatekeeper. In conducting this market investigation, the Commission will examine specific and limited factors such as the size of the firm, its activities and the number of users, and the network, scale and scope effects it benefits from.[133] Although the DMA mentions a market study to be conducted, given the limited number of elements to be analysed and the fact that these elements are to be examined only in the context of the relevant firm and not in the context of its competitors, a peculiar situation arises in which the Commission may legally avoid a comprehensive examination and definition of the relevant market in which the firm operates. As a result of these two methods, the assignment of gatekeeper status to a firm requires an exclusive decision of the Commission, which must list all the CPSs operated by the firm concerned.[134] This means that the firm is only included in the gatekeeper status in the context of the CPSs in this decision. In addition, once a gatekeeper does not necessarily mean always a gatekeeper and the Commission may reconsider, modify or revoke its decision if there is a material change in the facts on which the decision to be a gatekeeper is based or if the decision is based on incomplete, incorrect or misleading information.[135]

The dual filter system explained above is related to the DMA's implementation conditions. The DMA has made a design choice by taking market power problems in the digital economy and competition law very seriously. In other words, while it is inevitable that this dual system aims to increase procedural efficiency, it is unclear whether the Regulation is essentially targeting the high market power of digital actors or the characteristics of particular suppliers. In this context, the DMA sometimes directly targets services that create market power since digital services are weak in contestability and fairness.[136] At the same time, the DMA sometimes targets large digital firms for their significant elimination of contestability and fairness regardless of their services. The quantitative thresholds used in gatekeeper characterisation are

[133] DMA, Art 3 (8).

[134] DMA, Art 3 (9).

[135] DMA, Art 4 (1).

[136] DMA, Recital 2.

a clear indication of this. Despite the uncertainty on this issue, the most prudent inference is that the DMA is targeting both issues to a certain extent, but this leads to an uncertainty that cannot be underestimated in terms of the implementation standards of the Regulation. In other words, such a hybrid approach to controlling market power in the digital economy leads to a circular spiral of thinking. This means that a gatekeeper must necessarily be a CPS provider. Although not explicitly provided for in the Regulation, a service qualifies as a CPS only if a gatekeeper offers it.[137] After all, the gatekeeper concept, which aims to overcome the difficulties of the dominance concept of competition law, is not synonymous with the dominance concept. It is stated in the DMA that the current EU competition law does not address the difficulties to the effective functioning of the internal market caused by the behaviour of gatekeepers who do not hold this position due to the dominance concept. In this context, the DMA targets the largest firms providing digital services or services, i.e. it significantly lowers the threshold for intervention but remains limited in scope. In this context, it is even a convincing argument that the legislator reverse-engineered the design of the DMA with GAFAM in mind.[138] The DMA, which has very low criteria compared to competition law in terms of intervention in existing ones, covers other platform companies. The DMA, which will take precedence over competition law in all cases due to the main concepts on which it is based, is also characterised as an asymmetric ex ante regulation due to its structure, targeting only the largest firms.[139]

As explained above, firms designated as gatekeepers are subject to a set of conduct rules, which include the obligations introduced by the DMA and discussed earlier. While the literature categorises these rules in many different ways, they can be broadly divided into two categories: those that do not require explanation and those that do. The rules contained in Article 5, both prohibitions and obligations, do not require the Commission's guidance on their application by gatekeepers. Articles 6 and 7 contain rules that are open to clarification. As indicated, the Commission is authorised to clarify these rules. This clarification can take two forms. First, the Commission may adopt implementing acts setting out the measures that gatekeepers must take to comply with the code of conduct. Secondly, the gatekeeper may request the Commission to

[137] Natalia Belloso and Nicolas Petit, 'The EU Digital Markets Act (DMA): a competition hand in a regulatory glove' (2023) 48 European Law Review 4.

[138] ibid 6.

[139] Inge Bernaerts, 'The Genesis and Main Features of the Digital Markets Act' in Adina Claici, Assimakis Komninos and Denis F Waelbroeck (eds), *The Transformation of EU Competition Law: Next Generation Issues* (Wolters Kluwer 2023).

engage in a regulatory dialogue to determine whether the measures the gatekeeper intends to take are effective in achieving the objectives of these rules. The Commission has discretion whether or not to engage in this dialogue, subject to general principles of law such as equal treatment and proportionality. It should be noted that such rules are less commonplace for competition law, although they are not absent at all. This is because in the case of such rules a simple preliminary decision is not sufficient, as the obligations demanded require the enforcer to specify a desired course of action in more detail. To summarise, the rules of conduct in Articles 5 to 7 DMA are per se. Many of them aim to reduce barriers to entry by prohibiting behaviour likely to exclude competitors, like Article 102 TFEU. Differently, the DMA does not require the Commission to prove that the conduct is likely to exclude competitors in a particular case, as the Commission insists in its competition law practice, let alone to prove that it is expected to affect consumer welfare, for example in the form of higher prices or lower levels of innovation. This means that all of the rules of conduct introduced by the DMA are per se illegal, regardless of whether they require further explanation.

Finally, another critical aspect of the DMA regarding procedural efficiency, which differs significantly from EU competition law, is how the Regulation is enforced. This issue was intensively debated during the enactment process. The Commission's legislative proposal envisaged that only the Commission would be authorised to enforce the DMA. Accordingly, in an unusual move, the national competition authorities of the 27 EU Member States issued a joint statement calling for greater involvement of the Member States in the enforcement process.[140] Although national competition authorities are more involved in implementing the DMA than in the initial proposal, the DMA explicitly states that the Commission is the primary enforcer.[141] The powers of national competition authorities are minimal. The possibility of collecting evidence and initiating investigations into possible infringements of the DMA is one of the few marginal powers of NCAs. However, the competence of NCAs ends here, as they cannot decide on the firm in question and are obliged to transmit the information they have obtained to the Commission. The Commission is the sole enforcer of the DMA.[142] In addition, NCAs have been given the much more limited ancillary task of assisting the Commission in

[140] European Competition Network, *Joint Paper of the Heads of the National Competition Authorities of the European Union: How National Competition Agencies Can Strengthen the DMA* (22 January 2025).

[141] DMA, Recital 91.

[142] DMA, Art 38 (7).

monitoring whether gatekeepers comply with the conduct rules.[143] Taken together, the various responsibilities delegated to the Commission, both those already discussed and those to be examined below, demonstrate the privileged position it holds in implementing the DMA.

4.3.2.2 More Effective Remedies

As previously noted, concerns about the effectiveness of remedies in the digital economy have been one of the main drivers behind the DMA. Reflecting this priority, the Regulation devotes substantial attention to remedial measures. The emphasis on speed and efficiency is also reinforced through a range of reporting obligations. For example, firms must submit a report to the Commission within six months of their appointment as gatekeepers explaining the measures they have implemented to ensure compliance with the code of conduct.[144] If the Commission decides that a conduct is non-compliant, it first issues a cease-and-desist order, similar to competition law. At this point, the reasonable period for the gatekeeper to order the cease and desist is another aspect of procedural efficiency.[145] In the same vein, it is also stated that in urgent cases, the Commission may order interim measures of limited duration based on a preliminary finding of non-compliance. This may be followed by a fine of up to 10 percent of the gatekeeper's worldwide turnover in the last financial year (and a daily fine of 5 percent of daily turnover), again in a manner very similar to competition law.[146] The Commission may impose a fine of up to 20 percent of the turnover in question if a second infringement of an obligation relating to the same CPS occurs in the same or a similar manner within eight years.[147] Suppose three non-compliance decisions are made within eight years. In that case, systematic non-compliance occurs, and any behavioural or structural remedy is proportionate and necessary to ensure the Commission applies effective compliance.[148] In principle, these remedies involve disintegrating the gatekeeper, but this will not be characterised as easily proportionate and necessary.

[143] DMA, Art 26 (2).

[144] DMA, Art 11.

[145] DMA, Art 29 (5).

[146] DMA, Art 30 (1); DMA, Art 31; DMA, Art 30 (3).

[147] DMA, Art 30 (2).

[148] DMA, Art 18 (1); DMA, Art 3; and DMA, Recital 75.

Looking at the system of remedies introduced by the DMA, it is not difficult to speculate that this system may be more effective than that of competition law, at least in the earlier stages of intervention. This is because the DMA lays down obligations that are different from competition law, and it is usual that the rapid detection of non-compliance with these obligations will lead to a fast intervention. Indeed, in this context, the boundaries of the general principles of law have been pushed to the limits to ensure speediness and the Commission has been given vast powers both in terms of fact-finding duties and remedies and monitoring their implementation. The Commission may require firms to provide all necessary information or access to their data and algorithms.[149] The DMA's negotiation system offers some innovations, perhaps not in speed but efficiency. Indeed, before making an infringement decision, the Commission may dialogue with the relevant gatekeeper and seek a solution instead of one-off negotiations, as in competition law. Similarly, the Commission may reopen an investigation if the relevant remedies are ineffective.[150] The main benefit expected from these measures is the expectation that everything will take place in a much shorter period. Thus, it is desired to intervene before a market is tipped, as restoring the market after that point is very difficult.

In addition to the remedies mentioned above related to fines, which are not very different from competition law, it is a mystery what the DMA has introduced in terms of more serious remedies that differ from the competition law remedies it criticises. The main reason for the failure to introduce a more effective remedies system is that the DMA followed the trend in competition law and introduced obligations, most of which are related to the business models of the digital giants. Indeed, in particular, obligations that include a commitment to do something often require the firm concerned to review its monetisation strategy or the design of the service it provides.[151] This being the case, in other words, since it strictly follows competition law in terms of remedies, there is no guarantee that the results reflected in case law regarding digital cases, which can be characterised as weak in a good scenario and unsuccessful in a bad scenario, will not be encountered in the DMA application. To take one example, various provisions of the DMA explicitly include obligations to offer the option of choice screens, and the extent to

[149] DMA, Art 21 (1); DMA, Art 21 (5).

[150] DMA, Art 8 (9).

[151] Pablo Ibáñez Colomo, 'Product Design and Business Models in EU Antitrust Law' (2021) <https://ssrn.com/abstract=3925396> accessed 28 March 2024.

which remedies in this context can produce a more effective outcome than the outcome in the *Google Android* case seems open to debate.

4.4 Criticisms of DMA

4.4.1 Criticisms on Goals and Legal Ground

As explained above, the DMA's objectives involve protecting legal interests distinct from antitrust rules. The DMA passionately emphasises this separation of purpose from competition law. In other words, the DMA's objectives, which are highlighted as ensuring contestability and fairness in digital markets, are different from the objective of competition law, which is to protect undistorted competition in any market.[152] Such a clear definition of the objectives of regulation by the legislator is an unusual situation, especially compared to the opposite situation in competition law. The DMA's objectives are emphasised because they constitute its legal basis. Indeed, as explained above, the modern interpretation of the ne bis in idem principle allows for the existence and effective implementation of the DMA but also poses a great danger. From this point of view, it is natural and even necessary to want to remove obstacles to the parallel implementation of a regulation that has different objectives from those of competition law. Indeed, as analysed in the previous chapter on consumer welfare, the Commission can use objectives very flexibly whenever it wishes to change or revise competition policy. However, the Commission's recent attempt to argue that the DMA is not an instrument of competition law for its objectives and, therefore, does not affect how antitrust rules are applied in digital markets appears problematic in several respects, which may significantly affect the implementation of the Regulation.

Although this issue has already been analysed in previous chapters, it is worth recalling that the purpose of competition law has never been entirely clear. The DMA has accepted the argument that fairness and contestability have no counterpart in competition law based on accepting a competition law system solely based on consumer welfare. Although its meaning and scope remain controversial, as will be examined in the subsequent chapters, it cannot be convincingly argued that the notion of fairness is entirely absent from EU competition case law. In particular,

[152] DMA, Recital 11.

many public policy-related concepts, including contestability and fairness, have found their place in various court decisions. Since the motto of the DMA is to have different objectives from competition law and the objectives of competition law have always been one of the most controversial issues in EU competition law, the confusion on this issue is also reflected in the literature on the DMA. This becomes evident when examining the works of scholars holding diverse views on regulation. To give an example, some scholars concerned with the accuracy of the DMA and support its objectives state that various concepts such as innovation, consumer welfare, and consumer choice are also objectives of the DMA, in addition to its touted objectives. They ignore the problems this issue will cause when applied together with competition law. However, even if it is accepted that these inclusive views may be correct, bearing in mind that the objectives of competition law have always been a somewhat overly speculative field, there is no indication or normative argument that the promotion of fairness and contestability is different from the essence and scope of competition law.[153] The enactment process also reflected the confusion regarding the objectives of competition law and the DMA. The DMA draft included the goals of protecting consumer welfare and promoting innovation, and the European Parliament approved this version. Still, before the finalisation of the Regulation, these concepts were removed from the draft as they were no longer considered objectives.[154] This appears to be more of a last-minute touch to circumvent the principle of non-double jeopardy, as explained above, rather than a consideration of the objectives of the DMA.

Moreover, the DMA's obligations essentially cover practices subject to past and ongoing antitrust investigations, further highlighting the confusion with competition law. For example, the prohibition of combining personal data between the services of gatekeepers was inspired by the Bundeskartellamt's case against *Facebook*.[155] Similarly, *Google Android* inspired the obligation to refrain from requiring users to subscribe or register for another core platform

[153] Pınar Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (2022) 47 European Law Review 85; Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair' (2021) 3 Zeitschrift für Europäisches Privatrecht (ZEuP) 503.

[154] European Parliament, *Amendments adopted on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)* (15 December 2021) COM(2020) 842–C9-0419/2020–2020/0374(COD).

[155] Bundeskartellamt, Facebook (B6-22/16) (6 February 2019).

service operated by the same gatekeeper as a condition of access to that service.[156] Self-referencing, which the Commission first raised in *Google Shopping*, is also codified in the DMA.[157] The DMA's MFN provisions target long-standing disputes between NCAs and online travel agencies such as *Booking.com* and *Expedia*. These provisions were also inspired by the Commission's *e-books* case against Amazon.[158] Some prohibitions also explicitly address the fight against controversial practices in the Google and Apple app store ecosystems, which have been at the centre of various antitrust lawsuits and legislative initiatives all over the world, such as the obligation to allow sideloading and enforce fair, reasonable and non-discriminatory (FRAND) access conditions for commercial users, as well as the prohibition of anti-steering provisions, preventing end-users from uninstalling any pre-installed software applications, and providing preferential access to technical functionality to their own complementary and supporting services, such as payment services and technical services supporting the provision of payment services.[159] These examples could be multiplied, but it is noteworthy that DMA obligations inspired by recent case law on the digital economy, as shown above, are sometimes strongly associated with one of the DMA's two main objectives and sometimes with both objectives simultaneously. However, as is well known, the same obligations are merely the result of cases brought before the courts as a result of the Commission's enforcement practice, shaped around a consumer welfare-oriented competition law approach. Even if the reasoning that fairness and contestability issues have no place in case law were to be accepted, the fact that the DMA obligations are a codification of consumer welfare-oriented case law weakens, at best, the argument for the originality of the DMA's objectives.

Although the above-mentioned issues regarding the objectives of the DMA are severe, it is well-known that the Commission is as flexible as possible when it comes to the objectives and has circumvented problems that may be considered theoretical. In this context, it can be predicted that the DMA's fairness or contestability objectives may also be circumvented, such as whether the DMA's objectives of fairness or contestability have no place in competition law or whether it is not contradictory that the obligations imposed in line with the DMA's goals are

[156] Commission Decision in Case AT.40099 – *Google Android* [2019] OJ C402/08.

[157] Commission Decision in Case AT.39740 – *Google Search (Shopping)* [2018] OJ C9/08.

[158] Commission Decision in Case AT.40153 – *E-Book MFNs and Related Matters* [2017] OJ C264.

[159] O Borgogno and G Colangelo, 'Platform and Device Neutrality Regime: The Transatlantic New Competition Rulebook for App Stores?' (2022) 67 Antitrust Bulletin 451.

based on recent case law. However, as previously noted, if the DMA's unsubstantiated claim of pursuing different objectives is tested against the modern interpretation of the principle of non-double jeopardy by the European courts, significant legal challenges are likely to emerge, as further discussed below.

The first situation where the risk of double jeopardy may arise is the parallel application of European and national antitrust provisions. Of course, given that the DMA is the Commission's creation, it will probably not refer to the EU competition law in the matters covered by the regulation, and there is no risk of conflict in this context. On the other hand, NCAs are always likely to apply Union and national competition rules. In such cases, the risk of double penalisation is severe, as DMA obligations codify practices subject to past and ongoing antitrust investigations. Past investigations indicate that the DMA and the NCAs have not been unanimous. The German Facebook case is the most famous example and inspired the DMA provision prohibiting the combination of personal data.[160] As another example, DMA provisions on access to mobile ecosystems and app stores have been analysed in different jurisdictions. The Italian Competition Authority fined Google for refusing to integrate Enel's Charge app (JuicePass) into Android Auto.[161] Similarly, the Netherlands Authority for Consumers and Markets initiated an investigation into terms, conditions and other measures limiting competitors' access to near-field communication (NFC) functionality based on a competitive concern that Apple was undermining competition by reserving the potential of NFC technology exclusively for its proprietary payment application.[162] These national antitrust cases, given as examples, essentially aim to address specific forms of self-referencing, which the DMA also sees as the primary concern regarding the dual role that online platforms have. Similarly, in addition to the Union level, various investigations into Amazon's terms and conditions have been conducted at the national level in Austria,[163] Germany[164] and Luxembourg.[165] From the perspective of the principle of non-double jeopardy, there is no

[160] Bundeskartellamt, Facebook (B6-22/16) (6 February 2019).

[161] Autorità Garante della Concorrenza e del Mercato, *Decision No 29645* (27 April 2021).

[162] Autoriteit Consument & Markt, *Investigation into users' freedom of choice regarding payment apps on smartphones* (2020) <https://www.acm.nl/en/publications/acm-launches-investigation-users-freedomchoice-regarding-payment-apps-smartphones> accessed 7 January 2022.

[163] Bundeswettbewerbsbehörde, *Facebook Data Case*, Decision B2-88/18 (17 July 2019).

[164] Bundeskartellamt, B2-88/18 (17 July 2019).

[165] Conseil de la Concurrence, 2019-MC-01 (3 July 2019).

assurance that such overlaps will not recur in the post-DMA era. On the contrary, by invoking the argument that it pursues different objectives, the DMA may even encourage NCAs to launch separate investigations into its obligations.

Another way the DMA and national competition rules may be applied together is for Member States to strengthen their antitrust enforcement tools by introducing platform-specific provisions. Germany's amendment to its national competition legislation made this possibility a reality. In this context, the Bundeskartellamt has new powers to identify positions of particular relevance to the market and their possible anti-competitive effects on competition in digital ecosystems, where individual companies may have a gatekeeping function.[166] If a company is identified under this authorisation, the German Competition Authority may prohibit it from engaging in anti-competitive practices. The new provision introduces seven types of abusive practices that the Bundeskartellamt may prohibit if the undertaking cannot show that such behaviour is objectively justified. In this context, the Bundeskartellamt has already initiated various investigations. Google was the first platform of great importance for intermarket competition.[167] In a similar vein, Amazon,[168] Apple[169] and Facebook[170] were also targeted. The extreme functional similarity is striking when this German initiative is compared with the DMA, despite the differences in the ex-post ex-ante approach. The DMA has also considered

[166] J Franck and M Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) 12 Journal of European Competition Law and Practice 513.

[167] Bundeskartellamt, 'Proceeding against Google based on new rules for large digital players' (25 May 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html> accessed 16 May 2022; Bundeskartellamt, 'Bundeskartellamt examines Google News Showcase' (4 June 2021);
<https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html> accessed 16 May 2022.

[168] Bundeskartellamt, 'Proceedings against Amazon based on new rules for large digital companies' (18 May 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html> accessed 16 May 2022.

[169] Bundeskartellamt, 'Proceeding against Apple based on new rules for large digital companies' (21 June 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html> accessed 18 May 2022.

[170] Bundeskartellamt, 'First proceeding based on new rules for digital companies' (28 January 2021) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html> accessed 21 May 2022.

penalisation due to the risk of this regulation coexisting with the DMA. Indeed, Article 1(5) prohibits Member States from imposing additional obligations on gatekeepers to ensure competitive and fair markets. This provision is designed to mitigate the risk of internal market fragmentation effectively. However, this rule is not as strict as it seems. There appear to be two ways for Member States to circumvent this prohibition. First, they remain authorised to impose additional obligations that do not respond to the same regulatory rationale and motivating concerns as the DMA. Second, they may impose obligations relating to matters beyond the scope of the DMA, provided that these obligations are not linked to the gatekeeping role of the firms concerned.[171] It is also made clear that the obligations envisaged by this rule are obligations pursuing other legitimate public interest objectives.[172] Second, Member States may impose obligations on gatekeepers (or gatekeepers not covered by the DMA) beyond the DMA, provided that the national rules are competition rules.[173] In this context, it is clear that implementing a national regulation similar to the DMA would not be an obstacle if it pursued objectives other than fairness and contestability, which could lead to double penalisation. More interestingly, the DMA's Impact Assessment even considered such potential national measures as supportive and potentially complementary to EU remedies.[174]

As a further risk, the overlap between national economic dependence laws and the DMA raises significant concerns about potential double jeopardy for digital firms. While national economic interdependence provisions aim to redress unfair bargaining imbalances in business-to-business relationships, the DMA aims to prevent gatekeepers from imposing unfair conditions on dependent commercial users. However, the simultaneous application of these laws creates the risk of multiple sanctions for the same behaviour, leading to legal uncertainty and compliance burdens. Several EU Member States, including France,[175] Germany,[176] and Italy[177] have adopted specific provisions regulating the abuse of economic dependence within their

[171] DMA, Art 1 (5).

[172] DMA, Recital 9.

[173] DMA, Art 1 (6).

[174] European Commission, *Digital Markets Act Impact Assessment Support Study* (2020) 47.

[175] France, Law No 2016-1920 of 29 December 2016, art 3, amending Book IV of the Commercial Code, art L 420-2(2).

[176] Germany, Act against Restraints of Competition (GWB), s 20 (as amended, 27 July 1957).

[177] Law No 57 of 5 March 2001, art 11.

competition law frameworks. In contrast, others, such as Spain[178] and Greece[179] have opted to address it under unfair competition or civil law regimes. These national provisions typically target situations where a business partner is effectively locked into a relationship due to high switching costs or lack of viable alternatives, exposing them to exploitative contractual terms. Such regulations are particularly relevant in digital markets, where large platform operators are essential intermediaries for smaller businesses seeking to reach consumers. The French Competition Authority, for example, has considered applying economic dependence provisions in cases involving Google's relationship with press publishers despite the DMA already addressing similar concerns about bargaining power imbalances.[180] Likewise, the Bundeskartellamt has scrutinised Amazon's business terms under both abuse of dominance and economic dependence frameworks, highlighting the regulatory overlap between national and EU-level rules.[181] This fragmented regulatory landscape underscores the necessity for a more precise delineation of competencies between national competition authorities and the European Commission. Given that Regulation 1/2003 permits Member States to enforce stricter unilateral conduct rules, there is an increasing risk that businesses operating in the EU digital market may face conflicting interpretations and enforcement actions across jurisdictions. Moreover, the recent amendments to German competition law, which extend economic dependence provisions to digital intermediation platforms,[182] and Italy's proposal to introduce a rebuttable presumption of economic dependence for firms reliant on digital platforms to access end-users further illustrate the expanding scope of national regulation in this area.[183] Given the DMA's existing framework on the extent to which matters common to the DMA can and cannot be regulated at the national level, as explained above, the dual enforcement risk may undermine the effectiveness of both national economic dependence laws and the DMA, leading to high compliance costs and uncertainty for digital market participants.

[178] Unfair Competition Act, Law No 3 of 10 January 1991, art 16(2).

[179] Law No 703 of 26 September 1977, art 2a.

[180] Autorité de la concurrence, Decision 20-MC-01 (9 April 2020).

[181] Bundeskartellamt, Decision B2-88/18 (17 July 2019).

[182] German Act against Restraints of Competition (GWB), as amended by the Digitalization Act of 18 January 2021, 20.

[183] Italian Government, Annual Competition Law Bill (2021), art 29.

4.4.2 Criticisms on the DMA's Approach to Structural Failures

As discussed above, the DMA relies on the concept of gatekeepers and their CPS to address competition concerns in digital markets. However, there are several problems with the consistency of these concepts with traditional competition law principles. One of the most fundamental criticisms of the gatekeeper concept is that it appears to have been reverse-engineered to capture specific firms, namely, the GAFAM. The thresholds set by the DMA, such as a market capitalisation of €75 billion or revenues of €7.5 billion, were designed to ensure these firms fall within its scope. While the DMA argues that these criteria are neutral and behaviour-focused, the reality suggests otherwise. Statements from key policymakers, such as Schwab's explicit listing of problematic firms, reinforce the notion that the regulation is tailored to pre-emptively target these dominant players rather than establishing a genuinely neutral framework.[184] This approach resembles the outdated big is bad philosophy, where size is treated as a problem rather than anticompetitive conduct. Although Commissioner Breton, who was in charge of drafting the DMA, tried to steer the DMA away from this point of view by emphasising that size is not a problem in itself, the regulation's practical application suggests otherwise.[185] The law's fixation on market cap and revenue, rather than a firm's actual impact on market dynamics, makes it difficult to escape the conclusion that the DMA is designed to regulate size rather than abuse.

The DMA's approach diverges significantly from traditional competition law, which relies on the concept of market power to identify firms warranting regulatory scrutiny. The gatekeeper concept, however, is based on broad user-based thresholds (e.g., 45 million monthly active users and 10,000 business users in the EU), which do not necessarily correspond to dominance in a relevant market. As a result, firms that do not hold a dominant position under traditional competition law may still be designated as gatekeepers, creating a significant disconnect between the DMA and established legal principles. Moreover, the DMA attempts to extend its scope to platforms beyond the GAFAM's core markets, such as video-sharing platforms, cloud

[184] Javier Espinoza, 'EU Should Focus on Top 5 Tech Companies, Says Leading MEP' *Financial Times* (31 May 2021) <https://www.ft.com/content/49f3d7f2-30d5-4336-87ad-eea0ee0ecc7b> accessed 25 July 2022.

[185] Samuel Stolton, 'Breton Reveals Details on Gatekeeper Criteria in Digital Markets Act' *Euractiv* (26 November 2020) <https://www.euractiv.com/section/internet-governance/news/breton-reveals-details-of-future-digital-gatekeeper-definition-in-eu-law/> accessed 25 July 2022.

computing, web browsers, and virtual assistants. In many cases, market power is either diffuse (as in cloud computing, which is oligopolistic rather than monopolistic) or difficult to define using conventional economic analysis. This overinclusive approach risks capturing firms that do not pose significant competition concerns while failing to address more nuanced market dynamics.[186] The DMA's reliance on CPSs as the basis for regulation may also introduce significant inconsistencies. Unlike traditional competition law, which focuses on defining relevant markets and assessing dominance, the CPS designation is a broad and somewhat arbitrary categorisation. Services such as online intermediation services, search engines, social networks, video-sharing platforms, cloud computing services, web browsers, and virtual assistants all fall under CPS despite substantial differences in their competitive dynamics. For instance, number-independent interpersonal communications services like WhatsApp are included as CPS. Yet, competition authorities have found these markets competitive due to multi-homing and low switching costs.[187] However, the DMA's approach assumes that such platforms inherently act as bottlenecks, justifying regulatory intervention. This lack of differentiation between distinct digital services weakens the credibility of the CPS classification and risks imposing unnecessary burdens on firms that do not hold significant market power.

The DMA risks overregulation by imposing obligations on firms that do not necessarily have market power in all of their active markets but merely meet arbitrary size and user thresholds. The broad scope of CPSs under the DMA means that firms operating in adjacent, non-dominant markets are also subject to stringent rules, regardless of whether they exert actual competitive constraints. This overreach could disincentivise investment and innovation, as firms may avoid scaling beyond certain thresholds to evade regulatory burdens. Finally, the gatekeeper designation process may not be as procedurally efficient as intended. The burden of proving user engagement numbers and compliance requirements falls on the platforms, leading to potential legal uncertainties and prolonged disputes over gatekeeper status. This could result in legal fragmentation, where firms face inconsistent enforcement across different jurisdictions within the EU.

Given the vagueness of the concepts setting the DMA's intervention standards, as well as the fact that they also lower the intervention standards considerably, there is indeed a risk of

[186] Bostoen (n 82) 274.

[187] Commission Decision (EU) M.7217 *Facebook/WhatsApp* [2014] OJ C417/04.

marginalisation of EU competition law in the case of digital markets, both at the Union level and at the national level. While the DMA is officially framed as a complementary tool rather than a substitute for competition law, its design and enforcement mechanisms raise serious concerns about the marginalisation of traditional competition law in digital markets. This risk stems from the DMA's ex-ante regulatory approach, which pre-empts the need for economic analysis, market definition, and effects-based assessments, which are core principles of EU competition law. By imposing automatic obligations on designated gatekeepers, the DMA alters the enforcement landscape, diminishing the role of competition law's ex post interventions and potentially rendering them obsolete in key areas of digital market regulation.

DMA's obligations are largely drawn from past and ongoing antitrust cases, particularly investigations into dominant digital platforms under Article 102 TFEU. Practices such as self-preferencing, data leveraging, and anti-competitive tying, which have been the subject of extensive competition law scrutiny, are now outright prohibited under the DMA, regardless of the market context or the specific effects on competition. While this may enhance enforcement efficiency, it also undermines the core economic principles of competition law, which typically require a case-by-case assessment to determine whether a firm's conduct results in consumer harm or market foreclosure. The removal of these analytical requirements raises the question of whether competition law enforcement will continue to be relevant in digital markets or whether the DMA will, in practice, replace it as the primary regulatory framework for digital competition. This risk is further exacerbated by the lower intervention threshold set by the DMA compared to traditional competition law. While competition law requires enforcers to establish dominance, define relevant markets, and prove anti-competitive effects, the DMA sets a much lower bar for regulatory intervention. The simple designation of a firm as a gatekeeper triggers pre-emptive obligations, significantly lowering the evidentiary burden for enforcement. Given that both DMA and EU competition law enforcement are centralised within the European Commission, it is highly likely that the Commission will prioritise the DMA over competition law, as it offers a more straightforward and faster route to intervention. Since DMA enforcement does not require complex economic assessments or lengthy investigations, it provides regulators with a more immediate and predictable tool than the often prolonged and uncertain competition law proceedings. This inevitable preference for DMA enforcement over competition law will further accelerate the latter's marginalisation, reducing its role as a meaningful corrective mechanism in digital markets. At the same time, the deliberate move away from protracted investigations raises legitimate rule of law concerns. While lengthy

proceedings under Article 102 TFEU have rightly been criticised for their inefficiency and delayed corrective impact, they also serve important procedural functions, including thorough fact-finding, the protection of defence rights, and the careful assessment of complex economic evidence. A regulatory framework that prioritises speed and pre-emptive intervention therefore risks shifting the balance from procedural accuracy towards administrative expediency. In this sense, the DMA's promise of rapid enforcement should not be understood as an unqualified improvement, but rather as a trade-off that recalibrates the relationship between effectiveness and legal certainty.

Moreover, the DMA introduces a centralised enforcement model that significantly reduces the role of national competition authorities. Traditionally, NCAs have played a crucial role in enforcing EU competition rules, particularly in complex and evolving digital markets. However, under the DMA, the Commission holds exclusive enforcement authority, meaning that NCAs are sidelined mainly despite their extensive experience in dealing with digital competition issues at the national level. This shift not only raises concerns about the centralisation of regulatory power but also weakens the adaptability and flexibility of competition enforcement, which has historically relied on decentralised mechanisms to tailor interventions to specific market conditions. Ultimately, the DMA does not merely supplement competition law, it fundamentally alters the balance between regulation and competition enforcement in digital markets. While it seeks to address the limitations of traditional competition enforcement in fast-moving digital markets, it does so at the cost of marginalising competition law as a relevant enforcement tool. By prioritising ex-ante regulation over ex-post intervention, replacing economic analysis with rigid prohibitions, and centralising enforcement within the Commission, the DMA risks reducing competition law's adaptability and long-term relevance in the digital economy. If competition law is systematically bypassed in favour of DMA enforcement, its role in shaping digital market competition could fade into the background, making future antitrust interventions increasingly irrelevant.

Finally, as mentioned above, one of the most fundamental expected benefits of the DMA is about remedies. In this respect, the DMA was expected to respond to the perceived shortcomings of competition law remedies, particularly their inefficiency and slow enforcement. One of the central criticisms of the DMA is that its remedies largely mirror those found in previous competition law cases rather than offering fundamentally new interventions. Many of its core provisions, such as the prohibition of self-preferencing, restrictions on the use

of non-public data, and obligations to provide access to key platform functionalities, have already been addressed in antitrust enforcement. For instance, cases like *Google Shopping* and *Google Android* involved remedies that required changes to platform behaviour in ways that closely resemble the DMA's requirements. The primary difference is that the DMA codifies these obligations into an ex-ante framework, removing the need for protracted legal battles to establish violations before imposing remedies. While this may enhance procedural efficiency, it does not fundamentally alter the nature of the interventions available. As such, whether the DMA can introduce radical interventions that reshape digital markets is crucial. The DMA does not have an easy task in the context of remedies. Digital markets operate on complex business models, and aggressive regulatory interventions could unintentionally disrupt ecosystems. The enforcement history of digital antitrust cases suggests that structural remedies, such as those requiring fundamental changes to platform design or business models, are challenging to implement effectively. For example, the remedy imposed in *Google Shopping* sought to ensure non-discriminatory access to search result placements. However, enforcing such changes in a way that meaningfully restores competition remains a challenge, as platforms often retain significant discretion in how they apply these obligations in practice. Similarly, *Google Android* demonstrated the difficulty of intervening in business models where monetisation strategies are deeply embedded in ecosystem dynamics. The case focused on Google's tying practices, but the remedies did not fundamentally restructure the mobile market. This raises doubts about whether the DMA, despite its broader scope, can impose remedies that truly alter competitive dynamics meaningfully.

If regulatory intervention requires businesses to change their operations fundamentally, enforcement becomes legally complex and economically disruptive, leading to significant resistance and compliance challenges. Regarding a more effective set of remedies, the DMA follows a flexible approach, moving closer to competition law than its other provisions. It does not offer a radical departure from competition law remedies. Instead, it serves as an attempt to address procedural inefficiencies rather than introduce groundbreaking new solutions. The effectiveness of the DMA will depend on how well it enforces obligations and whether it can prevent dominant firms from finding alternative ways to circumvent restrictions. While it may succeed in filling some procedural gaps, its substantive impact remains constrained by the same challenges that have long hindered competition law in digital markets. A genuinely transformative framework would require more than just faster enforcement. It would necessitate reconsidering the types of remedies available, ensuring that interventions are timely and capable

of effectively counteracting entrenched market power. Whether the DMA can achieve this in practice remains an open question.

4.5 Conclusions

The DMA was framed around its objectives to provide a legal basis for its adoption, particularly by aligning with the principle of non-double jeopardy, given that it regulates the same subject matter as competition law. This framing also aimed to ensure that the DMA could be applied in parallel with existing competition law. This is hardly surprising, given the Commission's longstanding reliance on the concept of policy objectives in shaping its regulatory framework. As a matter of fact, the Commission emphasises the objectives extensively every time it updates its competition policy. Ironically, the motivation for introducing a new instrument grounded in regulatory objectives stems from the challenges faced by the Commission in applying competition law, particularly the consumer welfare standard. Although this standard was long defended by the Commission and ultimately recognised by the EU courts, it has proven difficult to implement effectively in the digital economy. Accordingly, the Commission introduced a regulatory instrument that reflects its objective-driven approach. While the DMA's primary aim is evidently to exert stronger regulatory control over the digital economy, the substantive content and coherence of its objectives, as well as their alignment with competition law goals, have not been sufficiently scrutinised. This is evident from the fact that the Commission initially sought to address digital market challenges through competition law before eventually turning to regulation. Even after selecting a regulatory instrument, there continued confusion about the objectives. Although various objectives, such as the protection of consumer welfare and innovation, were included in the draft of the DMA, they were not included in the final version of the regulation.

Fairness and contestability goals remain in the DMA's final version. Strikingly, these concepts are introduced in the DMA as though they represent novel regulatory ideas. Indeed, public policy concerns, such as fairness, are not foreign to EU competition law. This continuity undermines the DMA's claim of introducing a distinctly new set of objectives. This tension becomes more pronounced when examining the relationship between the DMA's objectives and its substantive obligations. The DMA's obligations are primarily based on recent case law outcomes targeting digital conduct. However, these obligations are also tightly linked to

fairness and contestability, which are touted as the DMA's objectives in the regulation. The claim that the DMA's objectives differ from those of competition law appears questionable, especially since the regulation simply codifies existing case law outcomes with minimal modification. In other words, characterising the DMA as complementary to EU competition law on this basis does not seem to be an accurate approach. Although the DMA was introduced as a means to regulate the fast-evolving digital economy, its justification based on stated objectives, many of which are ambiguous or inconsistent, remains unconvincing, as previously discussed.

This chapter has demonstrated that the simultaneous application of the DMA and EU competition law risks violating the ne bis in idem principle, potentially leading to significant problems in the medium and long term. Moreover, the DMA's provisions intended to remedy the formal shortcomings of competition law raise several concerns of their own. First, the design of gatekeepers and core platform service concepts, which set the DMA's intervention standards, contains significant ambiguity. Qualifying a firm as a gatekeeper is highly complex and likely to be successfully challenged by the firms involved. Moreover, although the authorities have stated that the thresholds for gatekeeper status are behaviour-based, the concept seems to have been designed with tech giants already identified as gatekeepers. Such an attitude seems to justify the allegations that EU competition law targets size, which has been the nemesis of EU competition law for many years. The existing gatekeepers are also subject to DMA obligations concerning services that are not dominant in the sense of competition law, which justifies these criticisms. As such, it is highly likely that acting with such presuppositions will yield results that will be detrimental to innovation and consumers in the medium and long term. Above all, the gatekeeper standards set the DMA's intervention threshold extremely low. Although the DMA is positioned as complementary to Union and national competition law by reference to its objectives, such low-intervention standards would imply the marginalisation of competition law. The marginalisation of competition law through the DMA will likely have important consequences. To begin with, the DMA's obligations are deeply rooted in both Union and national competition law frameworks that govern digital markets. As is well known, the know-how on the competitive scrutiny of the digital economy results from a painful learning process of enforcement activities for both the Commission and the NCAs. However, the case law on the digital economy has been regulated relatively early and somewhat frozen. This is likely to undermine the flow of information in the digital sector. On the other hand, while the same case law has been harshly criticised in terms of the efficiency of its remedies and its ability to control

the anti-competitive behaviour of technology giants, it is questionable how healthy it is to put the still relatively limited outcomes of this case law into a binding regulatory form. Blocking the case law, the main source of empirical experience in controlling a dynamic area such as the digital sector, is not a very healthy solution.

Taking all the above factors as a wh9ole, it is clear that the DMA will likely fragment rather than bring clarity and harmonisation to the control of digital markets in the EU. Despite its enforcement deficiencies, especially in the formal aspects, competition law could be considered a healthy instrument in terms of judicial integrity to control the digital economy on a more legal and non-fragmented basis, although its deficiencies should be addressed in the absence of a complementary DMA. On the other hand, since the DMA is now a reality for the EU competition law systematisation, it can be argued that the obligations imposed by the DMA can still be utilised for competition law. If one way or another, the DMA is to be applied simultaneously with competition law, despite all the contradictory situations explained above, it is possible that various issues, as analysed in this chapter, may come before the EU courts. In such situations, utilising the benefits of the DMA may help create a more holistic jurisprudence in the EU courts. As analysed in this chapter, the DMA's transparency and unfair competition law-based obligations regarding the control of the digital economy are not entirely new to EU competition law, but they are not frequently taken into account in recent consumer welfare-oriented case law in a systematic approach. Their transposition into EU competition law will contribute to EU competition law in a standalone manner and minimise conflicting situations when the DMA and EU competition law are applied together, as discussed in the remaining two chapters of the research.

CHAPTER 5: FROM FOOTNOTE TO FRONT STAGE: THE RISE OF FAIRNESS RHETORIC IN EU COMPETITION LAW DISCOURSE

5.1 Introduction

As discussed in earlier chapters, the increasing reliance on consumer welfare as the guiding principle of EU competition law has exposed notable analytical and normative limitations when applied to the complex realities of digital markets and their novel forms of anticompetitive behaviour.[1] Unlike the United States, where consumer welfare emerged as a clearly dominant enforcement paradigm, EU competition law has undergone a distinct evolutionary trajectory, characterised by incremental adjustments and adaptations aimed at accommodating the complexities presented by digital economies. Even with the EU's distinctive approach, the limitations of a purely consumer welfare-based enforcement framework have become increasingly apparent, especially in cases involving self-preferencing, discriminatory access to key application programming interfaces (APIs), or problematic cross-service data usage. These are forms of conduct that traditional metrics such as price, output, and allocative efficiency struggle to capture effectively. Furthermore, as examined previously, the DMA explicitly articulates fairness and contestability as distinct regulatory objectives.[2] This explicit positioning seeks to differentiate the DMA from classical competition law frameworks, particularly Article 102 TFEU, thereby providing a legal basis for its parallel application alongside existing competition rules. However, as previously argued, the legitimacy and accuracy of the DMA's positioning of fairness as a standalone, novel regulatory goal distinct from traditional competition objectives remain critically contested. Specifically, it was argued that the DMA's fairness-based obligations do not represent entirely new regulatory inventions but rather codify principles already articulated within established EU competition jurisprudence. As a result, serious concerns have been raised that portraying the DMA's fairness goals as fundamentally

[1] For a discussion of the evolution and limitations of the consumer welfare standard in EU competition law, see Section 2.3 of Chapter 2 and Section 3.5 of Chapter 3.

[2] For a detailed examination of the DMA's stated regulatory objectives, as well as a critical analysis of its portrayal of fairness as a novel regulatory value, see Chapter 4, Section 4.2.

novel may lead to conflicts. In particular, it could risk violating the ne bis in idem (double jeopardy) principle through overlapping enforcement and duplicative regulatory action.[3]

This chapter tests the empirical validity and doctrinal foundations of these earlier assertions by systematically examining the evolution of EU competition enforcement rhetoric and its underlying case law. The analysis is structured around two interrelated objectives. First, the chapter empirically investigates the extent to which EU competition enforcement rhetoric has demonstrably shifted from a consumer welfare-centred framework toward an explicit emphasis on fairness-oriented terminology. To achieve this, a comprehensive corpus-wide term-frequency analysis is employed, quantifying and comparing the prevalence of fairness versus consumer-welfare vocabulary across a diverse range of competition enforcement documents, including key decisions from the Commission, landmark rulings by NCAs, and significant judicial decisions by both the General Court and the CJEU, covering the critical period between 2017 and 2024. The resulting empirical data, systematically presented in detailed visualisations (Figures 1-6), provide robust quantitative evidence demonstrating whether fairness rhetoric has indeed supplanted consumer welfare discourse within EU competition law enforcement. The empirical methodology employed in this chapter is not developed ex nihilo. Rather, it builds upon established approaches in empirical legal scholarship that employ term-frequency and discourse-analytic techniques to examine shifts in the objectives and rhetoric of competition law enforcement. In particular, the methodological design draws inspiration from the comprehensive empirical investigation conducted by Stylianou and Iacovides, which analyses the evolution of competition law goals through large-scale case-law analysis.[4] While the present chapter adapts these methodological insights to a more focused corpus and a different doctrinal question, namely the emergence of fairness as a regulatory objective under the DMA, the underlying analytical framework reflects and extends tools developed in the existing literature. The contribution of this chapter therefore lies not in the invention of a novel empirical method, but in its systematic and context-specific application within EU competition law.

[3] For a detailed discussion of how the DMA's fairness-based obligations risk overlapping with established competition law principles, and may, as a result, raise ne bis in idem concerns due to duplicative enforcement, see Chapter 4, particularly the analysis of regulatory objectives and legal coherence.

[4] K Stylianou and MC Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (SSRN Working Paper, 2020) <https://ssrn.com/abstract=3735795> accessed 16 March 2022.

Second, the chapter critically examines whether the fairness-based obligations explicitly codified in the DMA genuinely represent novel regulatory interventions or, conversely, are deeply rooted within pre-existing EU competition case law. To support this, the chapter traces a doctrinal genealogy that connects each DMA fairness obligation to its earliest identifiable precedent within established EU competition jurisprudence. This doctrinal tracing is detailed explicitly in Table 4 and further clarified visually through the DMA–Case-Law Lineage diagram (Figure 7). By explicitly demonstrating that the DMA's fairness obligations have substantial doctrinal foundations within existing EU case law, the analysis critically questions the DMA's assertion of fairness as a novel regulatory goal distinct from traditional competition law. In synthesising the empirical and doctrinal findings, this chapter provides robust evidence supporting the allegation that the DMA, rather than introducing genuinely novel fairness objectives, effectively codifies fairness principles already embedded within EU competition jurisprudence. This codification, while analytically valuable for providing regulatory clarity and operational consistency, simultaneously raises critical concerns regarding the appropriateness and necessity of the DMA's parallel application alongside classical competition law. Specifically, by claiming fairness as a standalone and distinct regulatory goal, the DMA risks exacerbating regulatory overlaps and violating foundational competition principles such as ne bis in idem.

Nevertheless, despite these conceptual and regulatory tensions, the DMA's codification of fairness provides substantial analytical value. This codification results in a structured catalogue of fairness-based obligations rooted in clearly identifiable judicial precedents. This catalogue serves as an invaluable evidentiary and conceptual foundation for the functional fairness test proposed in the final chapter of this thesis. As will be further elaborated, this structured catalogue offers critical clarity and practical utility in developing a balanced and coherent regulatory framework capable of addressing the unique competitive challenges posed by digital markets. This chapter's analysis of fairness rhetoric and its doctrinal foundations leads to two key conclusions. First, fairness has emerged as the dominant rationale in EU competition enforcement, gradually replacing traditional consumer welfare language. Second, although the DMA presents fairness as a novel objective, its obligations are in fact deeply grounded in established EU competition jurisprudence. This nuanced understanding clarifies both the strengths and limitations of the DMA's codification of fairness, highlighting potential regulatory conflicts while also recognising the analytical benefits of explicitly formalising fairness principles for future competition law enforcement. Ultimately, these insights lay the

essential groundwork for the functional fairness framework proposed in the subsequent chapter, aiming to reconcile the DMA's fairness objective with established competition enforcement principles.

5.2 Rhetorical Shift in Fairness and Consumer Welfare Language

This section seeks to determine whether the rhetorical framework underpinning EU competition law enforcement has undergone a discernible transformation, from a longstanding consumer welfare-oriented idiom towards one that is progressively anchored in the notion of fairness. Whereas consumer welfare terminology typically frames competitive harm primarily through quantifiable metrics, such as adverse price effects, reductions in market output, or detriments to allocative efficiency, fairness-oriented discourse instead foregrounds normative principles that emphasise equitable treatment, the avoidance of discriminatory practices, and the preservation of fair and balanced competitive conditions. Should empirical analysis confirm a decisive lexical shift from consumer welfare toward fairness terminology, this finding would provide robust support for the broader argument advanced in this research. Specifically, it would demonstrate that European competition law is experiencing a significant normative realignment, in which fairness increasingly functions as the central organising principle, while consumer welfare is repositioned to occupy a subsidiary and context-specific analytical role. Thus, such a rhetorical transformation, if validated empirically, would not merely indicate superficial linguistic variation; instead, it would signal a profound normative recalibration within EU competition enforcement practices.

To investigate and empirically test this central hypothesis, this section employs the systematic term-frequency methodology, which is thoroughly outlined below. The analysis is applied comprehensively to an extensive corpus of relevant competition enforcement documents, including European Commission decisions, key rulings issued by prominent NCAs, and significant judgments delivered by both the General Court and the CJEU, spanning the period from 2017 through to 2024. Following the careful identification and categorisation of forty-four distinct keyword stems into two analytically meaningful conceptual groups, labelled respectively as fairness and consumer welfare (as detailed explicitly in Table 2), the raw frequency counts of these keywords were methodically normalised according to the total word

count of each document. This crucial methodological step ensured comparability and accuracy, controlling effectively for varying document lengths.

Subsequently, these normalised frequencies were synthesised into a single composite measure, designated as the Fairness/Consumer Welfare Ratio Index, calculated individually for each decision in the dataset. The resulting index scores, indicative of the rhetorical orientation within each text, are systematically visualised through six detailed charts. Collectively, these visualisations facilitate a nuanced examination of temporal trends, cross-institutional variations, and level-specific rhetorical developments, thereby providing a robust quantitative basis for assessing the hypothesised shift toward fairness-oriented language.

Moreover, to further enhance the methodological precision and interpretive clarity of the empirical analysis, illustrative context excerpts are provided in the Appendix. These excerpts directly present keyword occurrences within their immediate legal contexts, effectively addressing and mitigating potential semantic ambiguities that commonly arise in quantitative analyses of legal discourse. In order not to disrupt the integrity of the research, these lengthy context excerpts are included in Appendix at the end of the thesis.

In the following sections, the results derived from this comprehensive empirical analysis are presented and discussed thoroughly, beginning with a careful, chart-by-chart interpretive assessment. Ultimately, this quantitative and qualitative examination culminates in an integrative synthesis, explicitly situating the empirical findings within the broader doctrinal and theoretical trajectory articulated throughout the research. This holistic approach ensures that the empirical analysis not only verifies the rhetorical realignment hypothesis but also positions its implications within the broader landscape of contemporary EU competition law scholarship and policy discourse.

5.2.1 Methodology for Measuring the Language Change

As mentioned above, this section undertakes a detailed term-frequency analysis aimed at systematically evaluating the relative prominence and institutional adoption of fairness-based language compared to traditional consumer welfare terminology within recent EU competition enforcement discourse. By employing a rigorous empirical approach, this methodological

framework aims to capture and quantify the precise extent to which fairness-oriented rhetoric has gained traction vis-à-vis the historically dominant consumer welfare perspective. To construct a comprehensive and representative analytical framework, the selection of relevant keywords for this comparative lexical analysis was methodically developed through a robust triangulation process. Three complementary sources informed the choice of keywords. First, it drew from influential academic literature that critically examines theoretical and conceptual developments in EU competition law. Second, it incorporated relevant policy documents, position papers, and official press releases from the Commission, particularly those addressing regulatory challenges in the digital economy. Third, it relied on a detailed review of competition enforcement decisions issued by both EU institutions and national competition authorities between 2017 and 2024.

The triangulated selection process ensured both conceptual clarity and empirical robustness, enabling the identification of keyword stems that reliably reflect the central concepts and normative frameworks characteristic of fairness-based and consumer welfare-oriented analyses. As a result of this methodological approach, the identified keywords have been systematically organised and grouped into two distinct and analytically coherent categories, clearly delineating between fairness-based terminology and consumer welfare-related vocabulary. These carefully constructed keyword groups, each representing a distinct normative orientation, are comprehensively detailed and summarised in Table 2 below. This structured categorisation serves as a foundational reference, guiding the subsequent term-frequency analyses and providing clarity and transparency regarding the methodological underpinning of the empirical examination. Moreover, by explicitly identifying and distinguishing these two terminological frameworks, the research ensures that subsequent empirical findings precisely reflect genuine shifts in normative discourse rather than superficial linguistic variations, thus lending greater analytical validity to the conclusions derived from this empirical investigation.

Table 2: Grouped Keyword List for Fairness vs Consumer Welfare Term-Frequency Analysis

Fairness Keywords Family	fair, fairness, unfair, unfairness, unfair competition, level playing field, equitable, equal treatment, discrimination, discriminatory, ranking, interoperability, bias, portability, contestability, contestable, gatekeeper, gatekeepers, access, data protection, access obligation, data access, privacy, exploit, exploitation, exploitative, excessive, equality, equality of opportunity
Consumer Welfare Keywords Family	consumer welfare, consumer, consumer wellbeing, harm to consumers, harm consumers, detrimental to customers, detrimental to consumers, consumer surplus, interests of consumers, price, prices, quality, output, efficiency, innovation

The term-frequency analysis described in this study was conducted systematically and separately across three distinct institutional levels within the EU competition enforcement architecture, namely the policy enforcement level, the General Court, and the CJEU. At the policy level, the analysis encompassed both official enforcement documents issued by the Commission and a carefully selected set of significant competition investigations and decisions from key NCAs. To ensure methodological rigour and terminological consistency, particularly for NCA decisions, the analysis exclusively relied upon official English language translations provided directly by the respective national authorities. This deliberate methodological choice effectively mitigates the risk of interpretive distortions or inaccuracies that might otherwise arise from reliance on informal, unofficial, or ad hoc machine-generated translations. By adhering strictly to authoritative official translations, the study maintains the consistency of the empirical evidence, thus enhancing the validity and reliability of subsequent analytical interpretations.

The explicit disaggregation of term-frequency counts according to these institutional levels was undertaken with a clear and deliberate analytical intent, fulfilling two critical methodological objectives. Firstly, this stratified approach prevents the inadvertent multiple counting of identical language or terminology as individual cases progress vertically through different layers of the competition enforcement and judicial system. This methodological safeguard is essential to ensure the precision and accuracy of empirical results, providing clarity regarding the unique contribution of each institutional actor in shaping the evolving discourse. Secondly, institutional disaggregation permits the analysis to examine explicitly whether the normative rhetoric initially developed at the policy enforcement stage genuinely withstands and survives subsequent judicial scrutiny, particularly within appellate contexts such as the General Court and the CJEU. This analytical focus addresses a significant conceptual and empirical concern, namely, the potential for strategic manipulation or selective goal-framing at the policy level, a risk extensively discussed in relation to consumer-welfare rhetoric in the preceding chapters of this research. By systematically tracking rhetorical continuity or divergence across these institutional layers, the study provides an empirically grounded basis for evaluating the depth and durability of the fairness-oriented rhetorical shift identified in contemporary EU competition discourse.

The empirical dataset underpinning this term-frequency analysis comprises a total of fifteen landmark decisions involving digital platform regulation, decided between 2017 and 2024. Among these selected cases are widely recognised, influential decisions such as *Google Shopping,*[5] *Google Android,*[6] *Facebook Data,*[7] *Amazon Marketplace,*[8] *and Apple ATT*.[9] In addition to these digital-market-focused cases, two recent judgments from the Court of Justice

[5] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11; Case T-612/17 *Google LLC and Alphabet Inc v Commission* EU:T:2021:763; Case C-48/22 *P Google LLC and Alphabet Inc v Commission* ECLI:EU:C:2024:726.

[6] European Commission, Commission Decision of 18 July 2018 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 — *Google Android)* C(2018) 4761 final [2019] OJ C 402/19; Case T-604/18 *Google LLC and Alphabet Inc v Commission* ECLI:EU:T:2022:538.

[7] Bundeskartellamt, Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)*.

[8] Bundeskartellamt, Decision B2-55/21, *Amazon – Determination of the Status as Addressee of Section 19a(1) GWB*.

[9] Autorité de la concurrence, Decision 22-D-12 of 16 June 2022 concerning practices in the online advertising sector *(Meta/Facebook – Apple ATT)*.

concerning non-digital contexts, namely *Servizio Elettrico Nazionale* and *European Super League Company*, have been deliberately included in the analysis to serve as critical control cases. These control judgments, originating directly before the CJEU without preceding investigations or decisions by the Commission, remain explicitly unaffected by any pre-existing rhetorical orientation or potential normative framing at the policy-enforcement level. Consequently, their inclusion provides a particularly valuable analytical benchmark, allowing the study to ascertain whether the observed rhetorical reorientation toward fairness represents a phenomenon exclusive to digital-platform regulatory contexts or instead indicates a broader, institution-wide doctrinal evolution transcending digital boundaries. To facilitate transparency and clarity regarding the empirical foundations of this analysis, a complete and detailed listing of all selected decisions is presented systematically in Table 3. Earlier, historically significant consumer welfare-dominant judgments, such as the influential *Intel*[10] examined comprehensively in Chapter 4, have been intentionally excluded from the current analysis to maintain analytical coherence and ensure an accurate representation of contemporary rhetorical trends. Ultimately, this selection process enhances the analytical precision and contextual relevance of the term-frequency analysis, providing robust empirical insights into the institutional diffusion and consolidation of fairness-oriented language within recent EU competition law discourse.

The selection of a limited corpus of fifteen landmark decisions reflects a deliberate methodological choice rather than an attempt at exhaustive coverage. The cases included were selected on the basis of their precedential value, institutional significance, and their centrality to contemporary debates on digital platform regulation and fairness-oriented enforcement. Given the relatively limited number of relevant decisions at the level of the European Commission and the EU Courts addressing digital markets and fairness-related concerns, the corpus was extended to include selected decisions of national competition authorities. This approach ensures a broader and more representative picture of enforcement practice in digital contexts, while maintaining analytical coherence. Earlier or peripheral decisions were excluded in order to focus on cases that have demonstrably shaped enforcement rhetoric and doctrinal development during the relevant period.

[10] Case T-286/09 *Intel Corp v Commission* EU:T:2014:547; Case C-413/14 P *Intel Corp v Commission* EU:C:2017:632; Case T-286/09 RENV *Intel Corp v Commission* EU:T:2022:19.

Table 3: Decision Corpus Analysed (2017-2024): Cases, Courts and Levels

Case	Year	Level
Google Shopping	2017	Policy – EU Commission
Google Android	2018	
Google Search AdSense	2019	
Apple App Store Music Streaming	2021	
Apple Pay NFC/Mobile Wallets	2024	
Facebook Data, Bundeskartellamt	2019	Policy – NCAs
Amazon Marketplace, Bundeskartellamt	2022	
Google AdTech, Autorite de la concurrence	2021	
Apple ATT, Autorite de la concurrence	2022	
Google Shopping	2021	General Court
Google Android	2022	
Servizio Elettrico Nazionale	2022	Court of Justice of the EU
Facebook Data	2023	
European Super League Company	2023	
Google Shopping	2024	

The analysis underpinning this empirical study was systematically conducted using the officially published PDF versions of relevant competition decisions. To ensure methodological precision and to avoid unintended interpretive errors, the searches implemented utilised a whole-word-only filter. This methodological choice guaranteed that only exact keyword matches were identified, thereby significantly improving the accuracy and reliability of the textual analysis. Furthermore, to maintain analytical consistency and clarity, supplementary textual elements, specifically, footnotes and any citations introduced by phrases such as "see also," were deliberately excluded from the analysed corpus. These elements were omitted because they often contain extraneous or ancillary information that could distort or dilute the accurate assessment of central normative terminology.

Recognising that certain generic terms, including commonly used words such as "price," "data," or "access," frequently appear within narrative or descriptive portions of competition decisions, portions not directly related to substantive legal analysis, an additional

methodological safeguard was implemented. Specifically, each instance or "hit" identified by the keyword searches was individually reviewed within a defined textual context window of ±10 words around the keyword. This manual review procedure was essential to verify that the keywords genuinely appeared within substantive analytical or judicial reasoning sections, rather than in purely descriptive or background narrative passages. Consequently, only those instances clearly embedded in substantive legal contexts were ultimately counted. This manual verification process significantly mitigated the inherent risk of false positives, a methodological concern particularly salient in empirical legal research, where isolated textual frequencies could misleadingly inflate or distort the empirical results.

Moreover, in circumstances where the keyword analysis revealed overlapping terminology, particularly when a longer, multi-word phrase encapsulated within it a shorter single-word stem (such as "consumer welfare" containing the shorter stem "consumer"), clear methodological precedence was systematically given to the complete multi-word expression. This explicit prioritisation effectively suppressed the overlapping single-word counts, thereby preventing the potential methodological pitfall of double-counting, which could otherwise compromise the analytical precision of the empirical findings.

Given the importance of methodological transparency, reproducibility, and reliability within empirical legal studies, an additional precautionary step was taken. Specifically, to facilitate external validation and replication, a comprehensive illustrative appendix was compiled. This appendix presents detailed excerpts from selected paragraphs, clearly demonstrating the immediate legal context in which each relevant keyword appeared. By explicitly presenting these contextual illustrations, the methodological framework ensures both analytical robustness and transparency, enabling independent scholarly verification and enhancing the overall credibility of the empirical analysis.

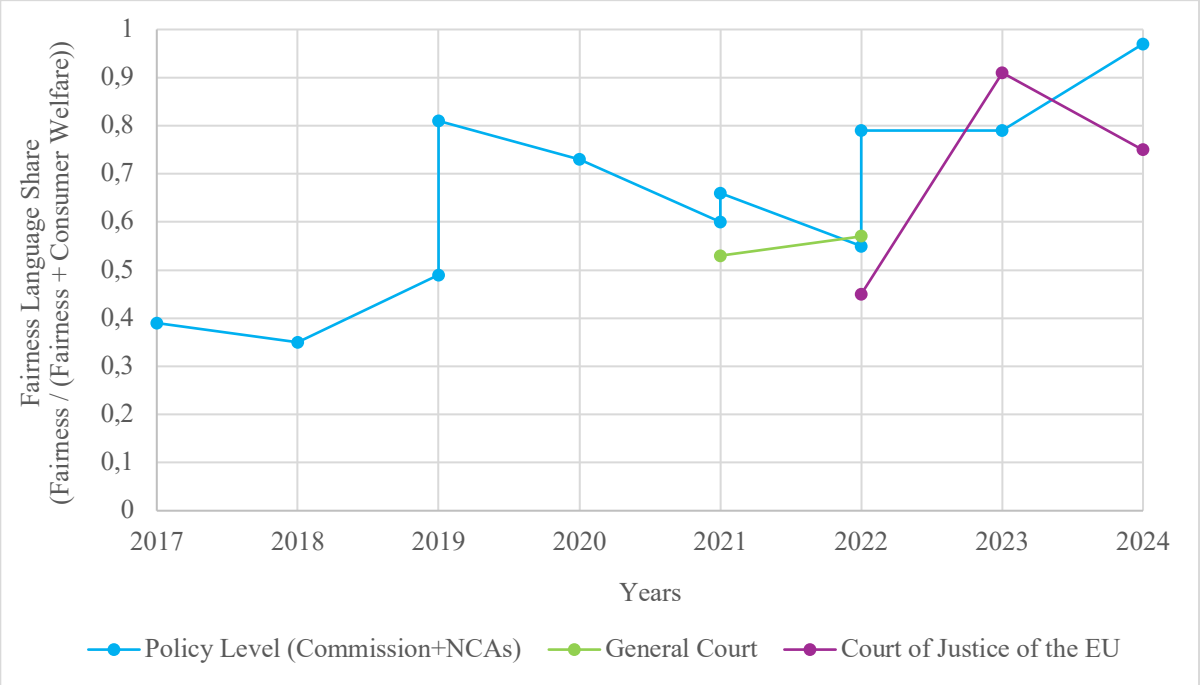
In the final methodological stage, the collected textual data underwent a careful process of quantitative transformation, resulting in the construction of a robust and analytically insightful quantitative index. This index, labelled the Fairness/Consumer Welfare Ratio Index, was explicitly designed to capture, quantify, and compare the rhetorical orientation present within each individual decision or document analysed. To ensure meaningful comparability across the entire corpus, especially considering documents of varying textual length, all term frequencies identified in the analysis were systematically normalised by the total number of tokens (words)

in each respective document. The resulting standardised values were then aggregated to generate a composite ratio index, which directly reflects the relative prominence or salience of fairness-oriented language vis-à-vis traditional consumer-welfare terminology across the analysed decisions.

The empirical findings derived from this Fairness/Consumer Welfare Ratio Index are subsequently visualised through a detailed series of bar and line charts (Figures 1 through 6). Collectively, these visual representations offer a clear, concise, and systematic quantitative foundation, serving as the empirical underpinning for the detailed qualitative and interpretive analysis developed in the subsequent chapter of this research. While the quantitative index provides valuable and empirically robust insights into the evolving patterns of rhetorical orientation within contemporary EU competition law enforcement discourse, it remains crucial to acknowledge specific methodological limitations inherent in such empirical linguistic analyses. In particular, reducing complex and nuanced legal language to discrete, quantifiable terms inevitably entails some loss of semantic richness and interpretive subtlety. Also, the relatively small size of the corpus does not permit claims of statistical representativeness in a strict inferential sense, nor does it allow for conventional tests of statistical significance. Accordingly, the findings presented here should be understood as indicative rather than determinative. The value of the analysis lies in identifying consistent rhetorical patterns across influential cases and institutions, rather than in producing generalisable statistical conclusions. These limitations do not undermine the qualitative and doctrinal insights derived from the analysis, but they do inform the scope and interpretative caution with which the empirical results should be read. Acknowledging and transparently stating these limitations is critical to appropriately contextualising the analytical results from this empirical research.

5.2.2 Findings on Rhetorical Change in Fairness and Consumer Welfare Language

Figure 1: Fairness Language Share over Time by Institutional Level



Before interpreting the observed trends, it is important to clarify the methodological scope of the empirical analysis presented in this section. The findings reported here are not intended to establish statistical significance in the inferential sense, nor to test formal hypotheses through econometric or probabilistic modelling. Rather, the analysis adopts a systematic descriptive approach, tracing longitudinal and institutional patterns in the use of fairness-related language across EU competition enforcement and judicial decisions. Given the nature of the dataset, consisting of a finite and non-random corpus of institutional texts, the purpose of the analysis is to identify structured and persistent shifts in rhetorical emphasis, rather than to infer population-level parameters. In this context, the significance of the findings lies not in statistical probability measures, but in the consistency, direction, and institutional diffusion of observed linguistic trends over time. Accordingly, the empirical results should be understood as evidencing a meaningful and non-random rhetorical reorientation within EU competition law institutions, rather than as statistically generalisable claims in the conventional quantitative sense.

The empirical analysis of Figure 1 clearly illustrates that fairness-oriented language within EU competition enforcement has experienced a pronounced and systematic expansion over the observed time period, reflecting a noteworthy shift in institutional rhetoric. At the policy level, which encompasses the Commission and NCAs, the share of fairness-related vocabulary demonstrates a significant and essentially continuous increase, ascending from an initial proportion of 0.39 in 2017 to a peak of 0.96 by 2024. Despite some minor short-term fluctuations evident in the data, the overall trajectory at this institutional level remains strikingly linear, underscoring a consistent commitment to fairness terminology as an increasingly dominant analytical framework.

Turning to judicial institutions, the pattern of rhetorical evolution at the General Court level is characterised by a notably incremental, two-stage process. Initially, the General Court introduced a substantial presence of fairness lexicon in its 2021 *Google Shopping*[11] ruling, with the fairness proportion standing at approximately 0.53. This preliminary adoption was subsequently reinforced and consolidated through the *Google Android*[12] decision of 2022, where the fairness terminology share rose modestly yet meaningfully to a proportion of 0.58. Although this shift at the General Court may appear relatively restrained in comparison to the policy level, it nonetheless indicates an apparent judicial acceptance and institutional embedding of fairness-oriented discourse, albeit with cautious incrementalism.

The CJEU exhibits perhaps the most dramatic rhetorical shift, showcasing a rapid and pronounced late-stage adoption of fairness language. According to the graphical analysis, the court's engagement with fairness vocabulary increased sharply from a relatively moderate proportion of 0.46 in the 2022 *Servizio Elettrico Nazionale*[13] decision to a remarkable peak of 0.91 in the subsequent 2023 *European Super League*[14] ruling. Although the share slightly moderated to 0.75 in 2024, this still represents a considerable institutional commitment to fairness, highlighting its consolidation as a central normative frame even at the apex judicial level. The data thus vividly underscores not only the speed but also the scale of this rhetorical

[11] Case T-612/17 *Google LLC and Alphabet Inc v Commission* EU:T:2021:763.

[12] Case T-604/18 *Google LLC and Alphabet Inc v Commission* ECLI:EU:T:2022:538.

[13] Case C-377/20 *Servizio Elettrico Nazionale and Others v AGCM* ECLI:EU:C:2023:11.

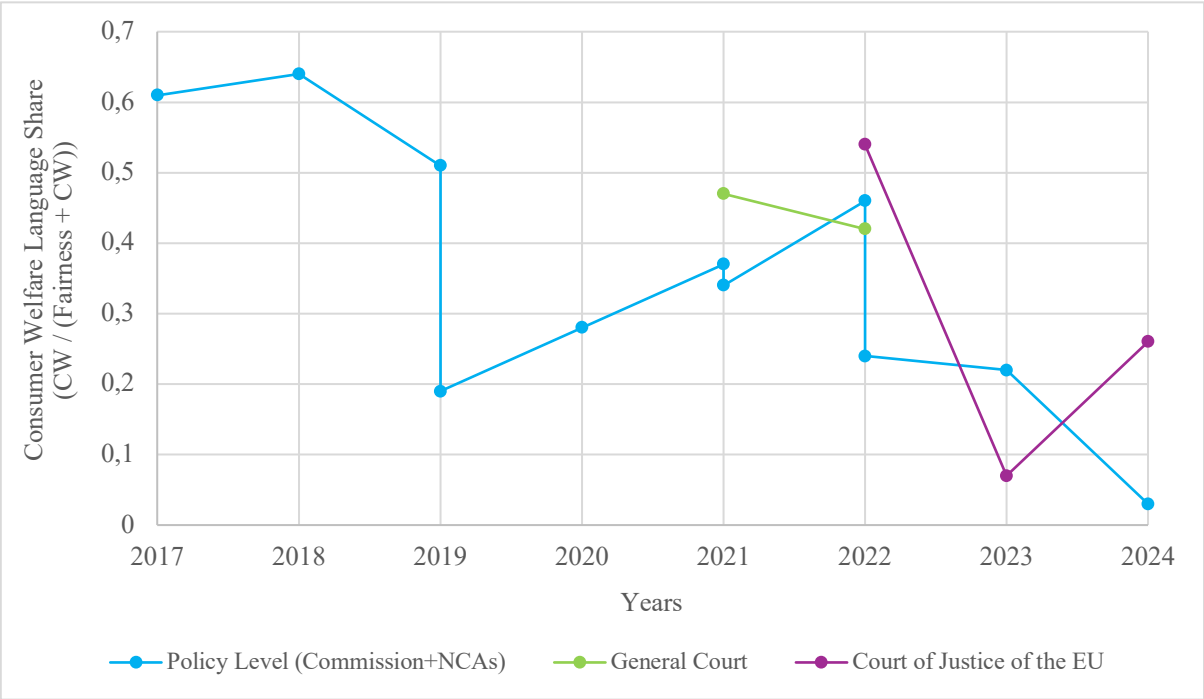
[14] Case C-333/21 *European Superleague Company SL v UEFA and FIFA* ECLI:EU:C:2023:1027.

adoption, suggesting a fundamental reorientation in how fairness is perceived and articulated within the CJEU's jurisprudential reasoning.

Furthermore, the parallel yet temporally staggered trajectories observed across the three institutional layers, policy, General Court, and CJEU, provide additional analytical insights. Specifically, the data strongly suggest that fairness-oriented rhetoric originates predominantly at the enforcement and policy-making level, initially introduced and developed by national authorities and the Commission. Subsequently, this conceptual framework is progressively echoed and ratified by higher judicial bodies, first by the General Court and ultimately by the CJEU. This dynamic indicates a bottom-up diffusion process, whereby initial policy innovations are systematically institutionalised and legitimised within judicial discourse. Such a hierarchical pattern not only validates fairness as a functional normative principle but also highlights the critical interplay and interdependency between enforcement authorities and judicial institutions in shaping the conceptual landscape of EU competition law.

Collectively, the empirical findings presented through the graphical representation reinforce the core hypothesis advanced throughout this analysis: fairness discourse, far from remaining a superficial rhetorical device, has increasingly become the dominant normative lens through which EU competition institutions frame and assess competitive conduct. The extensive diffusion and institutionalisation of fairness-oriented language across different layers of enforcement and judicial practice unequivocally signal a deep-seated, systemic transformation within EU competition law's normative orientation.

Figure 2: Consumer Welfare Language Share over Time by Institutional Level



In parallel to the observed ascendance of fairness rhetoric, consumer welfare terminology has experienced a pronounced and systematic decline across all institutional levels, reflecting a significant shift in the justificatory framing of EU competition law enforcement. At the policy level, the graphical analysis reveals a particularly stark reduction in the prominence of consumer-welfare discourse. Initially, in 2017, consumer welfare vocabulary occupied a dominant position, accounting for approximately 0.64 of the combined normative lexicon. However, by 2024, this proportion had dramatically plummeted to a negligible 0.03, suggesting an almost total rhetorical displacement of consumer welfare considerations in contemporary policy-level discourse. This decline signifies not merely a quantitative reduction. Still, it indicates a fundamental shift in regulatory priorities and conceptual orientation away from traditional, consumer-centric price and efficiency concerns toward broader fairness-based objectives.

Turning to judicial institutions, the rhetorical displacement of consumer welfare language is discernible but notably less abrupt. At the level of the General Court, the contraction is more gradual and modest in scale, moving from an initial consumer-welfare share of 0.47 down to approximately 0.42 by 2022. Although less dramatic than at the policy enforcement level, this decrease still indicates an essential conceptual shift within judicial discourse, as the court

incrementally reduces reliance on consumer welfare arguments in favour of fairness-oriented justifications. This shift suggests judicial caution or gradualism in adopting new normative frames, yet nonetheless confirms the steady integration of fairness considerations into judicial reasoning at this intermediate appellate level.

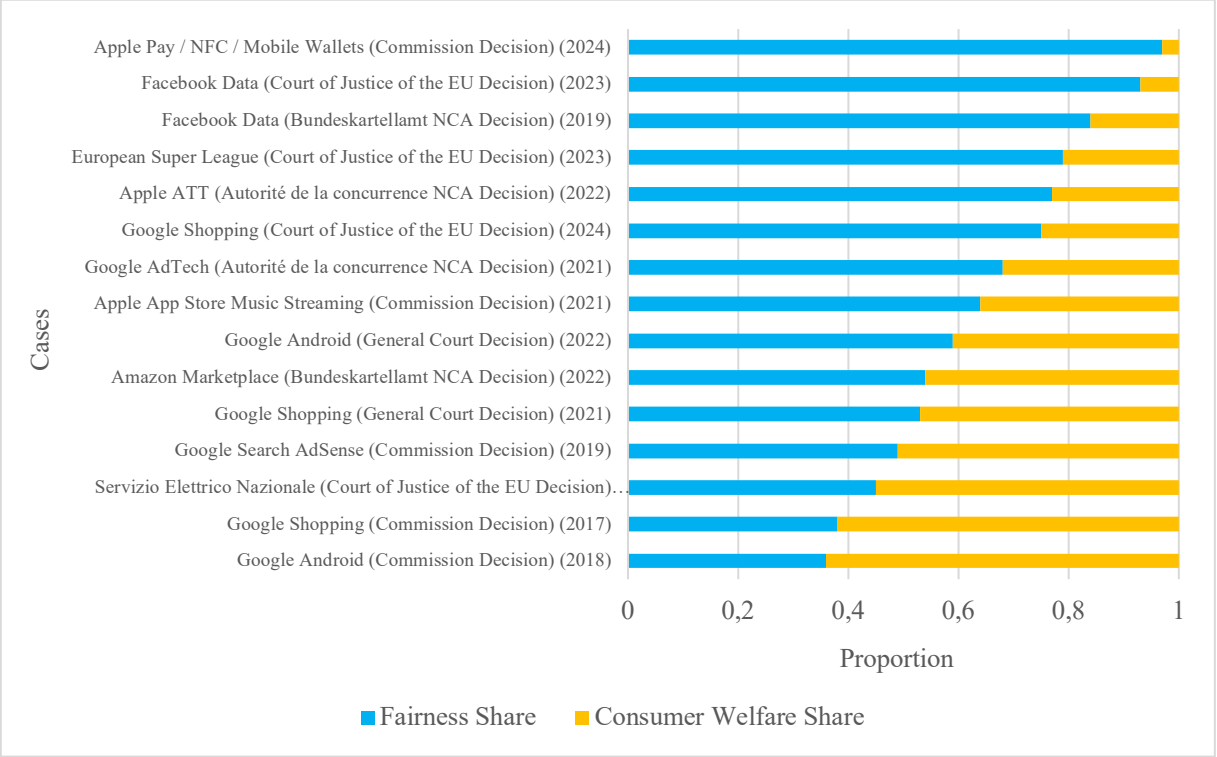
The CJEU exhibits the most striking rhetorical transformation in the usage of consumer welfare terminology. Initially, the court showed a relatively strong adherence to consumer welfare discourse, as evidenced by its high baseline proportion of 0.54 in the 2022 *Servizio Elettrico Nazionale*[15] judgment. Remarkably, however, the subsequent year witnessed a sudden and dramatic reversal, with consumer welfare rhetoric sharply dropping to a minimal share of only 0.09 in the 2023 *European Super League*[16] decision. This substantial rhetorical retreat highlights a pronounced shift in judicial priorities at the highest EU judicial level. The court's abrupt reorientation strongly implies an institutional recognition and endorsement of fairness as the dominant justificatory principle, significantly overshadowing the traditionally prevailing consumer welfare perspective.

The graphical data not only vividly illustrate these institution-specific trends but also provide compelling evidence of an overarching rhetorical realignment within the EU competition enforcement ecosystem. Critically, the observed pattern of asymmetric substitution, the marked rise of fairness rhetoric mirrored by the steep decline of consumer welfare terminology, suggests that fairness has not been simply added as a supplementary consideration. Rather, fairness-oriented arguments are effectively supplanting or even replacing traditional consumer welfare justifications across multiple enforcement contexts and judicial forums. This analytical insight reinforces the broader thesis that fairness is emerging not as a mere complementary normative framework but increasingly as the central, organising principle for EU competition law discourse and adjudication. Taken together, the patterns evident in this empirical analysis confirm a decisive and systemic transformation in the normative priorities guiding EU competition policy and jurisprudence.

[15] Case C-377/20 *Servizio Elettrico Nazionale and Others v AGCM* ECLI:EU:C:2023:11.

[16] Case C-333/21 *European Superleague Company SL v UEFA and FIFA* ECLI:EU:C:2023:1027.

Figure 3: Aggregate Fairness vs Consumer Welfare Bar Chart (All Levels)



Upon combining the empirical findings from the three institutional layers, a clear and significant shift in rhetoric emerges between fairness oriented and consumer welfare-oriented terminology. Notably, the aggregated analysis reveals that the relative shares of fairness and consumer welfare language intersect precisely in 2021, a key transitional point at which fairness terminology marginally surpasses consumer-welfare rhetoric, capturing approximately 0.51 of the combined normative vocabulary. This intersection point represents a crucial symbolic and analytical threshold, marking the moment when fairness discourse began to gain ascendancy within EU competition enforcement definitively.

From 2021 onwards, the rhetorical divergence between fairness and consumer welfare vocabulary continues to widen progressively and steadily each year, underscoring an increasingly pronounced preference for fairness-oriented justifications. By the year 2024, fairness language has firmly established its dominant position, accounting for approximately 0.78 of the overall normative lexicon, while consumer welfare terminology correspondingly declines to only 0.22. This persistent and expanding gap strongly supports the argument that the observed rhetorical shift is neither incidental nor confined to isolated institutional contexts

or exceptional cases. Instead, the consistency and clarity of this chronological progression reinforce the conclusion that the transformation is genuinely systemic and reflects a broader normative realignment across multiple EU competition law institutions.

Moreover, a deeper examination of the case level distribution, as illustrated in the accompanying visual representation, further enhances the robustness of this conclusion. The bar chart demonstrates that more recent landmark decisions, such as the 2024 *Apple Pay-NFC/Mobile Wallets*[17] Commission Decision and the 2023 *Facebook Data*[18] judgment from the CJEU, exhibit a notably high proportion of fairness language compared to earlier rulings. Conversely, earlier decisions such as the 2017 *Google Shopping*[19] Commission decision and the 2018 *Google Android*[20] decision display a substantially larger proportion of consumer welfare-oriented vocabulary, indicating the historically dominant position of consumer welfare in EU competition enforcement discourse. This trend clearly highlights a pronounced temporal dimension in rhetorical practices, confirming that recent judicial and enforcement decisions increasingly favour fairness-based justifications, thereby reinforcing the systemic nature of the shift.

Importantly, the broad and consistent expansion of fairness vocabulary is not limited to a single type of decision-making authority or institutional forum. Rather, as evidenced by the diverse array of cases, ranging from Commission investigations to General Court appeals and CJEU judgments, the widespread adoption of fairness terminology signals a coherent and deliberate institutional recalibration. This multidimensional and cross institutional diffusion pattern strongly suggests that fairness rhetoric is becoming deeply embedded within the analytical framework of EU competition law, underscoring its newfound primacy over consumer welfare considerations. Collectively, these empirical findings confirm that the transformation observed

[17] European Commission, Decision of 22 May 2024 in Case AT.40452 – *Mobile Wallets (Apple Pay)* C(2024) 3626 final.

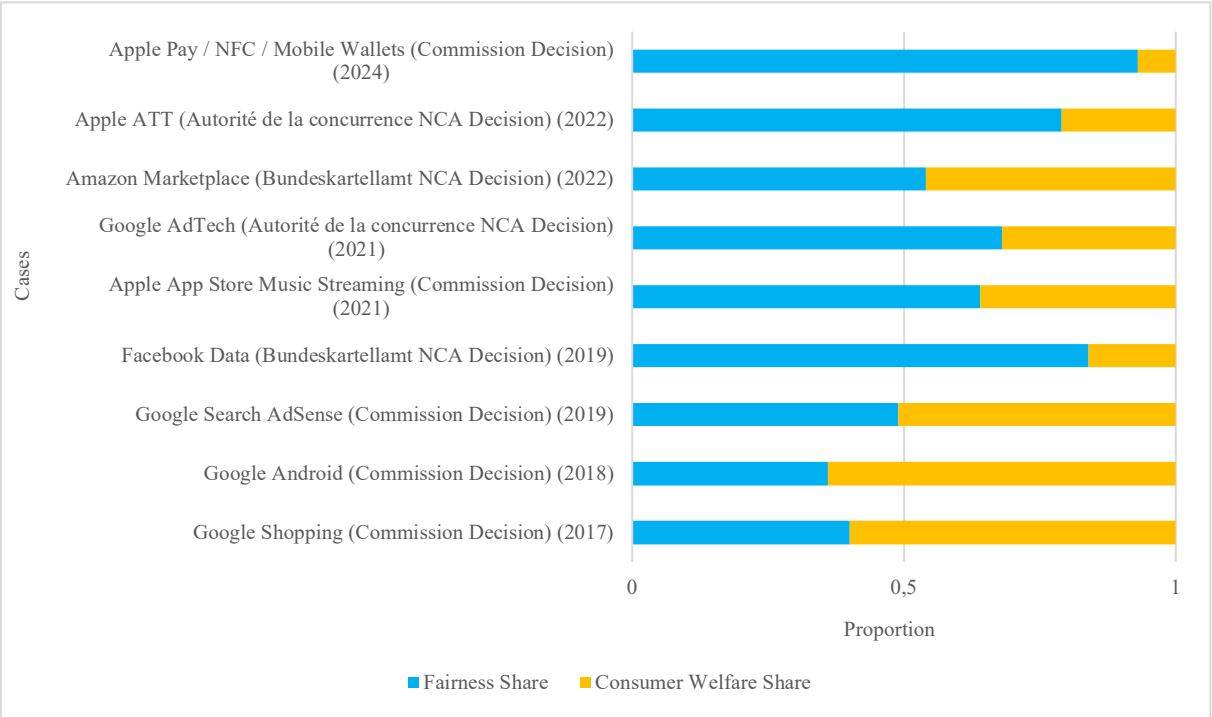
[18] Case C-252/21 *Meta Platforms and Others v Bundeskartellamt* ECLI:EU:C:2023:537.

[19] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11.

[20] European Commission, Commission Decision of 18 July 2018 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 — *Google Android)* C(2018) 4761 final [2019] OJ C 402/19.

in this analysis is fundamentally structural and represents a comprehensive normative shift rather than a transient or isolated rhetorical phenomenon.

Figure 4: Fairness vs CW at Policy Level (Commission + NCAs)



The analysis of policy-level documents, which comprise both the Commission's decisions and rulings by NCAs, reveals a distinctive narrative of convergence toward fairness-based discourse and a concurrent displacement of traditional consumer welfare rhetoric. The expansion and integration of fairness-oriented language at this institutional level exhibit a consistent upward trajectory across the observed period. Significantly, however, the most pronounced increases in the adoption of fairness terminology are temporally aligned with landmark interventions by prominent NCAs, notably the 2022 *Amazon Marketplace*[21] decision by Bundeskartellamt and the 2022 *Apple ATT*[22] decision by France's Autorité de la concurrence (AdlC). In these pivotal enforcement actions, the proportional share of fairness vocabulary not only increases sharply

[21] Bundeskartellamt, Decision B2-55/21 – *Amazon – Determination of the Status as Addressee of Section 19a(1) GWB* (5 July 2022).

[22] Autorité de la concurrence, Decision 22-D-12 of 16 June 2022 concerning practices in the online advertising sector *(Meta/Facebook – Apple ATT)*.

but notably exceeds the 0.80 threshold, clearly signifying a decisive rhetorical realignment in national level competition enforcement practices.

Furthermore, the Commission's own decisional practice closely mirrors and reinforces this broader trend observed at the NCAs level. The Commission's engagement with fairness-oriented vocabulary steadily intensifies over the analysis period, culminating prominently in its 2024 *Apple Pay-NFC/Mobile Wallets*[23] decision. In this landmark ruling, fairness language reaches an exceptionally high proportion of 0.97, indicating an almost exclusive reliance on fairness-oriented justifications and conceptual frameworks. This striking peak represents the apex of an ongoing rhetorical evolution at the EU's central competition enforcement body, unequivocally demonstrating the Commission's institutional endorsement of fairness as a core justificatory framework.

An additional noteworthy insight derived from the graphical evidence pertains to the relative timing and sequencing of fairness language adoption across policy level institutions. The comparative data presented clearly demonstrates that NCAs generally adopt fairness-oriented terminology slightly in advance of the Commission. This temporal sequencing, observable in several cases depicted in the graphical analysis, strongly suggests a form of horizontal peer influence or normative diffusion among NCAs. In other words, national authorities appear to be mutually influencing each other's rhetorical practices, collectively laying the conceptual groundwork that the Commission subsequently incorporates and amplifies in its own decisional rhetoric. Such horizontal interplay among NCAs underscores the decentralized yet coordinated manner in which fairness concepts have progressively entered and ultimately reshaped the EU competition policy landscape.

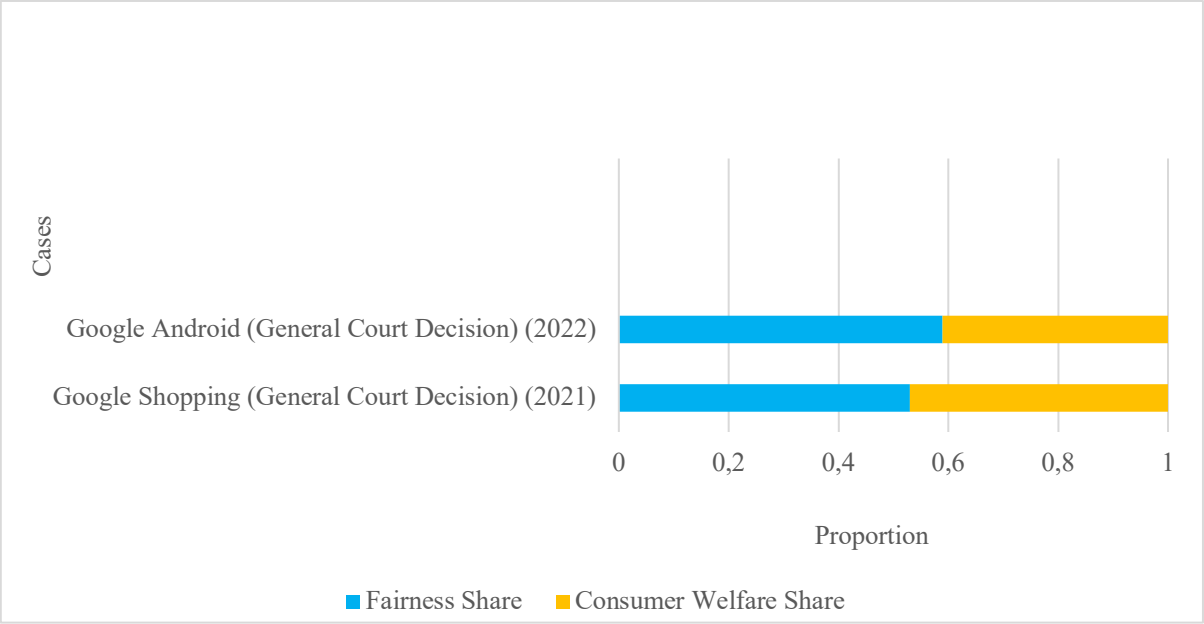
It is important to emphasise that the significance of the observed increase in fairness-oriented language does not lie merely in its quantitative frequency. Rather, its normative relevance stems from the changing functional role that fairness appears to play within the reasoning of EU competition institutions. Across the examined decisions, fairness terminology is increasingly deployed not as a rhetorical supplement, but as an independent justificatory frame that informs the assessment of competitive harm, the articulation of intervention rationales, and the

[23] European Commission, Commission Decision of 22 May 2024 in Case AT.40452 – *Mobile Wallets (Apple Pay)* C(2024) 3626 final.

calibration of enforcement intensity. In several instances, fairness operates alongside, or in place of, traditional consumer welfare benchmarks, particularly where price effects are indeterminate or structurally inadequate to capture the competitive concerns at stake. This functional repositioning suggests a qualitative transformation in normative reasoning, whereby fairness begins to perform analytical work that was previously reserved for consumer welfare-based assessments.

Taken collectively, these observations reinforce the narrative of convergence and displacement initially identified. The data conclusively demonstrates that fairness terminology has not merely incrementally supplemented traditional consumer welfare arguments but has actively displaced and superseded them, marking a profound transformation in policy-level normative priorities. Moreover, this detailed graphical and empirical evidence underscores the systematic, coordinated, and multi-institutional nature of this rhetorical shift, supporting the broader thesis that fairness now occupies a dominant and central position within the normative framework of contemporary EU competition enforcement.

Figure 5: Fairness vs CW at the General Court



The analysis of language usage at the level of the General Court offers a valuable, albeit limited, insight into the progressive judicial adoption of fairness-oriented terminology within EU

competition jurisprudence. In the General Court's 2021 decision in the *Google Shopping*[24] case, the shares of fairness-based and consumer welfare-oriented language are initially presented at near parity, with fairness terminology representing approximately 0.55 of the combined vocabulary, compared to a slightly lower share of 0.45 for consumer welfare discourse. This relative balance suggests that, at this initial judicial stage, fairness had begun to establish itself as a viable and legitimate normative framework. Yet, consumer welfare considerations retained substantial relevance within the court's analytical reasoning.

However, the subsequent *Google Android*[25] decision issued by the General Court in 2022 reveals a subtle yet significant shift in rhetoric. Here, fairness language experiences an incremental increase, rising to approximately 0.58 of the combined normative vocabulary, while consumer welfare terminology correspondingly recedes to a proportion of 0.42. Although this incremental adjustment in rhetorical emphasis might appear modest when examined in isolation, it carries considerable analytical significance when contextualised within the broader trajectory of institutional shifts observed across different levels of EU competition law enforcement. Specifically, this nuanced yet noticeable rhetorical realignment indicates that the General Court is gradually but clearly becoming more receptive to and aligned with the fairness lexicon previously established and operationalised by the Commission. This rhetorical alignment becomes especially apparent once the fairness concept has been clearly articulated, procedurally framed, and supported by robust evidentiary foundations within the Commission's original enforcement decisions.

While acknowledging the inherent limitations of the current sample, consisting solely of two pivotal cases, the directional consistency and temporal alignment of these findings with those observed at both the policy enforcement level (the Commission and NCAs) and the highest judicial level (the CJEU) remain particularly compelling. The modest but clearly directional shift in the General Court's normative vocabulary underscores a broader institutional convergence, providing additional empirical support to the idea of a cascading rhetorical realignment. This cascading process describes how fairness language, first systematically introduced and embedded at the enforcement and policy level, progressively diffuses upwards through the judicial hierarchy, subsequently gaining legitimacy and prominence at higher

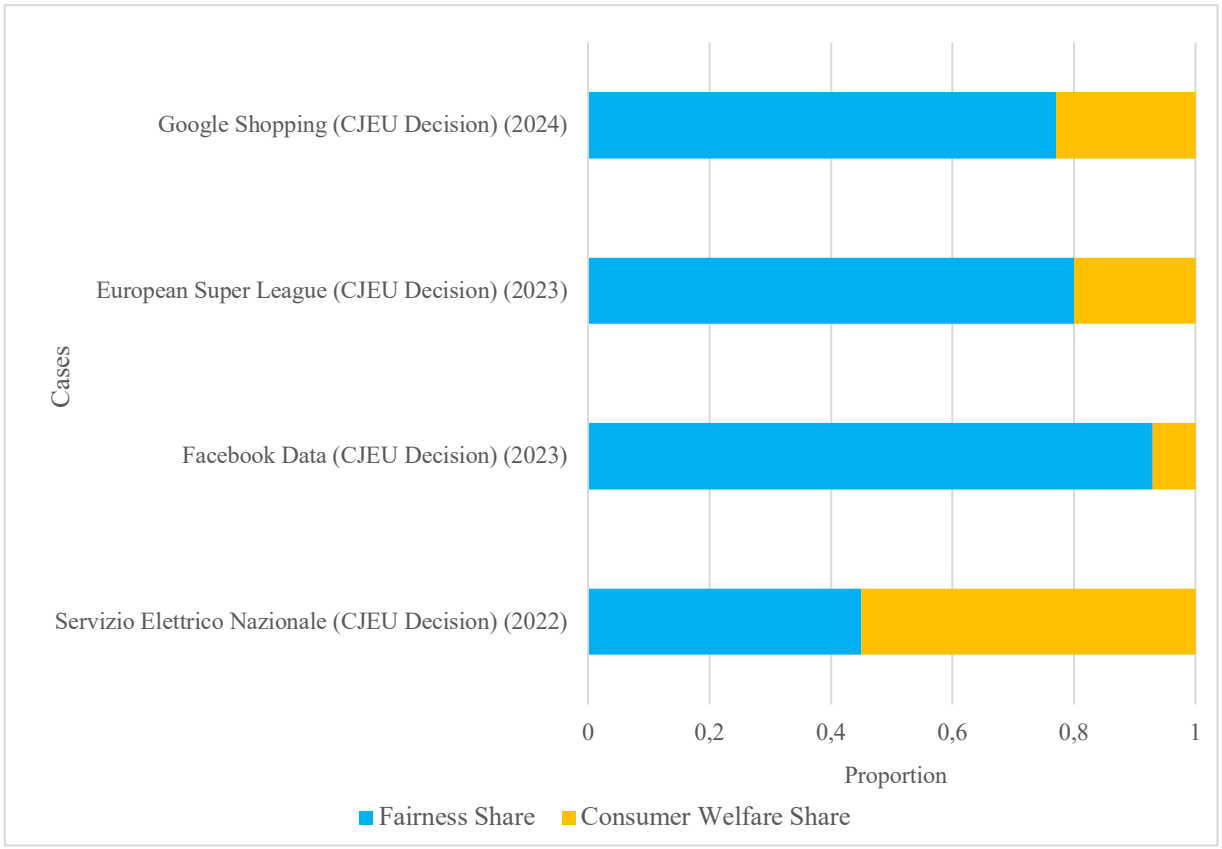
[24] Case T-612/17 *Google LLC and Alphabet Inc v Commission* EU:T:2021:763.

[25] Case T-604/18 *Google LLC and Alphabet Inc v Commission* ECLI:EU:T:2022:538.

judicial forums. Ultimately, the observed rhetorical developments at the General Court reinforce and validate the larger narrative of an ongoing structural and normative transformation, one wherein fairness is increasingly recognised as a central and dominant justificatory principle within the evolving landscape of EU competition jurisprudence.

It should be noted that the limited number of cases analysed at the level of the General Court reflects the current state of EU digital competition litigation rather than a selective methodological choice. At present, only a small number of digital competition cases have reached the General Court and resulted in final, publicly available judgments within the relevant timeframe. Accordingly, the sample analysed here captures the full universe of relevant General Court decisions addressing digital market conduct, rather than a subset thereof.

Figure 6: Fairness vs CW at the Court of Justice



The small number of cases examined at the CJEU level is primarily attributable to the procedural and temporal dynamics of EU competition enforcement in digital markets. Many digital competition cases have either not yet reached the CJEU or remain pending, with appeals

still ongoing or judgments not yet delivered at the time of analysis. As a result, the cases included in Figure 6 represent the complete set of final CJEU judgments engaging substantively with digital or digital-adjacent competition issues during the period under review.

At the level of the CJEU, the empirical analysis suggests an initially cautious approach to adopting fairness-oriented language, with the court's early reasoning notably prioritising traditional consumer-welfare considerations. Specifically, in the 2022 decision of *Servizio Elettrico Nazionale*[26], consumer welfare vocabulary occupied a slightly dominant position, representing approximately 0.54 of the combined normative lexicon, thus reflecting the court's initial adherence to a more established, consumer centric analytical framework. This initial stance underscores the judicial prudence exercised by the CJEU, particularly in maintaining continuity with historical doctrinal orientations before fully embracing emerging rhetorical and conceptual shifts.

However, a pronounced and significant rhetorical transformation becomes evident with remarkable rapidity in the court's subsequent jurisprudence. In the 2023 ruling on the *European Super League Company,*[27] the CJEU demonstrates an unexpectedly robust adoption of fairness-oriented terminology, with fairness rhetoric sharply rising to represent approximately 0.91 of the normative discourse. This adoption is particularly striking given the non-digital and sports-governance context of the case, suggesting that fairness language possesses a versatility and conceptual resonance extending well beyond the domain of digital markets alone. By decisively foregrounding fairness considerations in a context traditionally peripheral to standard competition law discussions, the court signals not merely the recognition of fairness as a supplementary justification, but its establishment as a central legal criterion capable of effectively shaping judicial reasoning, proportionality assessments, and broader competitive process evaluations at the apex level of EU jurisprudence.

Following this peak in the use of fairness rhetoric, the court's subsequent 2024 decision in the *Google Shopping*[28] case witnesses a moderation in fairness language usage, which nonetheless remains high at approximately 0.75 of the combined vocabulary. This moderate reduction does

[26] Case C-377/20 *Servizio Elettrico Nazionale and Others v AGCM* ECLI:EU:C:2023:11.

[27] Case C-333/21 *European Superleague Company SL v UEFA and FIFA* ECLI:EU:C:2023:1027.

[28] Case C-48/22 *P Google LLC and Alphabet Inc v Commission* ECLI:EU:C:2024:726.

not diminish the significance of fairness discourse within the court's analytical framework; rather, it indicates a balanced and context sensitive consolidation of fairness-oriented reasoning alongside traditional competition doctrines. Such nuanced usage underscores the court's careful calibration and integration of fairness principles within its broader jurisprudential architecture, affirming the concept's sustained relevance and normative legitimacy within contemporary EU competition adjudication.

Overall, the rapidity and decisiveness of the court's rhetorical shift, from an initially conservative consumer welfare-oriented stance to a robust embrace of fairness, provides compelling empirical evidence for a fundamental reorientation in normative framing at the highest judicial level. The observed patterns not only illustrate the accelerated institutional acceptance of fairness as a meaningful and actionable normative principle but also substantiate the thesis that fairness has evolved from being perceived merely as a rhetorical or policy level slogan into a formally recognised and operational legal criterion. As clearly demonstrated in the visual data, fairness rhetoric now informs and guides the court's analytical reasoning on proportionality and competitive process issues, marking a pivotal doctrinal evolution within EU competition law.

Collectively, the six graphical analyses conducted throughout this section provide clear empirical evidence of a profound structural and rhetorical realignment within the EU competition law enforcement landscape. The data consistently demonstrate that fairness terminology has experienced a substantial and sustained rise in absolute frequency, progressively establishing itself as the predominant normative framework within competition discourse. Indeed, by the year 2023, fairness-based language decisively surpasses consumer welfare vocabulary, effectively displacing a conceptual framework that had been central and dominant within doctrinal reasoning since the late 1990s. This significant shift in normative orientation underscores not only a change in rhetorical emphasis but also indicates a deeper doctrinal transformation, as institutions collectively embrace fairness as a core analytical principle guiding their reasoning.

One particularly notable aspect of this rhetorical transition is its clear institutional trajectory, characterised by a bottom-up diffusion pattern. The fairness lexicon initially emerges prominently within policy-level enforcement practice, specifically through the decisions and investigations of NCAs and the Commission. Subsequently, this normative framework

gradually finds resonance and explicit validation at the judicial level, first through landmark rulings by the General Court in prominent digital platform cases, and eventually through formal embedding in the jurisprudential reasoning of the CJEU. This consistent and methodical pattern of institutional diffusion effectively challenges, and indeed, strongly refutes, the notion that fairness discourse is merely a superficial or transient policy level rhetorical device. Instead, the empirical findings suggest a genuine, deliberate, and robust doctrinal consolidation across multiple layers of EU competition enforcement and adjudication.

Notably, the analysis further reveals that the rhetorical ascendancy of fairness is not confined exclusively to digital platform markets. The CJEU's explicit and pronounced engagement with fairness rhetoric in non-digital contexts, most notably demonstrated in cases such as the *European Super League Company,*[29] strongly suggests that the relevance of fairness terminology extends well beyond the specific regulatory confines of digital platforms. This broader judicial uptake signifies an emerging recognition of fairness as a generalised normative principle, capable of guiding analytical reasoning and proportionality assessments across diverse competition contexts. Consequently, fairness discourse appears increasingly poised to influence broader doctrinal and jurisprudential developments in EU competition law.

At the same time, this significant rhetorical shift does not entail the complete disappearance or irrelevance of consumer welfare considerations. Rather, consumer welfare language remains actively employed, albeit within a more narrowly defined scope, predominantly confined to contexts explicitly focused on price related effects or specific efficiency-based evaluations. Conversely, fairness-oriented language assumes a dominant position in analytical discussions regarding self-preferencing practices, parity clauses, transparency requirements, data access obligations, and other issues characterised predominantly by distributive concerns. Within these contexts, fairness vocabulary consistently highlights aspects of equal treatment, non-discrimination, and transparency, reflecting concerns distinct from purely allocative efficiency or traditional price centric considerations.

Together, these multifaceted empirical observations lend substantial support to the core argument advanced throughout this research. Specifically, they indicate that EU competition law is currently undergoing a significant transition toward a hybrid normative framework,

[29] Case C-333/21 *European Superleague Company SL v UEFA and FIFA* ECLI:EU:C:2023:1027.

within which fairness increasingly serves as the primary normative anchor, whereas consumer welfare assumes a more subsidiary, context specific analytical role. This transformation implies not merely rhetorical or semantic adjustments but points toward a deeper realignment of underlying normative priorities guiding competition enforcement.

While it is essential to acknowledge that any empirical analysis of legal language inherently involves methodological caution, this study incorporates rigorous methodological safeguards, including manual verification of textual context, prioritisation of complete phrases over isolated keywords, and careful segmentation by institutional levels, to minimise risks of false positive identification and analytical inaccuracies. In contrast to an earlier study, which concluded that fairness language remained confined largely to superficial policy rhetoric with limited judicial adoption, the extensive and updated corpus analysed here clearly demonstrates that, within merely four years, fairness terminology has decisively migrated from peripheral policy discourse into consistent and systematic use across both tiers of Union courts.[30] This evolution therefore confirms the authenticity and doctrinal significance of the observed rhetorical transformation, clearly distinguishing it from a mere counting artefact or superficial linguistic fluctuation.

5.3 Linking DMA Obligations to Their Jurisprudential Origins

This section aims to demonstrate in detail that the DMA did not emerge in a vacuum, isolated from existing legal principles and established doctrines of EU competition law. Instead, it explicitly argues and demonstrates that each of the fairness-oriented obligations codified in the DMA can be directly traced back to prior decisions issued under Article 102 TFEU. These earlier rulings typically analysed, evaluated, and often condemned precisely the types of conduct that the DMA subsequently formalised as statutory obligations. By carefully and systematically mapping ten key statutory duties enshrined within the DMA onto their respective jurisprudential antecedents, this exercise transforms what was previously a somewhat diffuse and occasionally ambiguous discourse on fairness into a clearly defined, structured, and coherent catalogue of regulatory obligations, firmly grounded in existing legal precedent. In

[30] Stylianou and Iacovides (n 4).

other words, this doctrinal genealogy provides not merely historical context, but concrete proof that the DMA's fairness obligations are deeply embedded in a continuous evolution of competition enforcement practice rather than being introduced as wholly novel regulatory concepts.

Such an analysis carries considerable significance for at least two important reasons. Firstly, by highlighting the extensive jurisprudential background of each DMA obligation, it challenges and ultimately refutes the commonly held perception or criticism that the DMA represents a fundamentally novel or revolutionary policy objective, disconnected from prior enforcement trends. Instead, the detailed case law mapping presented here confirms that the DMA essentially crystallises, consolidates, and formalises an enforcement trajectory already firmly underway, particularly evident in digital platform contexts where the presence of data driven network effects has substantially amplified risks of exclusionary or exploitative behaviour.

Secondly, the existence of this comprehensive DMA catalogue, directly anchored in concrete competition law rulings and clearly articulated fairness related concepts, significantly reduces the semantic ambiguity and interpretative uncertainty that have historically plagued the application of Article 102 TFEU. Traditionally, Article 102 has suffered from vagueness and open endedness, particularly regarding fairness and related normative concepts, complicating consistent enforcement efforts. However, by grounding fairness obligations in explicit, previously adjudicated legal principles, the DMA catalogue provides a structured and practical reference point, thereby enhancing analytical clarity and operational predictability. This clarity is particularly beneficial for the functional fairness test elaborated in the subsequent chapter of the research, as it enables this test to rely upon clearly established legal criteria rather than abstract or aspirational ideals.

The methodology employed to establish and validate this doctrinal genealogy, detailed comprehensively in the following paragraphs, depends upon a structured matching process, aligning each specific DMA obligation with corresponding legal precedents from competition cases. The empirical results generated from this analysis are systematically presented in Table 4. Additionally, to further illustrate and clarify these connections, the obligation to case mapping has been translated into a concise visual format through the lineage diagram provided immediately thereafter. This visual representation serves not only as an accessible summary but also as an analytical tool that emphasises the continuity and consistency inherent in the DMA's

fairness related provisions, reinforcing the central argument that the Regulation's obligations represent not an abrupt break but rather an incremental progression rooted deeply within the historical trajectory of EU competition jurisprudence.

5.3.1 Methodology for Linking DMA Obligations to the Case Law

The analysis developed in this section unfolds through three interconnected methodological steps, each designed to elucidate the relationship between the DMA's statutory obligations and the pre-existing competition jurisprudence.

The first step involved identifying the ten obligations introduced by the DMA that have been most frequently cited and debated in recent competition enforcement discourse. These obligations are evenly divided between Article 5 and Articles 6–7 DMA. Specifically, Article 5 obligations cover five key areas, namely most-favoured-nation (MFN) or parity clauses, anti-steering provisions, access to advertising performance data, requirements related to alternative app stores and side-loading practices, and rules governing data sharing. Meanwhile, Articles 6–7 contain obligations addressing alternative payment services, restrictions on self-preferencing practices, interoperability and API access, transparency in ad-ranking mechanisms, limits on cross service data combination, and enhanced data portability. Although certain concepts, such as the notion of narrow parity clauses, had appeared in antitrust discussions prior to the digital economy (as seen, for instance, in cases like *Expedia*[31]), the analysis specifically targets obligations whose precise doctrinal contours became clearly defined and fully crystallised through recent enforcement actions in digital-economy contexts. By selecting these obligations, the analysis aims explicitly to capture and illustrate the fairness-oriented normative core of the Regulation, as reflected in contemporary competition law discourse.

The second step entailed systematically mapping each selected DMA obligation to at least one pivotal competition decision that first articulated the corresponding legal test or remedial measure within a digital market context. To accomplish this mapping comprehensively, searches were conducted across multiple authoritative databases and repositories, including the European Commission's official case register, DG COMP press releases, and key national

[31] Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others* ECLI:EU:C:2012:795.

competition authorities' decision archives, notably those maintained by the French AdlC, Germany's Bundeskartellamt, and the Netherlands' Authority for Consumers & Markets (ACM). In instances where multiple potential cases emerged as plausible precedents, analytical priority was assigned to the earliest digital platform ruling in which the obligation in question was explicitly articulated as a standalone theory of harm, for example, the 2017 *Google Shopping*[32] decision for self-preferencing, and the 2021 *Apple App Store*[33] decision for anti-steering practices. Within the official PDF files of these landmark decisions, the precise paragraph containing the foundational term or phrase, for instance, "unfair self-preferencing" or "narrow parity clause", was carefully identified. To provide readers with transparent and verifiable evidence, these pivotal phrases are reproduced verbatim in Table 3, and the specific paragraphs in which they initially appeared are clearly referenced in the associated footnotes. For decisions issued by NCAs, the analysis relied exclusively on official English translations provided by the respective authorities, thereby ensuring terminological consistency and preventing potential distortions or inaccuracies that might result from translations. In cases where a multi word phrase contained a shorter single word stem (for example, "self-preferencing" inherently including "preferencing"), precedence was always given to the longer, more explicit phrase, with the overlapping shorter term deliberately excluded to avoid the risk of double counting, a methodological consistency that aligns closely with the data-cleaning protocols employed earlier in the rhetorical shift analysis.

Finally, in the third step, the detailed results compiled in the consolidated obligation to case mapping table served as the basis for creating a visual representation termed the "DMA–Case-Law Lineage" diagram, presented in Figure 7. This diagram succinctly yet comprehensively illustrates the direct connections between each DMA obligation and the specific competition law decisions that conceptualised and articulated these duties. By visually capturing a broader range of foundational rulings than would be possible through textual description alone, the lineage diagram clearly underscores that the principal fairness-oriented obligations of the DMA are not novel creations emerging from a regulatory vacuum. Rather, these duties represent the culmination of an incremental doctrinal trajectory, a continuous evolution of competition

[32] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11.

[33] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

jurisprudence, demonstrating concretely that the DMA's fairness provisions are deeply embedded within, and profoundly informed by, established competition law precedents.

5.3.2 Findings on Case-Law Foundations of the DMA's Fairness Catalogue

Table 4 and the accompanying DMA–Case-Law Lineage diagram (Figure 7) reveal a one-to-one doctrinal genealogy between the Regulation's ten key obligations and a sequence of landmark platform cases decided between 2017 and 2024. Contrary to the view that the DMA introduces an ex-nihilo rule set, each provision can be traced to at least one prior competition decision in which the same conduct was analysed under a fairness inflected theory of harm. Therefore, mapping reveals that, rather than inventing a catalogue shaped by the DMA's new fairness objective, it essentially codifies a catalogue based on case law.

The selection of source cases reflected in Table 4 is not intended to be exhaustive, but methodologically targeted. The cases included were chosen because they articulate, in a particularly explicit and operational manner, the normative concerns that later crystallised into specific DMA obligations, especially fairness, non-discrimination, access, and transparency. Decisions in which similar conduct was addressed primarily through price effects, efficiency analysis, or highly case-specific factual reasoning were deliberately excluded, as they do not offer the same degree of doctrinal translatability into the DMA's regulatory framework. The resulting mapping therefore prioritises normative lineage and conceptual continuity over numerical completeness, aiming to capture the core jurisprudential foundations upon which the DMA's fairness catalogue was constructed.

Table 4: Source Passages for the DMA–Case-Law Mapping[34]

	Obligation	Description	Source Case	Reference
1	Art. 5(2) MFN / Parity Clauses	Prohibits gatekeepers from imposing wide or narrow parity clauses.	Amazon Marketplace (BKartA, 2022)	"…Amazon's clause barred superior product info in non-Amazon sales channels…"[35] "…Abuse probe led Amazon to amend T&Cs, including parity rules, improving seller conditions…"[36]
2	Art. 5(3) Anti-steering Clause	Gatekeepers must allow steering to other payment systems.	Apple App Store Music-Streaming (EC, 2021)	"…Apple's rules blocked buy buttons, pricing info, or links to external payment options…"[37]
3	Art. 5(4) Ad Performance Data Access	No restrictions on advertisers' access to campaign data.	Google AdTech (AdlC, 2021)	"..Google withheld ad margin data, limiting transparency for advertisers and publishers…"[38] "…Google kept floor-price logic and per-impression data opaque from publishers..."[39]

[34] This table links selected DMA provisions with existing competition law case law. The paragraph numbers refer to relevant parts of the decisions that illustrate factual or legal findings underpinning each obligation. The full texts of these paragraphs are not reproduced here to maintain readability but can be consulted directly in the original decisions.

[35] Bundeskartellamt Decision B2-55/21, *Amazon – Determination of the Status as Addressee of Section 19a(1) GWB* (5 July 2022), para 433.

[36] ibid paras 441-442.

[37] Commission Decision C(2024) 1307 final, *Apple – App Store Practices (music streaming)* (Case AT.40437, 4 March 2024), para 184.

[38] Autorité de la concurrence Decision 21-D-11 Google AdTech (7 June 2021), para 3.

[39] ibid para 15.

4	Art. 5(5) Alternative App Stores / Side-loading	Gatekeepers must allow side-loading and access to third-party app stores.	Apple iOS Dating-Apps (ACM, 2022)	"…Apple blocks alternative app stores and side-loading, forcing use of its App Store only…"[40]
5	Art. 6(3) Alternative Payment Services	Gatekeepers cannot force use of their own in-app payment systems.	Apple App Store Music-Streaming (EC, 2021)	"…Apple's anti-steering barred user info and access to external payment options..."[41]
6	Art. 6(5) Self-preferencing	No unfair ranking advantage for gatekeeper's own services.	Google Shopping (EC, 2017) (GC, 2021) (CJEU, 2024)	"…Abuse found due to traffic diversion and likely anti-competitive effects…"[42] "…Court confirmed the case concerns discriminatory self-preferencing, not refusal of access..."[43] "..Court found exclusionary leveraging from search to shopping market…"[44]

[40] Netherlands Authority for Consumers and Markets Decision ACM/19/035630, *Apple – Abuse of Dominant Position in the Dutch App Store (Dating-App Providers)* (24 August 2021) <English summary, doc ACM/UIT/568584>, para 12.

[41] European Commission, Commission Decision of 4 March 2024 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.40437 – *Apple App Store Practices – Music Streaming)* C(2024) 1307 final, para 781.

[42] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11, para 341.

[43] Case T-612/17 Google *LLC and Alphabet Inc v Commission* EU:T:2021:763, paras 237–238.

[44] Case C-48/22 P *Google LLC and Alphabet Inc v Commission* EU:C:2024:726, para 108.

7	Art. 6(6) Interoperability / API Access	No discriminatory access to essential OS or device functionalities.	Google Android (EC, 2018) Google Android (GC, 2022) Apple Pay – NFC/Mobile Wallets (EC, 2024)	"…Lack of API access weakened rival Android forks' ability to compete..."[45] "…Proprietary APIs fostered lock-in, hindering from alternative OSs…"[46] "…HCE developers granted direct NFC access to ensure fair competition on iOS…"[47]
8	Art. 6(7) Ad Ranking & Transparency	Gatekeepers must ensure fair access and transparency in ad services.	Google AdTech (AdlC, 2021)	"…Google favoured AdX via DFP and vice versa, disadvantaging rivals and publishers…"[48]
9	Art. 6(10) Cross-Service Data Combination	No cross-service personal data use without prior user consent.	Facebook Data (BKartA, 2019)	"…Facebook combined personal data across services without consent, abusing its dominance…"[49]

[45] European Commission, Commission Decision of 18 July 2018 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – *Google Android)* C(2018) 4761 final [2019] OJ C 402/19, para 12.6.5.

[46] Case T-604/18 *Google LLC and Alphabet Inc v Commission* ECLI:EU:T:2022:538, para 855.

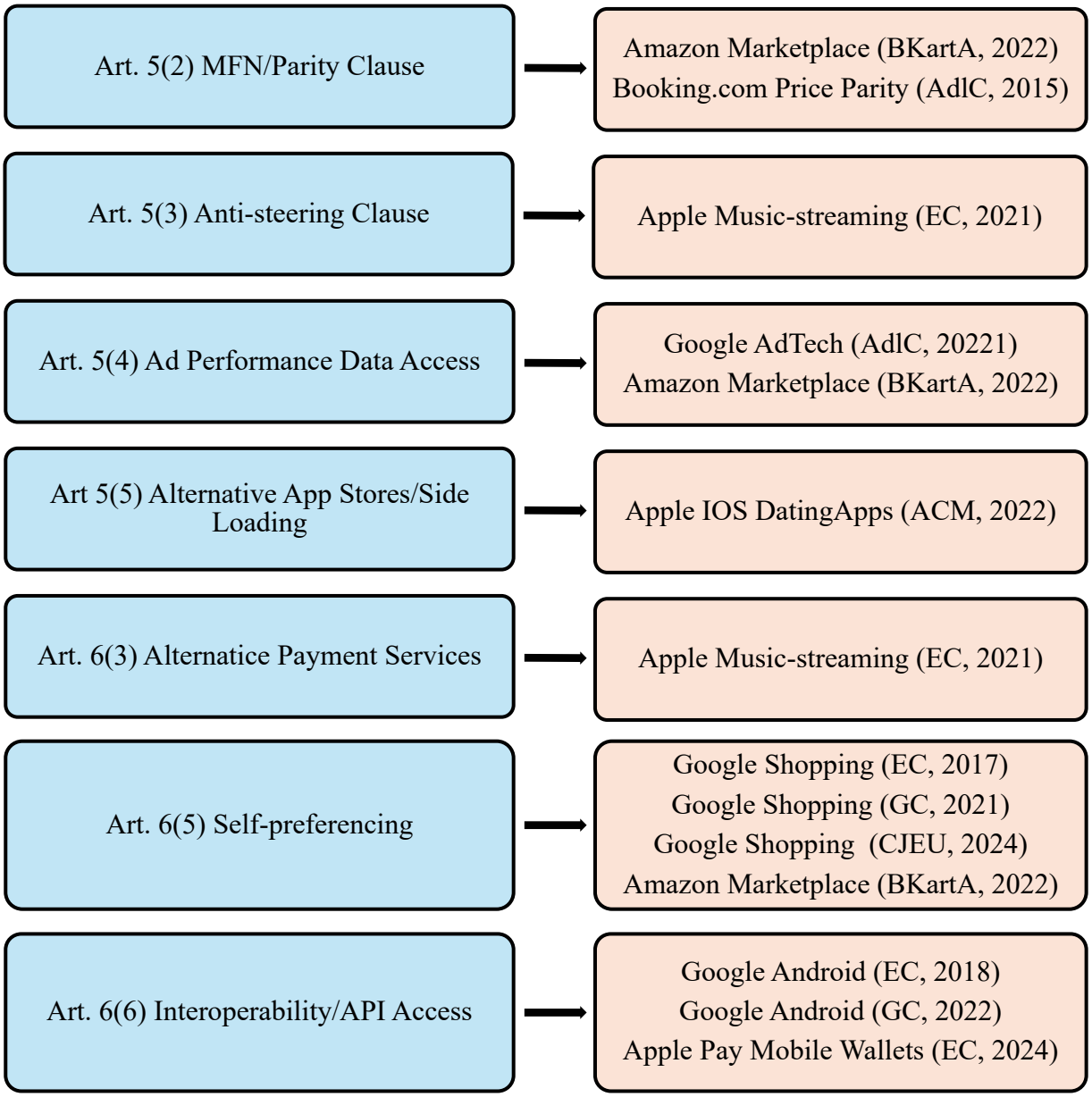
[47] Apple Inc, Case AT.40452 – *Mobile Payments: Proposal of Commitments to the European Commission*, para 1.4.

[48] Autorité de la concurrence, Decision 21-D-11 of 7 June 2021 concerning practices implemented in the online advertising sector *(Google AdTech)*, para 95.

[49] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019), para 580.

10	Art. 7(1) Data Portability	Right to access and transfer business data outside the platform.	Facebook Data (BKartA, 2019)	"…Users face switching barriers due to inability to port profiles and social data..."[50]

Figure 7: DMA Case Law Lineage Diagram



[50] ibid para 469.

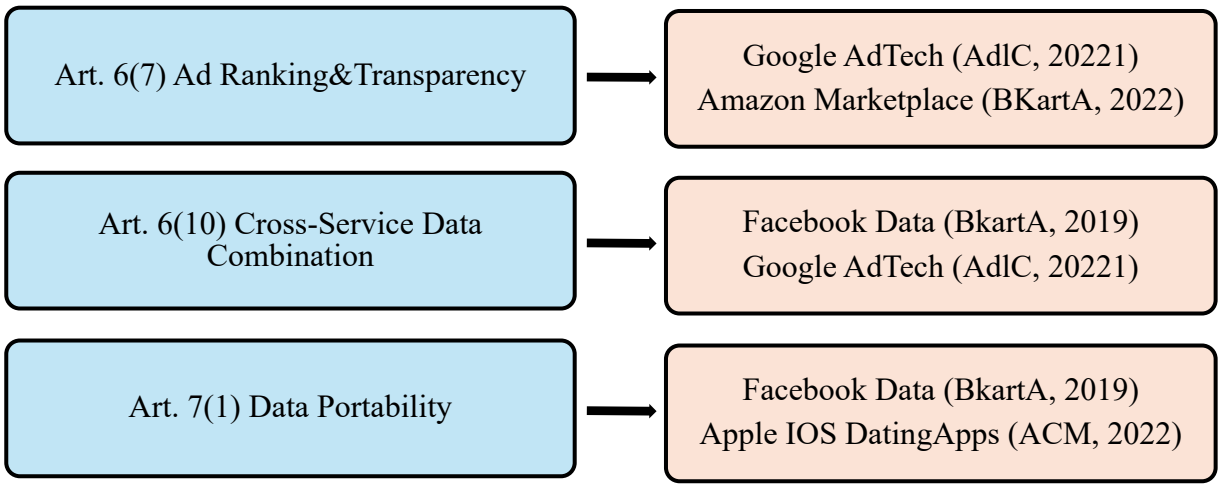


Figure 7 provides a structured overview of the doctrinal relationships between the DMA's fairness-oriented obligations and prior competition law enforcement practice. Rather than suggesting a linear or causal transfer from individual cases to specific legislative provisions, the mapping highlights how recurring fairness-based reasoning developed across enforcement decisions was subsequently consolidated and systematised through statutory codification. In this sense, the diagram illustrates a process of doctrinal crystallisation, whereby patterns emerging in case law informed the formulation of the DMA's regulatory catalogue without implying direct legislative derivation from any single decision.

The lineage diagram and the table show that every fairness-oriented obligation in the DMA can be anchored in a specific digital-platform decision. Article 5(2)'s MFN rule crystallised in the *Booking.com*[51] parity finding, which provided some of the first explicit language condemning restrictive parity clauses as unfair trading conditions distorting third-party competition, later reinforced by the Bundeskartellamt's *Amazon Marketplace*[52] decision. Similarly, the anti-steering ban in Article 5(3) echoes the *Apple App Store music-streaming*[53] probe, where Apple's anti steering design was framed as a discriminatory restriction on app developers' freedom to communicate alternative payment options, an approach that clearly foreshadowed the DMA's blanket steering right. Meanwhile, Article 5(4)'s ad-performance data access obligation draws

[51] Bundeskartellamt, Decision B9-121/13 of 22 December 2015 – *Booking.com (Narrow MFN Clauses)*.

[52] Bundeskartellamt, Decision B2-55/21 of 5 July 2022 – *Amazon (Determination of the Status as Addressee of Section 19a(1) GWB)*.

[53] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

directly on the French *Google AdTech*[54] case, in which the AdlC characterised Google's withholding of impression level data as an unfair transparency deficit that harmed advertisers and publishers, language that was carried almost verbatim into Article 5(4). In the same vein, the side loading right in Article 5(5) traces to the Dutch *Apple iOS Dating-Apps*[55] decision, where the ACM declared Apple's mandatory single store distribution model an unreasonable trading condition, thereby anchoring the DMA's side-loading entitlement in concrete enforcement practice. Likewise, Article 6(3)'s alternative payment mandate simply generalises the same *Apple App Store* factual matrix, where anti-steering restrictions had already been condemned, illustrating how a single enforcement record can give rise to multiple statutory obligations once codified. Likewise, the well-known self-preferencing restriction under Article 6(5) rests on the *Google Shopping* trilogy (Commission 2017, General Court 2021, CJEU 2024), which elevated discriminatory ranking practices to the status of a paradigm fairness abuse, a finding now generalised across gatekeepers through the DMA. Meanwhile, Article 6(6) on API interoperability emerges from *Google Android* (Commission 2018, General Court 2022), where the need for non-discriminatory access to APIs was first formalised, and is now being extended to *Apple Pay's NFC*[56] access probe (2024), further crystallising this obligation in statutory form. Along the same lines, Article 6(7)'s ad ranking transparency reprises the unfair information asymmetry condemned in *Google AdTech*[57], where the AdlC denounced opaque allocation rules as an abuse of superior bargaining position. Article 6(10)'s prohibition on cross-service data combination mirrors the Bundeskartellamt's *Facebook Data*[58] decision (2019), which framed cross context tracking as an exploitative breach of user autonomy, language that the DMA echoes in its consent requirement. That same *Facebook Data*[59] case also underpins the data-portability provision in Article 7(1), as it highlighted switching frictions and network effect lock in as key justifications for mandating user data mobility.

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[54] Autorité de la concurrence Decision 21-D-11 *Google AdTech* (7 June 2021).

[55] Netherlands Authority for Consumers and Markets (ACM), Decision of 24 August 2021 in Case ACM/19/035630 – *Apple (App Store: Dating Apps)* ACM/UIT/568584.

[56] European Commission, Commission Decision of 22 May 2024 in Case AT.40452 – *Mobile Wallets (Apple Pay)* C(2024) 3626 final.

[57] Autorité de la concurrence Decision 21-D-11 *Google AdTech* (7 June 2021).

[58] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019).

[59] ibid.

The mapping exercise brings to light four overarching patterns that illuminate the doctrinal development underpinning the DMA's obligations. First, a temporal concentration can be observed insofar as eight out of the ten obligations emerged between 2017 and 2022, during which the Commission increasingly incorporated fairness-based reasoning into its enforcement of Article 102 TFEU. This trend reinforces the argument advanced above, namely that rhetorical shifts often precede formal legal codification. Second, the obligations are distinctly anchored in digital platform contexts. While earlier vertical restraint cases such as *Expedia*[60] and *Pierre Fabre*[61] had already touched upon parity clauses and MFNs, it is within platform ecosystems, where data driven network effects intensify exclusionary risks, that these doctrines acquired their concrete and decisive shape. Third, fairness emerges as a unifying normative thread. Each underlying enforcement source invokes fairness either explicitly or through adjacent concepts such as discrimination, equal treatment, or transparency. Whether framed as unfair self-preferencing, a transparency deficit, or the exploitative combination of personal data, these obligations confirm that fairness, rather than contestability, provides the normative architecture of the Regulation. Finally, the diffusion of doctrine occurs across enforcement levels. Four obligations, concerning MFNs, data combination, ad transparency, and side loading, originated in national competition authority decisions before being absorbed at the EU level. This bottom-up evolution mirrors the rhetorical cascade outlined above, suggesting that normative framing and doctrinal substance co-develop through a dynamic interplay between national and supranational enforcement.

Early empirical studies had concluded that fairness rhetoric largely remained confined to the policy domain, with limited resonance in judicial reasoning.[62] However, the broader obligation to case mapping presented here illustrates that, within just four years, fairness-based language not only entered judicial discourse but also achieved formal legislative expression through the DMA. This contrast highlights how the timing of methodological inquiry significantly influences scholarly conclusions, as analyses limited to the 2010–2018 period tend to portray fairness as merely a policy-level concern, whereas extending the evidentiary window to 2024 reveals its rapid and substantive incorporation into jurisprudence. Moreover, previous scholarship has often centred on three headline obligations, self-preferencing, anti-steering, and

[60] Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others* ECLI:EU:C:2012:795.

[61] *Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS* ECLI:EU:C:2011:649.

[62] Stylianou and Iacovides (n 4).

data combination, to argue that the DMA selectively codifies aspects of the Commission's litigation against Google. Yet, the comprehensive catalogue developed in this research demonstrates that all fairness related provisions, including less examined ones such as interoperability and ad ranking transparency, are grounded in identifiable case law. By correcting this selective-sample bias, the analysis substantiates the claim that the DMA operates not as a radical regulatory departure, but as a systematic codification of evolving enforcement practice.

The genealogy confirms that the DMA's fairness catalogue serves a clarifying rather than disruptive function, as it codifies doctrinal strands already evident in platform related case law and thereby transforms the historically elusive and contested dimension of Article 102 TFEU into a concrete set of conduct-based obligations. This codification mitigates the semantic vagueness that long confined fairness to rhetorical invocations, offers businesses a clearer ex ante compliance benchmark, and preserves the analytical discipline of the more economic approach by decoupling fairness concerns from traditional price centric tests. Yet, while this systematic articulation of fairness obligations is valuable, particularly insofar as it lays the groundwork for a functional fairness test to be developed in the next chapter, it does not, in itself, resolve the deeper structural tension between the DMA's ex ante regulatory logic and classical competition law's ex post enforcement framework. As discussed in earlier chapter, the mere codification of fairness, however useful for conceptual clarity, falls short of justifying the DMA's parallel application alongside Article 102 TFEU. Rather than resolving that normative friction, the catalogue's primary contribution lies in rendering fairness analytically tractable, a benefit whose practical implications will be further examined in the context of operationalising fairness in digital markets.

5.4 Synthesis of Rhetorical Change and Case Law Findings

The results of the rhetorical index are presented below, beginning with an overview of how fairness and consumer-welfare language evolved over time across different institutional levels. Firstly, the quantitative term-frequency exercise reveals a stepwise diffusion of fairness language. NCAs and the Commission adopted this lexicon earliest; the General Court echoed

it in *Google Shopping*[63] and *Android*[64] appeals, and the CJEU ultimately followed suit (Figures 1–6). The Fairness/CW Ratio surpassed the parity threshold in 2021 and rose to 0.78 by 2024, while consumer welfare terminology became increasingly confined to narrowly defined price or efficiency related contexts. This trajectory lends support to the hypothesis that rhetorical change precedes legal codification, as fairness had already supplanted consumer welfare as the dominant justificatory frame in enforcement discourse by the time the DMA was proposed.

Secondly, the obligation to case mapping presented in Table 4 and visualised in the lineage diagram demonstrates that each of the DMA's ten headline duties can be traced to at least one landmark platform decision issued between 2017 and 2024. What makes the chronology particularly important is that eight of these ten duties crystallised within the same five-year window identified by the rhetorical graphs as the period of fairness ascendancy. Self-preferencing, anti-steering, data combination, and interoperability, often characterised in the literature as regulatory novelties, are in fact grounded in precedents such as *Google Shopping, Apple App Store, Facebook Data, and Google Android.* Another aspect of particular significance is the pattern of multi-level diffusion, with four obligations emerging from the NCA level, later endorsed by the Commission, and eventually upheld, or at least not contested, by the Union courts.

Thirdly, these twin trajectories, one rhetorical, the other doctrinal, appear to reinforce each other. Fairness rhetoric supplies the normative vocabulary that enables authorities to reconceptualise classical exclusionary or exploitative theories of harm in the context of data driven platform markets. Successful litigation, in turn, provides the doctrinal foundation for concrete legal tests, which the DMA subsequently codifies into a forward-looking catalogue. In this respect, the Regulation functions as a clarifying instrument by reducing the semantic ambiguity that previously confined fairness to the realm of rhetorical flourish, consolidating fragmented case-law strands into conduct-based obligations, and furnishing businesses with a tangible compliance framework. Rather than undermining the more-economic approach, codification segregates fairness concerns from price centric analysis, thereby preserving methodological coherence while expanding the normative reach of competition enforcement.

[63] Case T-612/17 *Google LLC and Alphabet Inc v Commission* EU:T:2021:763

[64] Case T-604/18 *Google LLC and Alphabet Inc v Commission* ECLI:EU:T:2022:538.

Finally, the combined empirical and doctrinal evidence demonstrates not only that fairness discourse has eclipsed consumer welfare language but also that fairness now functions as a viable analytical tool. The source cases underpinning each DMA obligation offer specific benchmarks, such as non-discriminatory ranking, limits on data combination, and transparency thresholds, that can be applied consistently across platform contexts. This new reality also explains why the CJEU is able to invoke fairness even in non-digital cases (e.g., *European Super League*[65]) and why the Commission increasingly pairs fairness-based reasoning with traditional efficiency assessments. On the other hand, although the DMA systematises these functional strands and thereby clarifies a once-elusive value under Article 102 TFEU, conceptual and institutional frictions remain. Most notably, the Regulation continues to present fairness as a freestanding objective, thereby reviving the long-standing academic debate over what fairness truly entails when elevated to the status of a legal goal. This tension is reflected in both policy discourse and scholarly commentary, which, while praising the DMA's fairness orientation, continue to diverge on the concept's normative contours. Moreover, codification alone does not resolve the practical dilemma posed by overlapping enforcement mechanisms and the risk of ne bis in idem conflicts arising from the parallel application of the DMA and Article 102 TFEU. Rather, the catalogue contributes analytical clarity for the construction of the functional fairness test and the hierarchy of enforcement tools proposed in the last chapter, a framework designed to reconcile ex ante and ex post control in digital markets while ensuring that fairness remains grounded in operational criteria rather than abstract ideals.

5.5 Conclusions

The central issue addressed in this chapter revolves around whether the DMA truly represents a paradigm shift in EU competition policy, as some commentators suggest, or whether it constitutes a more modest development, consolidating and clarifying an enforcement trajectory that was already becoming visible through recent legal practice. To comprehensively address this question, this chapter employs two distinct yet complementary empirical methodologies, approaches that have seldom been combined in existing legal scholarship. The first was a corpus-wide term-frequency analysis, which systematically quantified and traced the prevalence and distribution of fairness oriented versus consumer welfare-oriented language

[65] Case C-333/21 *European Superleague Company SL v UEFA and FIFA* ECLI:EU:C:2023:1027.

across an extensive body of competition decisions. As previously noted, to the best of my knowledge, only one prior study in the literature employs term-frequency analysis in the context of EU competition law.[66] However, that study adopts a broader perspective, aiming to assess the general orientation of competition law objectives. By contrast, the corpus-wide term-frequency analysis conducted in this chapter adopts a more focused approach, specifically comparing the concepts of fairness and consumer welfare. Notably, it reaches a significantly different conclusion regarding the role of fairness in EU competition law. The second was a detailed obligation to case genealogy, aligning each statutory duty introduced by the DMA with its identifiable jurisprudential antecedent in existing Article 102 TFEU enforcement practice. By juxtaposing these methodological approaches, the analysis generated a layered and multifaceted perspective on the DMA's origins and implications. As a result, the findings reveal a nuanced picture that transcends the overly simplistic binary framework of revolution versus incrementalism frequently encountered in scholarly literature on competition law reform. Rather than portraying the DMA merely as either a radical departure or a minor incremental adjustment, this chapter thus provides a richer, more contextualised account of the Regulation's position within the evolving doctrinal landscape of EU competition policy.

Building on this nuanced picture of the DMA's position within EU competition law, the empirical results further underline how rhetorical and doctrinal developments have progressed along parallel yet interdependent trajectories. The rhetorical analysis conducted in this chapter revealed a clear and methodical diffusion of fairness-oriented language, initially emerging at the level of NCAs and subsequently gaining traction within the European Commission's decisional practice. From there, the fairness lexicon continued to spread upward through the judicial hierarchy, finding notable resonance first in the General Court's landmark platform rulings, and ultimately receiving decisive validation from the CJEU. By 2021, the quantitative fairness/consumer welfare ratio had surpassed the parity threshold, signalling a definitive tipping point in normative discourse. By 2024, fairness related terms accounted for nearly four-fifths of all normative vocabulary deployed across these institutional layers, reflecting a substantial rhetorical realignment in EU competition enforcement. Running in parallel with this rhetorical diffusion, the obligation to case mapping provided further evidence supporting the incremental consolidation hypothesis. Specifically, the analysis demonstrated that each of the DMA's ten headline obligations, including those addressing self-preferencing, anti-steering

[66] Stylianou and Iacovides (n 4).

practices, data combination, and interoperability, could be directly linked to at least one significant platform enforcement decision issued between 2017 and 2024. Significantly, eight of these ten obligations crystallised within the very half decade that the lexical analysis pinpointed as the period during which fairness terminology surged to prominence. The synchronicity between these two developments is not coincidental; rather, these twin trajectories mutually reinforce one another. The adoption of fairness rhetoric supplied regulatory authorities and investigators with the necessary conceptual vocabulary to reconceptualise and articulate the competitive harms arising in digital platform contexts. In turn, successful litigation outcomes provided the concrete doctrinal building blocks upon which EU legislators subsequently relied when formalising these emerging enforcement trends in the DMA.

This interplay between rhetorical shifts and doctrinal developments sheds new light on the conceptual architecture of EU competition law. The findings suggest that the ongoing discussions regarding the normative purposes underpinning competition enforcement have become notably richer and more concrete, particularly with the increasing prominence of fairness as a distinct analytical concept. At the core of the system remains the traditional objective of preserving competitive process integrity, which focuses primarily on preventing undue concentrations of market power and maintaining market openness. Increasingly intertwined with this established principle is the concept of fairness, conceived here not merely as an abstract, aspirational ideal but as a practical procedural standard designed to ensure equal treatment, transparency in market access, and non-discrimination among market participants. While consumer welfare continues to play a meaningful role, its application is increasingly context dependent, primarily invoked in circumstances where immediate price effects or allocative efficiency considerations remain central. This clarified conceptual landscape helps to resolve long standing doctrinal tensions. By introducing fairness as the previously missing vocabulary, EU competition law gains the analytical clarity needed to address data driven exclusionary practices that harm rivals and consumers alike, even when immediate price related harm is difficult to quantify or demonstrate.

The integration of the fairness concept into EU competition discourse, as articulated in the preceding analysis, finds its most tangible expression in the codification efforts under the DMA, yielding several important pragmatic advantages. First, this codification translates previously diffuse and abstract notions, such as unfair self-preferencing in rankings or unfair transparency

deficits within advertising technologies, into clear, conduct based regulatory obligations. As a result, market participants now benefit from a structured ex ante compliance checklist that significantly reduces uncertainty, providing clarity where previously ambiguity had prevailed. Second, codifying fairness separately helps insulate it from the price centric analytical frameworks associated with the more economic approach. The significance of this separation lies in its ability to preserve methodological rigour and analytical discipline, ensuring fairness considerations do not unintentionally weaken price or efficiency-based analyses, even as it expands the normative framework to include non-price aspects of competitive harm. Third, and perhaps most consequentially, the catalogue of fairness-based obligations supplies a concrete evidentiary foundation for the functional fairness test elaborated in the subsequent chapter. Specifically, each obligation identified within the DMA is underpinned by clearly defined archetypes of harm and corresponding remedy structures. This structured relationship enables competition enforcers to effectively match specific regulatory tools to clearly identified competitive problems, thereby avoiding reliance on overly broad prohibitions or highly discretionary balancing exercises that can lead to inconsistency or unpredictability in enforcement outcomes.

Despite these pragmatic advantages, the chapter also highlights two significant structural challenges that remain unresolved within the DMA framework and its interaction with classical competition law enforcement. As explained in detail in the previous chapter, the first challenge pertains to parallel enforcement. Specifically, the presence of a clearly articulated fairness catalogue does not, on its own, fully resolve the risk associated with overlapping proceedings and the potential conflicts arising under the principle of ne bis in idem, which prohibits double jeopardy in EU competition law enforcement. To effectively manage this risk and avoid unnecessary procedural duplication and over deterrence, it appears essential to establish a single gateway allocation mechanism. Such a mechanism would strategically allocate enforcement responsibilities, assigning sub dominant gatekeepers to regulatory oversight under the DMA, while reserving the application of classical Article 102 TFEU enforcement to scenarios involving entrenched dominance. The second challenge pertains to conceptual ambiguity. Although the DMA successfully operationalises fairness by translating it into concrete, actionable obligations, it simultaneously elevates fairness into a distinct and freestanding objective. This dual character of fairness, as both an operational tool and a potential overarching goal, revives and intensifies scholarly debates regarding the precise conceptual status of fairness within competition law discourse, whether it should be understood primarily as a goal, as an

enforcement tool, or as a hybrid construct occupying an intermediate position. Consequently, the DMA embodies both the resolution of past uncertainties and the persistence of conceptual ambiguities. It effectively provides clear and enforceable rules yet continues to frame fairness as an inherently open ended ideal, thereby creating space for divergent judicial interpretations and, potentially, for gradual mission creep in future enforcement and case law developments.

A further complication arises from elevating fairness to a distinct regulatory goal within the DMA, thereby differentiating it from traditional competition law objectives. This approach risks neglecting other emerging, and indeed already pressing, issues within the broader domain of competition policy, such as sustainability considerations, labour market platforms, or artificial intelligence (AI) governance. By embedding fairness primarily within the regulatory framework of digital markets, the DMA inadvertently confines its applicability and may hinder the concept's broader adaptability. In other words, treating fairness as a DMA specific regulatory goal potentially restricts its analytical and normative reach, thereby overlooking its relevance and utility in adjacent policy areas. From this recognition, two lines of inquiry emerge. First, the adaptability of the fairness catalogue beyond the digital economy to other important policy domains, such as AI governance, sustainability agreements, and labour platforms, deserves systematic testing and evaluation. Ultimately, this chapter shows that fairness has travelled the full arc from rhetorical notion to functional norm, appropriated by enforcers, ratified by courts, and crystallised by legislators. Yet, as this transition makes clear, significant conceptual questions remain unresolved, particularly concerning the precise status of fairness as an overarching objective within EU competition law. The next chapter addresses this issue, directly engaging with the existential debates about whether fairness is best understood as a goal, a regulatory tool, or perhaps an intermediate concept situated somewhere between these two extremes. It will acknowledge that treating fairness explicitly as a standalone regulatory objective within the DMA does not fully resolve all the conceptual and practical tensions identified throughout previous chapters. However, drawing on the clarity provided by the DMA's existing catalogue of fairness-based obligations, the next chapter proposes a pragmatic way forward by articulating a functional fairness test that builds upon the concrete doctrinal foundations identified in this analysis. Chapter 6 therefore turns from genealogy to design, proposing a modular hierarchy that integrates ex ante and ex post control while keeping fairness grounded in measurable, operational criteria rather than abstract aspiration.

CHAPTER 6: FROM DESIGN TO DEPLOYMENT: A FUNCTIONAL FAIRNESS FRAMEWORK OF TEST, CATALOGUE AND GATEWAY

6.1 Introduction

Fairness has swiftly re-emerged as a central organising principle within the enforcement and analytical framework of EU competition law. For almost two decades, both the interpretation and practical application of Article 102 TFEU were primarily shaped by consumer welfare concerns, particularly those relating to quantifiable economic effects such as pricing, output, and allocative efficiency.[1] However, recent enforcement actions by the European Commission against digital platforms, such as the *Apple Music Streaming*[2] investigation, *Facebook Marketplace*[3] inquiry, and the influential *Facebook data*[4] decision by the Bundeskartellamt, signal a profound doctrinal shift towards treating unfair trading conditions as autonomous forms of abuse.[5] Such articulation embeds a structured proportionality analysis within the evaluation of potential abuses, marking a significant advancement in conceptual clarity compared to prior Commission decisions.

This proportionality-oriented understanding has rapidly influenced national competition authorities, evident in their alignment with this logic in landmark cases such as *Apple ATT*[6] and *Google's online advertising practices,*[7] underscoring an accelerated diffusion and acceptance

[1] For a discussion of the evolution of the consumer welfare standard in EU competition law, see Chapter 2 and Chapter 3.

[2] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

[3] European Commission, Commission Decision of 27 March 2024 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT.40628 – *Meta/Facebook – Marketplace and Data Interoperability)* C(2024) 2025 final.

[4] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019).

[5] For a detailed examination of the issues addressed by the DMA and an analysis of the changing rhetoric in EU competition law, see Chapter 4 and Chapter 5.

[6] Autorité de la concurrence, Decision 22-D-12 of 16 June 2022 concerning practices in the online advertising sector *(Meta/Facebook – Apple ATT)*.

[7] Autorité de la concurrence Decision 21-D-11 *Google AdTech* (7 June 2021).

of fairness-based analysis across multiple enforcement jurisdictions within the EU. In parallel with these significant developments in enforcement rhetoric and practice, legislative initiatives have swiftly mirrored these changes. The DMA explicitly enshrines fairness and contestability as its core regulatory objectives, thereby narrowing the responsiveness gap traditionally associated with ex post enforcement under Article 102 TFEU. Through recitals 2 and 33, the DMA imposes explicit obligations on designated gatekeepers, mandating the provision of open and fair conditions for consumers and business users alike. This legislative move implicitly acknowledges that effective competition in contemporary markets, particularly those dominated by data-rich digital platforms, requires analytical frameworks extending beyond traditional price-centric criteria. By pre-emptively addressing competitive concerns characteristic of the digital gatekeeper age, notably issues surrounding control over user data, digital interfaces, and integrated ecosystems, the DMA responds to critical scholarly insights highlighting the limitations of traditional competition frameworks in addressing modern market dynamics.[8]

However, notwithstanding these notable advances in regulatory and enforcement practice, the concept of fairness continues to attract substantial scrutiny and debate. Proponents argue that fairness provides essential analytical flexibility, enabling a better reflection of distributive justice and procedural fairness concerns prevalent in digital platform markets. In contrast, critics persistently highlight the concept's vagueness and subjectivity. This ambiguity, critics contend, risks transforming fairness into a catch-all clause, potentially leading to regulatory overreach and unpredictable enforcement outcomes, thus undermining the legal certainty historically associated with the consumer welfare paradigm. Indeed, concerns around the rule of law become particularly pronounced when regulatory bodies are tasked with retrospectively determining the legitimacy of diverse non-price related competitive harms, a tension clearly illustrated in the contrasting acceptance of profit maximisation objectives across different contexts in the Apple enforcement decision. In summary, as discussed comprehensively in previous chapters, the question of whether fairness constitutes a distinct regulatory goal or merely rhetorical framing remains unresolved, as do the precise boundaries and scope of its application. Within case law, courts have frequently linked fairness ambiguously to concepts such as undistorted competition or a level playing field, without clearly delineating its exact

[8] Anca D Chirita, 'Data-Driven Unfair Competition in Digital Markets' (2023) 29 Boston University journal of Science and Technology Law 2.

parameters as a regulatory objective. Conversely, the Commission explicitly positions fairness as a definitive regulatory objective in the DMA, thereby formally codifying it as a purpose, despite ongoing ambiguity regarding its practical implementation and theoretical limits. Another dimension of the fairness debate involves the rapid proliferation of enumerative practice lists featured prominently in the DMA. These detailed catalogues, covering an expansive array of anticompetitive practices, including tying, data combination, algorithmic discrimination, and self-preferencing, highlight the diversity and novelty of contemporary competitive harms. Nevertheless, such lists often lack a coherent organisational logic or guiding analytical framework, presenting substantial challenges to predictability and consistent enforcement. Specifically, these extensive enumerations create risks of both over- and under-enforcement. Legitimate yet novel business practices might be penalised unfairly due to the absence of proportionality assessments, while genuinely harmful but unlisted practices may evade scrutiny.[9]

In response to these dual challenges, conceptual ambiguity surrounding fairness and the fragmented, practice-oriented cataloguing approach, this chapter introduces a comprehensive functional fairness framework. Within this framework, fairness is deliberately positioned not as a standalone regulatory objective intended to supplant consumer welfare, but as an analytical and procedural instrument to guide enforcement actions precisely where traditional price-centric metrics prove insufficient. This perspective is particularly relevant in cases involving data leveraging, self-preferencing, or gatekeeper-imposed access restrictions, all of which commonly impose harms related to quality, innovation, and privacy, dimensions inadequately captured by traditional price output assessments.

The framework is structured around three key components. Firstly, it establishes a standardised fairness test that systematically incorporates a four-step proportionality analysis derived from established EU proportionality doctrine. This test involves assessing market dominance and commercial leverage, identifying protected interests such as partner autonomy, user privacy, or market contestability, evaluating whether the contested term or practice is necessary and suitable for achieving a legitimate aim, and carefully balancing the inflicted harm against the

[9] Anca D Chirita, 'Exclusionary and Exploitative Abuse of Consumer Data' in Maria Ioannidou and Despoina Mantzari (eds), *Research Handbook on Competition Law and Data Privacy* (forthcoming, Edward Elgar Publishing).

potential business benefits. Combining the reasoning from previous vital cases, this test of fairness brings together different analytical approaches under a consistent and predictable framework and, most importantly, paves the way for an application of Article 102 TFEU that is consistent with case law. Secondly, the framework incorporates a behavioural catalogue harmonised explicitly with the DMA provisions. This catalogue systematically classifies anticompetitive practices into distinct categories of competition-related unfairness, such as foreclosure tactics including self-preferencing, and contractual unfairness, encompassing exploitative conditions targeting business partners or consumers. Reflecting scholarly proposals aimed at bridging antitrust enforcement with unfair competition principles, this catalogue directly links each listed practice to specific DMA articles, notably Articles 5–7, and relevant sub-paragraphs of Article 102 TFEU.[10] This approach provides a structured analytical compass to mitigate regulatory overlaps and systematically highlights gaps requiring further guidance.

Thirdly, as thoroughly examined in earlier chapters, the framework addresses potential regulatory conflicts between Article 102 TFEU and the DMA, as well as the associated challenges, by proposing regulatory synchronisation grounded explicitly in the principles of proportionality and subsidiarity. This structure delineates clearly defined application roles. Article 102 TFEU addresses abuses arising specifically from market dominance, including firm-specific fairness issues. At the same time, regulatory measures extend analogous principles to entities that, although not meeting the traditional dominance threshold, fall within the gatekeeper criteria established by the current DMA. By explicitly articulating this hierarchical enforcement logic, the framework significantly reduces risks of double jeopardy and leverages the comparative strengths of each regulatory regime. Crucially, this framework is designed not only to address digital market concerns but also to be horizontally scalable and transferable across various economic sectors. As digital and data-driven gatekeeping mechanisms increasingly permeate sectors historically insulated from such dynamics, such as energy, finance, and healthcare, this scalability ensures comprehensive responsiveness and adaptability, proactively mitigating fairness-related distortions across all market domains. Additionally, there is discussion on how issues related to AI bias and sustainability can be addressed within the framework of fairness.

[10] Chirita (n 8).

The chapter's contributions are multifaceted. Normatively, it shows that fairness can be made truly functional by employing it within a rigorous analytical framework and primarily in the context of Article 102 TFEU, and that regulatory discretion can be limited through systematic proportionality analysis. Doctrinally, the framework provides a reconciliation between the DMA's ex ante regulatory approach and Article 102's ex post enforcement mechanisms, addressing critiques regarding predictability and regulatory coherence. Empirically, the analysis develops a cross-case matrix covering landmark enforcement actions to illustrate how proportionality-based fairness effectively captures contemporary competitive harms, particularly privacy infringements and discriminatory personalisation practices. Ultimately, by recharacterizing fairness as a disciplined analytical instrument rather than an ambiguous regulatory objective, the chapter aims to transcend conventional debates that pit consumer welfare against broader public interest objectives. This functional reframing empowers regulatory authorities, courts, and practitioners to address the increasingly sophisticated and data-centric competitive harms characteristic of contemporary digital markets. In doing so, it integrates Article 102's long-established special responsibility doctrine with the proactive obligations articulated in the DMA, laying a coherent, adaptable, and future-oriented foundation for EU competition law enforcement.

6.2 Pluralism and Public Policy Goals in EU Competition Law

6.2.1 Historical Roots of Pluralism

EU competition law has inherently possessed a pluralistic character from its inception, deeply influenced by post-war Ordoliberal thought. Originating within the Treaty of Rome, competition was never envisaged solely as an economic efficiency mechanism. Instead, it was fundamentally perceived as an essential constitutional instrument designed to uphold broader societal values, including democracy, economic liberty, and market pluralism.[11] This constitutionalist perspective highlights the intrinsic link between competition policy and the EU's broader democratic and socio-economic objectives. It positions competition enforcement

[11] Ariel Ezrachi and Viktoria HSE Robertson, 'Can Competition Law Save Democracy? Reflections on Democracy's Tech-Driven Decline and How to Stop It' (2024) Journal of Antitrust Enforcement 1.

not merely as an economic intervention but as a mechanism for safeguarding democratic governance and societal well-being.

These foundational values received formal recognition and reinforcement in Article 2 TEU, which explicitly codifies the Union's commitment to democracy, pluralism, and fundamental rights. Early jurisprudential developments in EU competition law, as exemplified by landmark cases such as *Commercial Solvents*[12] and *Continental Can,*[13] explicitly connected the control of market abuses to the broader goals articulated within the Treaty. Such early decisions underscored that competition rules are not confined to economic efficiency considerations but also encompass broader public policy concerns that directly relate to safeguarding democratic and pluralistic governance.[14] This original pluralistic ethos has manifested repeatedly throughout the evolution of EU competition law via multiple public policy considerations embedded within enforcement practice. Key among these considerations have been the safeguarding of democratic discourse, protecting media plurality, ensuring privacy rights, and maintaining economic liberty. The CJEU has consistently reaffirmed the centrality of the public interest within competition enforcement, insisting that competition rules should be interpreted and applied in light of the Treaties' values.[15] Such judicial pronouncements reinforce the understanding that competition law serves public policy objectives beyond merely correcting market inefficiencies. Academic scholarship provides critical support for this interpretative stance, notably through concepts such as Lon Fuller's notion of polycentricity. Fuller's theory effectively illustrates how competition law inherently intersects with a multitude of non-price values, especially as market dominance increasingly spills over into social and political spheres.[16] In this context, it has been emphasised that this complex interaction inevitably leads to antitrust proceedings encompassing broader social and democratic values. Such multi-faceted assessments are critical when addressing competitive distortions in markets with significant economic power and influence, as competition law in these markets inevitably goes

[12] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* EU:C:1974:18.

[13] Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* EU:C:1973:22.

[14] Ezrachi and Robertson (n 11) 7-8.

[15] Joined Cases 6 and 7 and 13/73 *ICI, BASF and Hoechst v Commission* EU:C:1974:6, [1974] ECR 619.

[16] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353.

beyond purely economic analysis.[17] This pluralistic interpretation is further underscored by early Commission policy statements, such as the 1966 Concentration Report, which explicitly framed abusive conduct as behaviour objectively faulty in view of Treaty objectives.[18] By anchoring abuse analysis explicitly within the broader constitutional objectives of the Treaty, these foundational policy documents reinforced the integral connection between fairness, constitutional conformity, and competition enforcement. Thus, from the outset, fairness and constitutional adherence were embedded as essential benchmarks within the analytical framework of EU competition law.

Although the rhetoric at the policy level has undergone numerous changes since the early Commission report cited above, recent developments, particularly in the context of digital markets, have revived and expanded this pluralistic legacy. It is an interesting irony that this has occurred despite the Commission's guidance on EU competition law policy, which appears to have been broadly endorsed by the Commission in recent years. The modern data-driven economy introduces significant risks to democratic structures, primarily through manipulation of information flows and distortion of public discourse, thus directly threatening the very integrity of the democratic marketplace of ideas.[19] Ezrachi and Robertson emphasize how digital dominance and the strategic manipulation of data-driven market power raise direct competition concerns that profoundly intersect with democratic values and societal pluralism.[20] Such dynamics demonstrate vividly how contemporary market structures reintroduce classical concerns for pluralism, privacy, autonomy, and democratic governance into the competition policy discourse.

In this context, pluralism, privacy, and individual autonomy are not merely novel or incidental concerns within contemporary enforcement practice. Instead, they represent foundational and longstanding pillars whose relevance and urgency have only intensified in response to the growing scale and influence of dominant digital platforms. As platforms exert unprecedented

[17] Ioannis Lianos, Polycentric Competition Law (Centre for Law, Economics and Society, UCL Faculty of Laws, CLES Research Paper Series 4/2018, September 2018) <https://ssrn.com/abstract=3257296> accessed 23 June 2025.

[18] Ariel Ezrachi, EU Competition Law Goals and the Digital Economy (Oxford Legal Studies Research Paper No 17/2018, 6 June 2018) <https://ssrn.com/abstract=3191766> accessed 23 June 2025.

[19] Ezrachi and Robertson (n 11) 1-2.

[20] ibid.

control over economic and informational ecosystems, the preservation of democratic discourse and economic plurality emerges as a central competition concern, reinforcing the critical need for an analytical framework sensitive to these broader values. Thus, contemporary EU competition policy, rather than introducing new values, effectively reengages and reaffirms its original pluralist roots. The centrality of these values in current enforcement actions, whether addressing issues of data privacy or concerns about platform gatekeeping practices, reflects an enduring recognition that competition law serves not only economic ends but is fundamentally committed to safeguarding democratic and societal pluralism. The resurgence of these pluralistic considerations, embedded deeply within the historical fabric of EU competition law, highlights the enduring relevance and necessity of a competition policy that comprehensively engages both economic and democratic objectives in safeguarding the public interest.

6.2.2 Inventory of Public Policy Considerations

The aim of this section is not to provide an exhaustive analysis of every public policy consideration relevant to EU competition law enforcement, as this extensive exploration has already been thoroughly conducted within existing scholarly literature. Instead, the objective here is to succinctly synthesise and distil a comprehensive set of public policy considerations that consistently underpin EU competition jurisprudence, operating in conjunction with, yet distinct from, purely economic analyses of market power. Within this synthesis, six overarching themes emerge repeatedly and warrant particular attention due to their consistent prominence across diverse enforcement contexts.

The first and most enduring theme is consumer wellbeing, which remains the central doctrinal anchor of EU competition law. Both the Commission and the CJEU consistently articulate that Articles 101 and 102 TFEU fundamentally aim to safeguard consumer interests.[21] This protection occurs directly through considerations of price levels and output availability, and indirectly through the preservation of robust competitive structures. Notably, consumer welfare in the EU context extends beyond simple price metrics to encompass broader qualitative

[21] For example, 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 45/7; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172; Case C-413/14 P *Intel Corp Inc v Commission* EU:C:2017:632.

aspects, including product and service quality, innovation, and consumer choice, as explained in detail in the previous chapters. This broader interpretation is particularly significant in zero-priced digital markets, where consumer harm is often intangible. Such harm may manifest as diminished privacy, degraded service quality, or reduced consumer autonomy, rather than through direct monetary costs. The second key consideration is economic freedom, which refers to the fundamental right of market participants to compete based on merit. This principle constitutes a critical component of EU competition law. This concept is deeply embedded in the Treaty provisions and has been consistently upheld by the court as a vital value requiring protection.[22] Even in the absence of immediate consumer price effects, such protection is vital in scenarios where dominant undertakings foreclose competitors, engage in coercive practices, or impose unjustified market barriers. Thus, economic freedom serves as a normative justification for regulatory interventions aimed at preserving open and merit-based market dynamics.

Thirdly, EU competition law has consistently interwoven the objectives of pluralism and democratic resilience into its enforcement practice. As early as the initial landmark abuse decisions, the European courts have treated anticompetitive conduct undermining media plurality and democratic discourse as inherently contrary to the broader objectives of the Treaties. In contemporary contexts, particularly within digital markets, this historical emphasis on pluralism acquires renewed significance, as data-driven market dominance poses pronounced risks to democratic discourse and the integrity of public debate. Ensuring competitive neutrality within the marketplace of ideas thus remains a critical concern for modern EU competition policy, intrinsically linked to the health of democratic institutions.[23]

A fourth salient consideration involves privacy and data autonomy, increasingly relevant in markets heavily reliant on the collection and monetisation of personal data. As personal information becomes central to contemporary business models, the protection of individual privacy and data control emerges as an essential non-price dimension of protecting consumer interests.[24] Antitrust enforcement thus rightly intervenes when dominant firms exploit consumer data or employ exclusionary practices around data access and utilisation, triggering

[22] Lianos (n 17) 61.

[23] Consolidated Version of the Treaty on European Union [2016] OJ C202/13, arts 2 and 3(3).

[24] Chirita (n 9).

significant fairness and fundamental rights concerns. Practices involving consumer deception or manipulation through misinformation also fall within this analytical framework, reinforcing privacy's critical role as a public policy concern within competition jurisprudence.[25]

Fifthly, innovation and dynamic efficiency constitute central considerations frequently invoked within merger assessments and abuse of dominance cases involving technology-driven markets. Traditional concerns around technological tying practices and refusals to license critical intellectual property rights continue to be pivotal, yet contemporary debates extend further. These debates encompass disruptive digital platform models whose strategic market conduct may dampen innovative ecosystems, entrench incumbent market positions, and inhibit competitive market entry.[26]

Finally, fairness and non-discrimination emerge not so much as independent or standalone policy objectives, but rather as critical operational lenses through which other foundational competition values, including economic freedom, privacy, pluralism, and consumer protection, are effectively safeguarded. When dominant market players impose disproportionately burdensome or exploitative trading conditions, fairness-based scrutiny serves to illuminate and address the resulting imbalance in commercial relationships.[27] Importantly, this operational approach aligns closely with the EU's longstanding objective of market integration. It ensures that competitive conditions remain equitable and that national barriers to trade do not reemerge in ways detrimental to the Union's economic coherence, even in the absence of immediate consumer harm.[28] In essence, the public policy considerations identified herein form an integral part of the interpretative and analytical fabric of EU competition law. These considerations collectively underpin enforcement actions, providing necessary normative coherence and ensuring competition law continues to serve broad societal interests beyond mere economic efficiency. This structured synthesis clarifies the critical public policy dimensions consistently recognised within EU jurisprudence, highlighting their contemporary relevance, interconnections, and enduring significance in shaping the evolution of competition law.

[25] Lianos (n 17) 23.

[26] Damien Geradin, What Should EU Competition Policy Do to Address the Concerns Raised by the Digital Platforms' Market Power? (30 September 2018) <https://ssrn.com/abstract=3257967> accessed 23 June 2023.

[27] Chirita (n 9).

[28] Ezrachi (n 18).

EU competition policy does not simply derive its guiding principles and objectives from conventional economic theory; rather, these foundational values are inherently embedded within the constitutional framework of the Treaties themselves. Specifically, Article 2 TEU explicitly grounds the Union's core identity in democratic governance, adherence to the rule of law, protection of human dignity, and the promotion of equality. Complementing this foundational constitutional commitment, Article 7 TFEU requires all Union policies, including competition policy, to be interpreted and applied in a manner consistent with these core constitutional values. Given that Articles 101 and 102 TFEU possess constitutional status within the EU legal order, their interpretation and application necessarily remain receptive and responsive to the Union's broader constitutional principles. This constitutional orientation of EU competition law was evident from the outset in early jurisprudence on abuse of dominance. Early landmark cases explicitly articulated that anticompetitive conduct was unlawful not merely due to adverse economic impacts but fundamentally because such conduct conflicted with the broader objectives of the Treaty.[29] Such formulation signalled clearly that competition enforcement in the EU serves not only economic efficiency goals but also a broader constitutional mission encompassing democratic resilience, market integration, and protection of fundamental rights and societal pluralism.

Crucially, these constitutional values and public policy considerations traverse various economic sectors, underscoring the expansive and integrative nature of EU competition policy. In telecommunications regulation, disputes surrounding net neutrality and zero-rating practices have consistently invoked principles of pluralism, consumer autonomy, and non-discrimination. In energy markets, controversies over smart metering and data access raise privacy concerns remarkably analogous to those encountered within digital platform markets, particularly social media. Similarly, within the financial services sector, regulatory frameworks such as the Second Payment Services Directive (PSD2) explicitly incorporate non-discriminatory data portability obligations that echo traditional competition law concerns regarding economic freedom and market accessibility.

[29] Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* EU:C:1973:22, Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* EU:C:1974:18.

Environmental considerations further exemplify the sectoral spill-over and integrative capacity of competition policy. For instance, the ACM's investigation into the *Chicken of Tomorrow* initiative prominently treated animal welfare and environmental sustainability as legitimate competitive parameters, while employing standard analytical tools related to consumer willingness to pay and market impact.[30] Additionally, in merger contexts, the Commission's assessment of the *Dow/DuPont* transaction explicitly linked innovation in crop protection technologies to broader public policy goals concerning food safety, human health, and environmental sustainability.[31] This approach demonstrates clearly how traditional competition methodologies, such as dynamic efficiency analyses, can effectively internalise and advance broader societal objectives without sacrificing analytical rigour or economic coherence.

Moreover, a temporal perspective further accentuates the enduring continuity of these constitutional and public policy values within EU competition law. In the landmark 1970s *Continental Can* decision, competitive interventions were explicitly justified to safeguard consumer choice and uphold market integration objectives amid industrial restructuring.[32] Decades later, the *Microsoft* decision of the 2000s emphasised interoperability as essential to preserving innovation and market plurality.[33] Contemporary digital enforcement cases, such as the *Apple Music Streaming*[34] investigation and the *Facebook data*[35] case, revisit these fundamental themes of autonomy, fairness, openness, and non-discrimination within evolving digital ecosystems. Despite the shifting economic contexts, from heavy industry to software development to data-centric digital platforms, the underlying substantive values of EU competition policy have consistently remained stable and coherent.[36]

Significantly, these broader constitutional values embedded within the EU Treaties do not inherently conflict with the objective of the protection of consumer interests. Concerns regarding quality degradation, manipulation of consumer choice, loss of privacy, or innovation

[30] Lianos (n 17).

[31] ibid.

[32] Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* EU:C:1973:22.

[33] Case T-201/04 *Microsoft Corp v Commission* EU:T:2007:289.

[34] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

[35] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019).

[36] Ezrachi (n 18).

stagnation ultimately translate into tangible harm to consumers.[37] Consequently, protecting these constitutional values frequently aligns with, and indeed advances, consumer welfare through alternative yet complementary analytical avenues. Contemporary competition enforcement thus does not need to choose between a narrow price output metric and broader societal objectives. Instead, existing analytical frameworks can and should be appropriately calibrated to account for both dimensions concurrently. Revisiting and reinforcing the EU's pluralist heritage in competition policy, rooted in constitutional principles and public policy values, offers a corrective framework. This framework is capable of addressing contemporary challenges more comprehensively. This approach, by explicitly reaffirming the constitutional foundations of competition law, restores the original breadth of its objectives. It also ensures that enforcement remains firmly aligned with societal values, democratic governance, and fundamental rights.

As EU competition scrutiny increasingly spreads to complex issues such as data management, privacy rights and sustainability concerns, enforcement authorities are inevitably encountering significantly multifaceted disputes. These disputes involve multiple interconnected constituencies, where traditional price-centric analytical proxies alone prove insufficient to capture the complexity and breadth of the societal stakes involved. This intricate complexity elucidates why the 1990s shift towards prioritising a singular, price-centred competition purpose eventually resulted in conceptual confusion between regulatory objectives and enforcement instruments. The following section examines in detail the historical evolution of what might be called consumer welfare centralism. It shows how this narrow analytical focus has inadvertently reduced the perceived scope and impact of EU competition law.

6.2.3 The Consumer Welfare Turn and the Purpose Instrument Confusion

The theoretical and empirical debates surrounding consumer welfare, its American origins, its transplantation into EU rhetoric, and its critics are examined in depth in the previous chapters. This section provides a concise overview intended to clarify how the single-purpose narrative emerged and the reasons behind the resultant confusion between purpose and instrument, addressed in this chapter. The 1990s marked a pivotal and transformative era in EU competition

[37] Geradin (n 26).

law, ushering in a pronounced, albeit ultimately destabilising, shift toward embracing consumer welfare as the exclusive guiding principle of enforcement policy. This conceptual migration originated from the United States, where influential Chicago School economic scholarship had significantly reshaped antitrust discourse, reframing competition law as a purely economic tool focused on short-term price and output optimisation. In doing so, broader societal and constitutional objectives traditionally embedded within competition policy were systematically marginalised or altogether excluded from analytical consideration. Although European courts never explicitly endorsed this singularly reductionist interpretation, its rhetorical power was nonetheless pervasive. For instance, the Commission's influential 1997 Green Paper on vertical restraints and the subsequent Article 102 Guidance Paper both mirrored the American-inspired analytical framework. Within these policy documents, efficiencies were overwhelmingly articulated in narrow economic terms, specifically centring around price and output impacts. At the same time, longstanding references to democracy, privacy, market plurality, and other broader constitutional concerns gradually vanished from the official discourse.

This adoption of consumer welfare monocentrism precipitated two significant unintended consequences within EU competition enforcement practice. Firstly, the adoption of a singular consumer welfare criterion inadvertently narrowed the perceived scope and mission of competition law itself. As a consequence, harmful practices adversely impacting core constitutional values, such as privacy violations through data exploitation, increasing media market concentration, and discrimination facilitated by algorithmic decision-making, were frequently dismissed or disregarded as non-competition issues if they could not be directly linked to tangible price increases or measurable economic harm. Secondly, the emphasis on a price output test as the central analytical metric blurred the critical distinction between competition law's fundamental goals and the analytical tools or instruments utilised to achieve these purposes. Designed initially as diagnostic instruments to identify consumer harm, these economic metrics became mistakenly viewed as the ultimate goals of competition policy itself. This conceptual misalignment may be termed purpose instrument confusion, resulting in competition law analyses that frequently disregard any values or harms not neatly captured within a narrow, price-centric analytical paradigm.

The allure of consumer welfare rhetoric in the EU was sufficiently powerful to engender an almost doctrinal reverence within policy circles. The Commission, through various speeches and policy statements, frequently positioned consumer welfare as the singular guiding star of

EU competition policy.[38] At the same time, influential scholars warned that moving away from strict price-based economic analysis could turn competition enforcement into a form of social engineering. Such a shift, they argued, would risk undermining analytical rigour and legal certainty.[39] Despite this strong policy rhetoric, the jurisprudence of European courts revealed significant ambivalence and resistance toward adopting a purely consumer welfare-centred analytical approach. Landmark rulings such as *Post Danmark* and *Intel* explicitly confirmed that price considerations constitute only one dimension within a broader range of relevant competition factors.[40] Similarly, the *Cartes Bancaires* expressly recognised the necessity of simultaneously considering market-integration concerns alongside traditional consumer-centric evaluations.[41] Consequently, in practical enforcement, the consumer welfare monocentric narrative continued to coexist uneasily with longstanding judicial precedents invoking broader constitutional and market integration objectives. This doctrinal tension became particularly evident in digital and zero-priced markets, where conventional price output proxies inherently proved inadequate for capturing the full extent of competitive harm. For instance, in its *Facebook* decision, the Bundeskartellamt identified excessive data collection and privacy erosion as exploitative abuses. These were deemed significant competition harms precisely because the services involved no direct monetary price.[42] Under a strictly price-centric lens, these harms would have gone entirely undetected, highlighting critical analytical shortcomings in traditional economic metrics.[43]

Analogous analytical limitations were apparent in the Commission's investigation of *Apple Music Streaming*, where questions of fairness and proportionality arose explicitly despite no

[38] For instance, M. Monti, 'Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: an EU Perspective' (Speech at the UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles, 28 February 2004).

[39] Geradin (n 26).

[40] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172, Judgment of 27 March 2012; Case C-413/14 P *Intel Corp. Inc. v European Commission* ECLI:EU:C:2017:632, Judgment of 6 September 2017.

[41] Case C-67/13 P *Groupement des cartes bancaires (CB) v European Commission* ECLI:EU:C:2014:2204, Judgment of 11 September 2014.

[42] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019).

[43] Ariel Ezrachi and Maurice E Stucke, 'Virtual Competition' (2016) 7 Journal of European Competition Law & Practice 585, 91.

immediate price impact upon consumers.[44] Such cases starkly illustrate the inherent limitations of relying exclusively on consumer welfare metrics in data-intensive market environments. Critically, recognition of broader constitutional values, such as democracy, privacy, and innovation, does not inherently conflict with the goal of consumer protection. On the contrary, these values frequently underpin and sustain consumer welfare, particularly over longer time horizons. A price-based consumer welfare approach relies on assumptions of perfect informational symmetry and rational consumer decision-making. Yet these assumptions collapse in today's attention-driven digital markets, which are dominated by behavioural advertising, mass data collection, and targeted misinformation. Thus, ironically, traditional consumer welfare metrics derived from Chicago School economic theory risk inadvertently undermining the very consumer interests Chicago School purportedly aims to safeguard.

Against this contextual background, the following section examines how elevating a diagnostic economic indicator to the status of a general regulatory goal obscures the historically pluralistic objectives of EU competition law and blurs the critical distinctions between enforcement goals and analytical methodologies. Subsequently, it is proposed that a functional analytical approach should be adopted, explicitly designed to restore conceptual clarity, preserve constitutional consistency, and reconcile economic rigour with the broader social and democratic concerns inherent in EU competition policy.

6.2.4 Advancing Analytical Tests Over Goal Labels in EU Competition Law

Before turning to the substantive contours of this test-centred analytical approach, it is necessary to clarify why such an approach is normatively and methodologically preferable to goal-based formulations in EU competition law. While the enumeration of overarching policy objectives, such as consumer welfare, fairness, innovation, or pluralism, may appear attractive from a normative perspective, experience demonstrates that abstract goal articulation alone provides limited operational guidance for enforcement authorities and courts. The persistent indeterminacy surrounding the hierarchy, interaction, and practical prioritisation of such objectives risks undermining legal certainty and analytical coherence, particularly in complex

[44] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

and data-driven market environments. By contrast, a test-centred analytical framework grounds normative concerns within established legal methodologies, requiring concrete identification of competitive harm, structured proportionality assessment, and reasoned justification of intervention. This approach preserves the constitutional pluralism of EU competition law while avoiding the conceptual inflation that follows from treating each underlying value as an autonomous enforcement objective. Importantly, it allows broader constitutional and societal values to be systematically internalised through existing analytical instruments, rather than abstractly asserted as standalone regulatory goals. It is for these reasons that the present section advances analytical tests, not goal labels, as the appropriate mechanism for reconciling economic rigour with the Union's pluralist constitutional heritage, ensuring both doctrinal continuity and effective enforcement in evolving digital markets.

The resilience and effectiveness of EU competition law ultimately rely less on enumerating an extensive catalogue of explicit policy objectives than on the robustness and coherence of the analytical frameworks and tests employed to realise those objectives in practice. Articles 101 and 102 TFEU already equip enforcement authorities and courts with a versatile array of analytical instruments capable of capturing diverse competitive harms. These analytical frameworks notably include an object effect inquiry designed to identify practices inherently detrimental to competitive market structures; a consumer-detriment screen capable of identifying harm in various dimensions beyond mere price, including quality reduction, diminished consumer choice, and innovation loss; and finally, a proportionality filter that rigorously balances the restrictive impacts of certain conduct against any legitimate justifications or business objectives offered by the undertakings concerned. By deploying these existing tests effectively, competition enforcement is well-positioned to address a diverse range of public policy considerations, such as privacy protection, media pluralism, democratic resilience, and environmental sustainability, without necessarily elevating each of these individually to the status of independent and standalone competition goals. Suppose these broader societal concerns can be systematically integrated and assessed through existing analytical lenses. In that case, their inherent values are adequately protected, thereby avoiding the unnecessary proliferation of distinct regulatory objectives that could potentially dilute enforcement coherence.

Notably, adopting a test-centred analytical approach also effectively addresses the confusion frequently observed between the purpose and the instruments of competition law enforcement.

Specifically, the reliance on a price output metric should not be misconstrued as the ultimate goal of competition policy itself. Instead, such metrics should be viewed as analytical tools employed to identify and quantify consumer harm. Confusing the tools of competition law with its purpose has historically obscured and marginalised essential harms. These often arise in non-price dimensions, such as excessive data extraction, exclusionary platform architecture, algorithmic discrimination, and unfair ranking practices.

A similar analytical perspective applies to the concept of fairness. Rather than inflating fairness into a new, overarching public policy objective, it is analytically more coherent and methodologically sound to view fairness as an operational lens. Through this lens, existing constitutional and Treaty values, such as privacy, economic freedom, and pluralism, can be methodically evaluated and vindicated through disciplined proportionality analysis. Understood in this context, fairness functions equivalently to established economic metrics, representing an instrumental analytical method rather than a separate destination or goal in competition law.

This test-centred enforcement structure also robustly preserves and promotes pluralism within EU competition law, avoiding endless and potentially contentious debates regarding which objectives merit inclusion within official enforcement guidelines. Such debates risk unnecessarily politicising enforcement practice and inviting judicial minimalism. Instead, systematically assessing whether existing analytical tests can effectively capture and address specific harms enables enforcement to preserve the Union's multifaceted heritage. This avoids the need to constantly revisit the foundational list of competition objectives every time market dynamics or technologies evolve. If existing analytical frameworks sufficiently capture specific competitive harms, they inherently fulfil the intended function of protecting underlying values. Conversely, if current tests inadequately capture specific harms, this signals not a failure of the underlying value but rather a necessary recalibration or refinement of the analytical instrument itself.

Recent enforcement practice compellingly illustrates the practical benefits of adopting this flexible, test-centred analytical framework. For instance, the Bundeskartellamt's *Facebook* decision explicitly treated excessive and exploitative data collection practices as abuses of market dominance, framing privacy erosion directly as competitive harm despite the absence

of monetary consumer price impacts.[45] This enforcement approach demonstrated the capacity of existing proportionality tests to robustly weigh the balance between user autonomy rights and legitimate commercial interests. Similarly, the Commission's decision in *Google Shopping*[46] effectively captured and addressed competitive harms associated with self-preferencing practices, despite unchanged consumer prices, by employing a comprehensive effects-based analysis combined with proportionality considerations. These cases highlight the effectiveness of a pluralist analytical approach, which is capable of recognising harms beyond traditional price-centric considerations.

Nonetheless, a crucial consideration remains that analytical flexibility and test refinement must be balanced with the overarching requirement for legal certainty. Analytical tests risk becoming overly broad and indeterminate if they lack clear, objective benchmarks. Therefore, the functional fairness framework, detailed in subsequent discussions, explicitly anchors each proportionality limb, market dominance assessment, legitimate aim evaluation, necessity, and proportionality balance in established case law precedents and explicit gatekeeper regulations. Providing transparent, predictable, and objective criteria ensures that both market participants and judicial authorities can reliably anticipate enforcement outcomes, thereby safeguarding legal certainty. By clearly restoring and maintaining the analytical distinction between the objectives of competition enforcement, grounded in constitutionally entrenched Treaty values, and the analytical instruments deployed to identify and address competitive harm, enforcement practice can robustly uphold the pluralistic heritage of the EU competition regime. At the same time, this clarity avoids unnecessary inflation of distinct competition goals, thereby preserving analytical rigour and coherence. Consequently, the following section elaborates on fairness explicitly as a structured procedural filter rather than as a vague regulatory slogan or competing policy objective. In this understanding, fairness represents a complementary analytical test, structured and methodologically disciplined to address competitive harms inadequately captured by traditional, price-centred analytical frameworks.

Taken together, historical precedent, sector-specific evidence, and the proposed test-based analytical perspective collectively affirm that EU competition law has always simultaneously

[45] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019).

[46] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11.

served multiple constitutional and societal values, even during periods when policy rhetoric, investigations, and court decisions appeared narrowly focused on consumer welfare. The actual effectiveness and scope of competition enforcement ultimately depend not on the expansiveness of the stated objective list but on the analytical precision, methodological rigour, and conceptual flexibility of the employed enforcement tools. Consequently, the forthcoming chapter explicitly recasts fairness as precisely such an enforcement tool, a structured proportionality-based analytical framework that effectively complements consumer-welfare analyses, aligns traditional Article 102 TFEU enforcement with contemporary regulatory frameworks such as the DMA, and coherently bridges the Union's pluralist constitutional heritage with modern digital market realities.

6.3 Operationalising Fairness in EU Competition Law

6.3.1 The Ambiguity of Fairness

Fairness has undeniably re-emerged as a central theme within EU competition law rhetoric; however, its precise legal definition and application continue to lack clarity. Article 102(a) TFEU, which prohibits unfair trading conditions, has existed since the Treaty's inception. Nonetheless, despite its longstanding presence, the provision remained relatively dormant for over half a century. Empirical data drawn from historical abuse of dominance cases highlight this underutilisation; between 1971 and 2019, only eight out of sixty-nine total abuse decisions, approximately twelve per cent, explicitly invoked Article 102(a). Such sparse usage underscores the historical hesitancy and ambiguity surrounding the operationalisation of fairness within EU competition enforcement. The introduction of digital platforms and ecosystems has notably altered this enforcement landscape, bringing fairness considerations to the fore in recent years.

Despite lingering conceptual uncertainties, empirical findings presented in the previous chapter demonstrate that fairness language has made a strong return to Article 102 TFEU enforcement, particularly in digital market cases. Several critical factors underpin this contemporary resurgence of fairness in competition law discourse. Firstly, the digital economy inherently involves numerous non-price-related competitive harms, particularly within zero-price business models where users are monetised as revenue streams rather than conventional consumers.

Traditional economic frameworks centred around price fail to adequately address these novel competitive dynamics. Consequently, enforcement agencies increasingly seek analytical vocabularies and frameworks capable of capturing and addressing competitive imbalances and consumer exploitation in contexts devoid of direct monetary exchange. Secondly, regulatory spillover effects emanating from recent legislative developments, particularly the DMA, have significantly influenced the readoption of fairness rhetoric in competition enforcement decisions. The DMA explicitly pairs the concept of fairness with contestability, compelling competition authorities to actively integrate these normative dimensions into their enforcement practices. Consequently, contemporary abuse decisions involving digital markets, such as cases dealing with in-app payment systems and algorithmic self-preferential ranking practices, frequently emphasise fairness considerations, reflecting a broader regulatory convergence around fairness principles. Thirdly, the resurgence of fairness resonates profoundly within current political and societal debates, enhancing its rhetorical power in enforcement discourse. Concerns surrounding democratic resilience, economic inequality, and opacity in algorithmic decision making have intensified public and political demands for fairness-oriented regulatory responses. Despite its political resonance and appeal, it is also important to emphasise that without a solid doctrinal basis and clear analytical frameworks, fairness risks becoming vague political rhetoric devoid of concrete analytical content. In conclusion, the need for clarity and discipline in defining and implementing fairness within competition law is undeniable, especially considering the rapid advancement of the concept.[47]

The extraction of fairness as a standalone objective from Article 102(a)'s prohibition of unfair trading conditions is arguably unfortunate, given that fairness represents the ultimate goal that any field of law aspires to achieve. The inherent ambiguity surrounding fairness largely stems from semantic overload, as the concept concurrently denotes multiple distinct normative dimensions across enforcement decisions, academic discussions, and policy formulations. Fairness is variably employed to signify equal opportunities, requiring a level playing field amongst competitors; equitable outcomes, aimed at preventing disproportionate value extraction from users or trading partners; and procedural propriety, necessitating transparency, predictability, and due process within competitive markets. Due to the absence of a clear hierarchy among these different interpretations, fairness often operates as a malleable rhetorical

[47] Niamh Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2020) Modern Law Review <https://doi.org/10.1111/1468-2230.12579>.

tool, capable of accommodating a broad range of policy preferences.[48] This malleability engenders conceptual ambiguity and raises concerns regarding enforcement consistency and predictability, especially when competing interests claim fairness to justify contradictory regulatory outcomes. *Apple App Store* decision exemplifies this ambiguity vividly; the same tying practice was simultaneously condemned as both exclusionary and exploitative, yet the decision did not clarify whether the unfairness lay primarily in the detrimental effects on rivals, the problematic contractual conditions, or the lack of user consent. The contemporary academic literature reflects competing perspectives on the optimal interpretation and operationalisation of fairness within EU competition law. One prominent viewpoint regards fairness as a moral or normative objective that could justify distributive interventions such as redistributive pricing or structural market remedies.[49] Conversely, a cautious school of thought warns against an overly expansive interpretation of fairness, advocating instead for clear, precise guidance to prevent arbitrariness, protectionism, or doctrinal confusion in enforcement practice, rather than providing clarity on the concept itself.[50] The persistent elusiveness of fairness within EU competition law can thus be attributed to multiple interconnected factors. Primarily, the limited historical jurisprudence provides inadequate benchmarks and reference points to guide consistent interpretation and application. Simultaneously, the concept's inherent semantic flexibility allows for contradictory and inconsistent application across different enforcement contexts. Furthermore, recent enforcement practices have increasingly substituted fairness rhetoric for traditional economic metrics without clearly articulating corresponding analytical tests or doctrinal frameworks, exacerbating interpretative ambiguity.

Given this backdrop, the subsequent analytical discussion explicitly seeks to anchor fairness within the EU's established proportionality doctrine. Attempting to identify a standalone fairness objective directly from the text of Article 102(a) TFEU is as unproductive as previous endeavours to elevate consumer welfare from an analytical tool to the singular overarching goal of competition law. Both approaches commit the same conceptual error by conflating the ultimate ends of competition enforcement with the instrumental frameworks used to diagnose competitive harm. The mere presence of the term unfair in Article 102(a) TFEU does not, in

[48] Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' (2019) Journal of Business Law 329.

[49] Adi Ayal, *Fairness in Antitrust: Protecting the Strong from the Weak* (Bloomsbury 2016).

[50] Dunne (n 47).

itself, elevate fairness to the status of an autonomous Treaty goal; instead, it highlights areas in which existing analytical tools require adaptation and refinement. As discussed in detail in the previous chapters, digital economy related cases, and the corresponding codification in the DMA, illustrate that fairness is most effectively operationalized as a structured procedural filter, systematically translating various competitive harms into proportionality-based analyses. Consequently, the central question is not whether fairness should emerge as a new and distinct objective, but rather how its practical, functional role can be formally articulated and consistently applied. Re-conceptualising fairness in this disciplined manner ensures coherence with the EU's constitutional principles and addresses the complexities of contemporary digital and data-intensive market realities. Therefore, the following sections advance this analytical task by situating fairness firmly within the proportionality framework integral to EU abuse of dominance enforcement.

6.3.2 Fairness as a Structured Proportionality Filter

Fairness can contribute effectively to EU competition law only when explicitly operationalised as an analytical instrument rather than an autonomous policy objective. The inherent ambiguity surrounding the notion of fairness, previously elaborated, underscores the necessity of this instrumental perspective. Fairness can simultaneously refer to several distinct normative dimensions, such as ensuring equal opportunities among market participants, preventing disproportionate value extraction, or upholding procedural propriety through transparency and predictability. Because of this semantic breadth, it lacks the conceptual coherence needed to serve as a singular, standalone policy objective. Historical precedent provides a cautionary lesson; the concept of consumer welfare, initially an analytical diagnostic tool, inadvertently transformed into a singular overarching competition objective, consequently creating confusion between policy instruments and ultimate goals. To circumvent a recurrence of this error, fairness must be securely anchored within the established analytical discipline provided by the proportionality principle.

The EU's public law proportionality framework follows a well-established, four-step analytical sequence. It involves identifying whether a measure pursues a legitimate aim, assessing its suitability to achieve that aim, evaluating necessity by considering the availability of less restrictive alternatives, and finally balancing the overall proportionality to ensure that the

measure does not impose disproportionate burdens relative to its objectives.[51] Even though the EU courts may not explicitly invoke the term proportionality in every competition case, empirical analysis reveals that the proportionality logic inherently underpins judicial reasoning concerning Article 102(a) TFEU. Historical examinations of abuse cases consistently demonstrate that infringements classified as unfair trading conditions invariably violate at least one component of this proportionality framework. While the intensity of the proportionality test varies depending on the context, Union institutions typically encounter a relatively deferential standard, described as manifest inappropriateness. In contrast, member state measures undergo more rigorous scrutiny for less restrictive alternatives; the fundamental analytical structure remains uniform across contexts.[52] Recent notable EU competition cases, which are examined in more detail below, vividly illustrate how proportionality principles already explicitly guide fairness assessments in practice. For example, in the *Apple App Store* decision, regulatory scrutiny initially assessed whether tying app payments exclusively to Apple's proprietary system genuinely furthered the asserted legitimate objectives, namely security and quality assurance.[53] Similarly, in *Google Shopping*, the Commission rejected Google's preferential self-ranking practices after determining that non-discriminatory ranking alternatives could achieve comparable user benefits, satisfying proportionality's necessity limb.[54] Additionally, the Bundeskartellamt's investigation into *Facebook* balanced data collection efficiencies against severe privacy encroachments and coerced user consent, ultimately concluding a violation of Article 102(a) TFEU based on an imbalance within proportionality's balancing step.[55] Empirical analyses of these contemporary digital market cases further confirm a deliberate, explicit shift towards employing proportionality criteria within fairness evaluations, indicating a conscious methodological evolution towards more structured proportionality-based fairness assessments.

[51] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439.

[52] ibid.

[53] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

[54] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11.

[55] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019).

To explicitly formalise this implicitly evolving proportionality practice, fairness evaluations can be structured within a systematic four-step analytical filter. The initial analytical stage assesses dominance and leverage, determining whether the undertaking under scrutiny holds sufficient market power to distort competitive conditions or consumer autonomy significantly. Subsequently, in the second stage, it is determined whether the contested conduct poses a threat to the fundamental protected interests discussed in more detail below, such as consumer privacy and market contestability. The third analytical stage scrutinises the credibility and legitimacy of business justifications advanced for the restrictive conduct, confirming their non-pretextual nature and relevance to legitimate objectives. Finally, the fourth stage comprehensively evaluates necessity and rationality, considering whether less restrictive alternatives could achieve similar benefits and ensuring that any residual competitive harm remains proportionate relative to asserted benefits. This structured framework transforms abstract fairness rhetoric into concrete legal analysis. Supplementary concerns, such as contract transparency or the sensitivity of consumer data, can be readily addressed within these stages, thereby preserving both analytical precision and legal predictability.

Adopting fairness explicitly as a structured proportionality-based analytical tool effectively resolves the semantic and conceptual ambiguity historically associated with the concept. Rather than competing with consumer welfare or other established competition goals, fairness operates coherently as a procedural interface, systematically identifying and evaluating competitive harms inadequately addressed through conventional price-centric methodologies. Moreover, this structured analytical approach aligns inherently with the EU's pluralistic mandate, allowing multiple Treaty values, such as privacy, pluralism, and innovation, to be coherently evaluated and vindicated through a single, predictable and functional framework. Notably, the operative significance is not derived from the explicit presence or absence of fairness as a standalone objective, but rather from the established analytical framework that naturally encompasses fairness assessments.

The subsequent section provides detailed operational guidance and practical thresholds for this four-step fairness filter, illustrated through concrete examples drawn from contemporary digital market enforcement cases. This demonstration underscores the analytical framework's efficacy in addressing diverse competitive harms, including both exploitative and exclusionary abuses, without unnecessarily expanding the existing Treaty objectives. By situating fairness explicitly within a disciplined framework, EU competition law enforcement can robustly maintain

analytical coherence, legal certainty, and alignment with the EU's foundational constitutional principles, effectively bridging historical pluralistic traditions with evolving digital market complexities.

6.3.3 Compatibility with Consumer Welfare Analysis

Treating fairness explicitly as a proportionality-based analytical filter does not undermine or displace the traditional consumer welfare benchmark within EU competition law; instead, it augments existing analytical frameworks by capturing non-price harms that conventional price output metrics fail to detect adequately. While consumer welfare analysis typically centres around identifying tangible economic detriments through observable changes in price, output, or product quality, the fairness filter addresses subtler but equally significant competitive harms such as privacy erosion, autonomy loss, or market contestability restrictions. The integration of both analytical tests ensures comprehensive protection of competitive structures and consumer interests, broadening the analytical lens without compromising established methodological rigour.

When both tests, consumer welfare metrics and the proportionality-based fairness filter, identify competitive harm, they typically converge in their conclusions but rely on distinct doctrinal reasoning. For example, dominance leveraged to increase prices or visibly diminish product quality directly engages traditional consumer welfare analysis, providing clear-cut evidence of harm. Concurrently, the fairness filter addresses the same conduct through a proportionality lens, assessing whether the infringement unduly compromises essential protected interests such as consumer privacy or market autonomy. A paradigmatic illustration of this analytical overlap is found in the *Apple App Store.* The requirement for in-app payment through Apple's proprietary system not only raised adequate commission levels, a straightforward price-based harm, but also curtailed developer autonomy, thereby meeting the criteria of the fairness filter.[56] Together, these two analytical frameworks provide complementary but distinct evidentiary routes for substantiating competition infringements.

[56] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

Procedurally, the integration of both tests follows a logical, structured sequence designed to optimise analytical efficiency and evidentiary robustness. Initially, authorities typically deploy the consumer welfare price output screen due to its comparative analytical simplicity, economic clarity, and ease of evidentiary substantiation. If this initial consumer welfare analysis reveals substantial harm, the fairness filter can subsequently serve as a confirmatory, rather than independently necessary, step. This sequence reinforces the overall legal robustness of enforcement decisions. Specifically, if subsequent judicial scrutiny challenges or undermines econometric evidence relating to price harms, the proportionality-based fairness analysis offers an independent evidentiary foundation to sustain the infringement decision. Likewise, a robust price-based analysis can similarly bolster fairness-based findings. Importantly, this dual-track approach also guides the scope and nature of remedies. It encourages authorities to adopt the least intrusive yet effective intervention, thereby avoiding excessively punitive or duplicative enforcement.

At first glance, the introduction of a proportionality-based fairness filter may appear to add analytical complexity to competition investigations. However, this perception rests on the mistaken assumption that fairness operates as an additional, standalone layer of assessment. In practice, the fairness filter is designed as a conditional and sequential analytical step, activated only where traditional consumer-welfare metrics fail to capture credible indications of competitive harm. By functioning as a targeted diagnostic safeguard rather than a routine evidentiary requirement, the fairness filter does not systematically expand investigative burdens. On the contrary, it enhances procedural economy by preventing both under-enforcement in cases involving non-price harm and over-investigation in cases where conventional economic analysis already provides clear answers.

In digital and zero price market environments, the proportionality-based fairness filter distinctly demonstrates its analytical value, addressing competitive harms that traditional price output metrics inherently overlook. In these contexts, competitive harm frequently arises in non-price dimensions. These include privacy violations, information manipulation, and restrictions on consumer autonomy, all of which remain invisible to economic metrics focused solely on price or output. For example, even if a digital platform provides services free of charge, consumer privacy or market openness could be significantly compromised through opaque data collection practices or restrictive terms of service. The fairness filter, as explained in its second step above, explicitly addresses such harms by identifying compromised protected interests, thereby

complementing traditional consumer welfare assessments. This expanded analytical approach aligns harmoniously with the multi-faceted objectives enshrined within the EU competition framework, explicitly recognising long-term consumer benefits encompassing a broader spectrum of market dimensions beyond mere price and immediate economic outcomes.

Given the partial yet significant overlap between the two analytical frameworks, a structured sequential approach optimally balances coherence and analytical rigour in competition enforcement practice. Initially, enforcement efforts commence with a familiar and established consumer welfare analysis, assessing whether the conduct in question results in increased prices, reduced output, or discernibly diminished product or service quality. This initial evaluation serves as a rapid, efficient screening mechanism to identify clear-cut economic injuries based on traditional price or output metrics.

In instances where the primary consumer welfare test clearly identifies such harms, the case can proceed directly on these established grounds. Concurrently, the proportionality-based fairness filter may be applied in parallel, serving as a corroborating analytical framework to reinforce the robustness of findings and provide additional evidentiary support. However, if the consumer welfare screen does not indicate explicit price-related or output-based harms, enforcement authorities then activate the proportionality-based fairness filter. This secondary analytical step specifically addresses competitive harms undetectable by conventional economic analyses, such as privacy erosion, limitations on consumer autonomy, or impediments to market contestability. The fairness filter initiates a structured, four-step proportionality analysis when credible evidence suggests substantial non-price detriments. Conversely, if no credible indication of non-price harm emerges, the fairness analysis terminates swiftly, conserving enforcement resources and avoiding unnecessary investigatory effort in cases lacking apparent competitive injury.

Crucially, where both analytical thresholds concur in identifying harmful competitive conduct, enforcement adopts a single, least intrusive effective remedy. This proportionality-driven remedial approach explicitly prevents redundant or excessive punitive measures. Thus, the fairness filter not only assists in identifying subtle competitive injuries overlooked by conventional metrics but also guides the precise calibration and proportionality of enforcement responses. This sequential double threshold framework ensures comprehensive enforcement rigour by preventing superficial improvements in price or output from masking deeper

competitive harms. Simultaneously, it maintains procedural efficiency and avoids unnecessary duplication of analytical efforts in cases where traditional metrics already sufficiently capture consumer detriment. In summary, the consumer welfare test provides efficient preliminary triage, the fairness filter functions as an essential safeguard against overlooked non-price harms, and the remedy rule ensures proportionate enforcement action when both analytical frameworks concur.

Each of the two analytical tests relies on differentiated yet complementary evidentiary standards and methodologies. Traditional consumer welfare analysis predominantly employs quantitative economic tools and econometric evidence, including elasticity estimates, price comparisons, and cost structure analyses. Conversely, the fairness filter draws upon qualitatively oriented proof, such as contractual arrangements, data handling procedures, interface designs, and consumer consent mechanisms. By leveraging these distinct yet complementary evidentiary frameworks, enforcement authorities optimise investigative resources, reducing redundancy while ensuring comprehensive detection and evaluation of competitive harms.

Thus, the combined analytical application of consumer welfare and fairness tests strengthens procedural proportionality and analytical precision within EU competition enforcement practice. In summary, treating fairness explicitly as a structured analytical filter, rather than as an autonomous regulatory goal, effectively complements and enhances the established consumer welfare analysis without compromising methodological rigour or clarity. Operating as an adjacent diagnostic framework, the fairness filter becomes particularly critical precisely when conventional consumer welfare metrics are insufficient to detect and address non-price competitive harms. The sequential double-threshold procedure ensures rigorous enforcement practice, preventing superficial price improvements from overshadowing substantive non-price competitive detriments, while simultaneously preventing analytical arbitrariness or overreach through structured procedural sequencing and evidentiary differentiation.

The subsequent section further elaborates on potential critiques, particularly concerns regarding the proportionality-based fairness filter's capacity to chill legitimate competitive behaviour inadvertently. It explicitly demonstrates how proportionality thresholds effectively mitigate such risks, ensuring that fairness remains a disciplined, effective analytical instrument within EU competition enforcement.

6.3.4 Clarifications for Possible Criticisms

Fairness-based enforcement in EU competition law may give rise to several conceivable concerns, notably including the possibilities of over-enforcement, legal indeterminacy, and retroactive rule-making. Each of these potential critiques warrants careful consideration. However, a response can be articulated through a comprehensive understanding and precise application of the four-step fairness filter and the structured double threshold analytical procedure.

One plausible criticism might suggest that an overly broad or amorphous fairness standard could inadvertently lead to over-enforcement, potentially deterring innovative yet aggressive market strategies that could benefit consumers, particularly within data-driven markets and technology-intensive sectors. This concern is not merely theoretical; commentators have indeed pointed out that a flexible fairness standard might unintentionally evolve into a protective instrument favouring less-efficient competitors, thereby stifling legitimate competitive pressure and innovation.[57] Such a scenario would run counter to the fundamental objectives of competition law, which traditionally aim to foster competitive processes that enhance consumer welfare through innovation and efficient market dynamics. Nevertheless, the proportionality-based fairness filter addresses this apprehension effectively by incorporating explicit analytical safeguards. Specifically, the initial analytical stage focused on dominance and leverage, significantly reducing the risk of penalising ordinary competitive conduct, as the fairness filter only activates in scenarios involving entities wielding dominance-level market power. In addition, even in cases of established dominance, the fairness test incorporates subsequent analytical steps designed explicitly to protect legitimate and pro-competitive business strategies. For instance, the assessment of the legitimacy of business aims ensures that credible, objectively verifiable efficiencies and functional justifications are fully recognised. Moreover, the necessity and proportionality balancing stage explicitly prevents enforcement actions unless it is clearly established that no less restrictive alternatives exist to achieve comparable consumer benefits. Empirical reviews of recent Commission enforcement cases reinforce this point by demonstrating that authorities explicitly dismissed fairness-based complaints when firms convincingly justified their conduct through proportionate improvements in security, functionality, or overall consumer benefit.

[57] Colino (n 48).

Another conceivable critique pertains to the potential vagueness and elasticity of the fairness concept itself, raising concerns that it could undermine legal certainty and predictability for business entities. This criticism argues that the inherent flexibility of fairness terminology might invite arbitrary or inconsistent enforcement actions, thereby complicating strategic planning and compliance efforts for businesses operating in the market.[58] However, embedding fairness within the structured proportionality doctrine significantly mitigates this concern. EU public law proportionality principles inherently provide clear and objective criteria, explicitly requiring any restrictive enforcement measures to demonstrate suitability, necessity, and proportionality in relation to the legitimate objectives pursued. Through its structured four-step analytical framework, the fairness filter effectively transforms an otherwise potentially vague fairness concept into a coherent set of goals, answerable legal inquiries. Moreover, the implementation of the double threshold analytical procedure further enhances clarity and predictability, as the fairness filter only activates when traditional consumer welfare metrics, focusing on price and output, prove insufficient or silent, thereby making enforcement actions both targeted and transparent.

A further objection is that new fairness standards might retroactively penalise past conduct or duplicate duties laid down in the DMA. In the enforcement framework advanced in this research, the overlap risk is inherently small because DMA obligations are limited to gatekeepers, a category that, in the context of this thesis, is considered to be limited in both personal and material terms, and does not affect the level of dominance. In contrast, the proportionality-based fairness filter takes effect and applies only to undertakings that exceed the dominance threshold. In every other scenario, the filter fills the enforcement gap that the DMA's deliberately narrow scope leaves open. Any residual uncertainty can be managed through soft law guidance clarifying evidence thresholds, acceptable justifications and procedural safeguards, in line with the Commission's usual practice for efficiencies under Articles 101(3) and 102 TFEU.

It should nevertheless be emphasised that soft law instruments, including Commission guidelines, notices, and decisional practice, do not possess binding force vis-à-vis either the Court of Justice or national competition authorities. Their relevance within the proposed

[58] ibid.

framework therefore does not stem from any formal normative hierarchy, but from their interpretative, coordinative, and adaptive function within the enforcement ecosystem. Importantly, the reliance on soft law is not incidental but reflects a deliberate design choice. The fairness catalogue proposed in this research is intended to operate within rapidly evolving digital markets, where technological architectures, business models, and competitive strategies frequently outpace formal legislative revision. Embedding such a framework within hard law instruments would risk excessive rigidity, rendering analytical tools slow to adapt to emerging forms of competitive harm. By contrast, soft law provides a flexible and revisable medium through which enforcement authorities can refine evidentiary thresholds, update analytical emphasis, and respond to new market realities without undermining legal certainty or judicial autonomy. In this sense, soft law guidance enhances transparency and predictability in enforcement practice while preserving the primacy of Articles 101 and 102 TFEU and the jurisprudence of the Union courts as the ultimate sources of binding legal authority.

In summary, when carefully bounded by explicit proportionality criteria, systematically activated via a clearly defined double threshold analytical procedure, and coherently aligned with the DMA's regulatory objectives and obligations, the fairness filter enhances analytical precision and predictability within EU competition enforcement. Rather than introducing arbitrary discretion or chilling legitimate competitive conduct, this structured analytical approach explicitly extends competition law scrutiny to significant yet traditionally overlooked non-price competitive harms, maintaining robust legal certainty and effectively addressing legitimate prudential concerns. This nuanced analytical integration thereby upholds the integrity and effectiveness of EU competition law enforcement in the context of contemporary digital market complexities.

Such an approach is based on repositioning fairness within a systematically structured framework that emphasises proportionality, thereby eliminating its conceptual ambiguity and functionalizing it as a practical analytical tool. When the empirical study conducted in the previous chapter and the statistics presented above are evaluated together, it is evident that the historically infrequently applied provision of Article 102(a) TFEU on unfair trading conditions has recently gained importance, particularly in digital markets, reflecting the multidimensional aspects of fairness such as market equality, fair results and procedural fairness. Integrating fairness into the EU's established proportionality test has effectively converted a vague normative notion into actionable legal criteria, enhancing both analytical coherence and

enforcement consistency. Additionally, this structured fairness analysis complements, rather than replaces, traditional consumer welfare measures, operating through a clear, sequential, dual threshold approach. This ensures that subtle non price harms are systematically addressed without compromising established economic assessments. Having established this structured foundation, the subsequent section provides concrete thresholds, illustrative cases, and a comprehensive behavioural catalogue, further aligning fairness analysis explicitly with the regulatory objectives of the EU competition law.

6.4 Development of a Functional Fairness Framework

This section introduces the research's principal contribution, the functional fairness framework, designed explicitly to integrate and rationalise the fragmented and often inconsistent fairness reasoning observed in recent digital market competition cases. Historically, the application of fairness within competition law has suffered from significant conceptual ambiguity, frequently serving more as a rhetorical device than a coherent analytical tool. Recognising this critical limitation, this framework seeks to transform fairness from a vaguely defined normative ideal into a structured, predictable, and operationally effective analytical instrument.

The functional utility of the proportionality-based fairness test lies in its capacity to translate abstract fairness rhetoric into a disciplined, legally operable analytical structure, while also addressing several structural challenges that characterise contemporary digital competition enforcement. Existing Article 102 TFEU practice has long relied on proportionality reasoning in an implicit and fragmented manner, particularly in cases involving unfair trading conditions. The absence of an explicit and structured test has contributed to inconsistent reasoning, legal uncertainty, and concerns of over-enforcement. By formalising proportionality as a sequential analytical framework, the proposed test enhances legal certainty, constrains enforcement discretion, and provides courts and authorities with a replicable method for assessing non-price competitive harms.

Beyond its internal analytical function, the test also serves a broader systemic role at the intersection of Article 102 TFEU and the Digital Markets Act. By clarifying the content and limits of fairness-based intervention under competition law, the framework reduces the risk of overlapping enforcement and double jeopardy arising from parallel application of regulatory

and antitrust instruments. It further enables a more calibrated allocation of enforcement responsibilities, allowing fairness-related digital conduct by dominant undertakings to be assessed within the legally safeguarded structure of Article 102 TFEU, while preserving the DMA's regulatory focus on non-dominant yet structurally problematic conduct that threatens fairness and contestability. In this way, the test contributes to a more coherent and proportionate enforcement architecture, without introducing new substantive obligations, but by systematising existing judicial logic and aligning competition and regulatory objectives.

The proposed functional fairness framework comprises three interconnected components, each addressing distinct yet complementary aspects necessary for a comprehensive approach to fairness-based enforcement. The first component is the proportionality-based fairness test, which extracts and structures the implicit analytical logic embedded within contemporary Article 102(a) TFEU decisions, the general logic of which is outlined in the section above. This test establishes a clear and systematic four-step analysis. It begins by evaluating market dominance, followed by identifying the specific protected interest at risk. The study then examines the legitimacy of the objectives pursued by the dominant undertaking and finally assesses the necessity and balance of the contested conduct. By clearly delineating these analytical steps, the test replaces subjective interpretation with a transparent, replicable, and legally robust methodology.

Complementing the test, the second component, the fairness behaviour catalogue, addresses the critique of vagueness by categorising identifiable conduct patterns that concretely threaten protected market interests. Through rigorous classification, it links abstract fairness concepts directly to observable and measurable market behaviours. This approach enhances clarity and predictability for market participants, enforcers, and courts alike, fostering greater legal certainty and compliance effectiveness.

The third component, the DMA synchronisation module, ensures cohesive and consistent enforcement between ex ante regulatory obligations established under the DMA and ex post antitrust reviews conducted under Article 102 TFEU. This module incorporates principles such as a single gateway system for coherent jurisdictional application, calibrated penalties to maintain proportionality, and protocols designed explicitly to prevent redundant or conflicting enforcement actions. Collectively, these three interconnected elements systematically address existing analytical gaps, reduce enforcement uncertainties, and bridge the limitations inherent

in traditional price-centric analytical approaches. By aligning regulatory tools and competition enforcement mechanisms cohesively, this framework significantly enhances the coherence, predictability, and overall effectiveness of fairness-based competition law enforcement in the digital economy.

6.4.1 Deriving the Proportionality-Based Fairness Test

6.4.1.1 Methodology and Defined Steps of the Test

This section provides a detailed and comprehensive examination of a carefully selected series of significant digital platform abuse investigations. Specifically, it covers ten individual decisions spanning cases investigated and adjudicated by the Commission, various NCAs, and the Union courts, all issued within the period from 2017 to 2024. This timeframe corresponds to a critical and formative period for EU competition enforcement, marked by heightened regulatory attention toward digital platforms and intensified efforts to address complex forms of market abuses not traditionally captured by conventional price output analyses. The decisions included in this review are selected precisely for their representative value and their explicit engagement with fairness-related considerations, providing a robust empirical foundation to systematically distil and analyse recurrent analytical patterns in modern competition enforcement practice. The selection of cases analysed in this chapter reflects structural constraints inherent in the current stage of EU digital competition enforcement rather than any preference for outcome-aligned examples. At the levels of the General Court and the Court of Justice, the number of digitally focused cases that have reached final adjudication and engage explicitly with proportionality-based reasoning remains limited. Accordingly, the corpus examined here encompasses the full set of Commission, NCA, General Court and CJEU decisions between 2017 and 2024 in which digital platform conduct was both substantively assessed and reasoned through fairness-related or proportionality-oriented analytical lenses. Cases excluded from the analysis were omitted not because of their substantive outcomes, but because they either remain pending, lack final judicial reasoning, or do not engage with the analytical dimensions central to the proportionality-based fairness framework developed in this chapter. The resulting corpus therefore represents the entire available universe of relevant decisions at this stage of doctrinal development, rather than a selectively curated subset. Importantly, the proportionality-based fairness test advanced here is not designed as a closed

or static catalogue tied to a finite set of cases. Instead, it distils recurring analytical patterns observable in existing enforcement practice into a structured evaluative framework intended for application to future cases as additional jurisprudence emerges. Subsequent judicial developments can thus be incorporated by assessing whether and how new decisions align with, refine, or depart from the proportionality logic identified in the present analysis. The cases examined are shown in the table below.

Table 5: Decision Corpus Analysed (2017-2024): Clusters and Decisions

Cluster	Cases
Streaming and Ads	Apple App Store Music Streaming (Commission) Facebook Marketplace (Commission)
Data and Privacy	Facebook Data (Bundeskartellamt) Facebook Data (CJEU) Apple ATT (Autorite de la concurrence)
Publisher and AdTech	Google AdTech (Autorite de la concurrence) Google Neighbouring Rights (Autorite de la concurrence)
Search and Mobile OS	Google Shopping (Commission, GC and CJEU) Google Android (Commission and GC)
Marketplace	Amazon Marketplace (Bundeskartellamt)

Decisions are examined holistically in order to systematically identify, extract and classify the fundamental analytical elements of each decision. This examination framework explicitly focused on several fundamental dimensions critical to fairness-based competition enforcement analysis. These included an in-depth assessment of the firms' market power or dominance. They also examined the specific competitive or consumer interests that were directly or indirectly affected by the contested practices. In addition, the decisions analysed the justifications or legitimate aims invoked by the undertakings to defend their conduct. Finally, they considered the role of proportionality reasoning, whether used explicitly or implicitly. Through this comprehensive analytical process, a consistent analytical structure emerged across diverse cases and jurisdictions, reflecting a coherent pattern of reasoning underlying these complex digital enforcement decisions.

The systematic analytical framework uncovered by this case analysis is formalised as the proportionality-based fairness test. Although each decision was independently approached, specific circumstances and market conditions unique to the respective platform contexts, collectively, they revealed a unified analytical logic. The test crystallises this logic into four coherent, sequential, and structured analytical steps that translate broader fairness rhetoric into precise and administrable legal criteria. The initial analytical stage examines whether the undertaking in question possesses substantial dominance and leverage, focusing particularly on dominance level power capable of significantly distorting market competition or restricting consumer and business alternatives. Following this foundational assessment, the second stage explicitly identifies the legally cognisable protected interests endangered by the contested practices, which often include privacy rights, consumer choice, market contestability, and innovation potential. The analytical framework subsequently assesses the legitimacy and credibility of the specific justifications or business aims presented by the investigated firms. This stage evaluates the authenticity and validity of asserted benefits, such as improvements in security, enhancements in product or service quality, intellectual property protections, and efficiency-based rationales. Ultimately, the test culminates in a thorough and nuanced examination of the necessity and proportionality of the contested conduct. This concluding analytical stage explicitly examines whether comparable benefits could feasibly be achieved through alternative, less restrictive means. It further evaluates whether any residual harm resulting from the investigated practice is disproportionate or manifestly excessive in relation to the benefits claimed by the undertaking.

Importantly, the fact that the elements of this analytical structure are derived from existing case law should not imply that their explicit articulation into a coherent test is redundant or unnecessary. On the contrary, systematically formalising this implicit judicial logic into a structured framework significantly enhances legal clarity, predictability, and consistency in enforcement practice. By explicitly codifying and clearly defining each analytical stage, the test provides courts, competition authorities, and market participants with a robust and transparent analytical tool, significantly reducing interpretative ambiguities and enforcement uncertainties historically associated with fairness-based analysis. Therefore, the formalisation and systematic articulation of the proportionality-based fairness test derived from case law analysis constitutes a meaningful and necessary advancement in EU competition enforcement. This structured approach not only facilitates consistent application across diverse cases and jurisdictions but

also explicitly aligns enforcement practices with broader policy objectives, thereby reinforcing the analytical integrity and coherence of fairness-based competition interventions.

6.4.1.2 Case-by-Case Demonstration of the Test

It is essential to demonstrate its implicit presence in contemporary landmark competition cases involving prominent digital platforms to robustly substantiate the analytical and practical applicability of the proportionality-based fairness test. The detailed case study below indicates that the four structured analytical components mentioned above consistently emerge and are applied in actual judicial decisions across many jurisdictions and levels of application.

In *Apple App Store Music-Streaming*, Apple's dominance in the mobile operating system market is recognised, observing that Apple controls over 70% of user time in mobile operating systems and thereby exerts unilateral control over in-app payment terms.[59] This dominance creates significant market leverage and restricts market dynamics. Further examination identified consumer choice and market contestability as the primary protected interests adversely affected, specifically through Apple's anti-steering clauses that substantially limit consumers' and developers' freedom to explore alternative payment options, effectively foreclosing competing music-streaming services.[60] Although Apple presented transaction security as a legitimate business aim, this justification was deemed credible yet excessively broad.[61] Consequently, upon evaluating the necessity and proportionality, it was concluded that alternative third-party payment mechanisms could achieve comparable security standards without imposing such restrictive conditions, thus rendering the restrictions disproportionate and constituting an infringement.[62]

Similarly, in *Facebook Marketplace*, it was found that Meta leveraged significant dominance through its unique social graph data, granting an unparalleled advantage in visibility and user

[59] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming*) C(2021) 2844 final, para 56.

[60] ibid para 43.

[61] ibid para 143.

[62] ibid para 175.

targeting.[63] Here, the primary protected interest was market contestability, which suffered notably as competing classified advertising services were incapable of replicating Meta's precise targeting capabilities.[64] Despite Meta's justification of improving user experience, the absence of empirical validation undermined the legitimacy of the claimed efficiency.[65] Subsequently, the Commission's proportionality assessment found that the adverse foreclosure effects considerably outweighed any plausible benefits, resulting in a precise determination of abuse.[66]

The *Facebook Data* provides further critical insights into fairness-based proportionality analysis. The German authorities clearly established Facebook's dominant position, noting a market share exceeding 80% within social networking services, which facilitated coercive cross-platform data practices.[67] This conduct compromised significant protected interests, notably user privacy and autonomy, as users lacked viable means to refuse data combination across platforms.[68] Facebook's defence centred on efficiencies derived from personalised advertising, an argument partially recognised yet deemed insufficient to justify the pervasive data practices employed.[69] Ultimately, the German Federal Court identified less restrictive opt-in consent models as feasible alternatives, concluding that Facebook's data collection practices imposed disproportionate burdens on users, thus confirming the infringement.[70]

The AdlC's *Google AdTech* investigation provides an additional illustrative example. Dominance was clearly established in the digital advertising server market.[71] The central protected interests identified were consumer choice and overall market contestability,

[63] Commission Decision C(2024) 8053 final of 14 November 2024 in Case AT.40684 – *Facebook Marketplace,* para 72.

[64] ibid para 98.

[65] ibid para 121.

[66] ibid para 162.

[67] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019), para, 23-27.

[68] ibid 40-45.

[69] ibid.

[70] ibid.

[71] Autorité de la concurrence, Decision 21-D-11 of 7 June 2021 concerning practices implemented in the online advertising sector *(Google AdTech)*, para 55.

significantly undermined by Google's opaque practices.[72] Google's partial quality control justification lacked sufficient substantiation.[73] Upon proportionality review, the Autorité concluded that an API constituted a less restrictive alternative, demonstrating evident disproportionality in Google's practices.[74]

Another notable decision, *Google Neighbouring Rights*, similarly confirmed dominance leveraged over news publishers, adversely affecting crucial protected interests, notably media pluralism and market contestability.[75] Although Google's claim of generating traffic was acknowledged as partly valid, its implementation was judged excessively sweeping and disproportionate.[76] A revenue-sharing model provided a clear illustration of less restrictive means, leading to a determination of abuse.[77]

Conversely, *Apple ATT* decision demonstrates the importance of nuanced proportionality reasoning. Apple's dominance as an iOS gatekeeper was established,[78] and significant privacy concerns constituted the primary protected interest.[79] Nonetheless, Apple successfully justified its approach based on genuine security and user experience considerations.[80] Crucially, the Autorité deemed the revised transparency mechanisms proportionate, illustrating a scenario where proportionality analysis confirmed compliance rather than infringement.[81]

The extensive *Google Shopping* investigation and cases reinforced the robustness of proportionality reasoning. Dominance was clearly demonstrated within search services, leading

[72] ibid para 97.

[73] ibid para 128.

[74] ibid para 173.

[75] Autorité de la concurrence, Decision 20-MC-01 of 9 April 2020 (interim measures) and Decision 21-D-17 of 12 July 2021 *(Google – Droits voisins),* para 44-86.

[76] ibid para 109.

[77] ibid para 152.

[78] Autorité de la concurrence, Decision 22-D-12 of 16 June 2022 concerning practices in the online advertising sector *(Meta/Facebook – Apple ATT),* para 38.

[79] ibid para 62.

[80] ibid para 104.

[81] ibid para 139.

to significant market contestability concerns.[82] Google's justification based on improved search result quality was rejected due to insufficient evidential support.[83] Ultimately, the Commission and subsequent court reviews concluded that a non-discriminatory ranking mechanism represented a clear, less restrictive alternative, firmly establishing disproportionality and confirming the infringement.[84]

The *Google Android* case followed a similar structured proportionality analysis. Google's dominance in mobile operating systems was explicitly confirmed, with contractual tying practices adversely affecting consumer choice.[85] While Google's fragmentation defence was partially recognised, the introduction of a choice screen mechanism clearly illustrated a less restrictive alternative, reinforcing the disproportionate nature of Google's original practices and thus confirming the abuse.[86]

Lastly, *Amazon Marketplace* decision demonstrated a nuanced proportionality analysis in action. Amazon's significant dominance was confirmed, particularly through its influential Buy Box and Prime ranking mechanisms, providing substantial market leverage.[87] Protected interests, notably contestability among third-party sellers, were highlighted.[88] While Amazon's justifications concerning customer convenience and fraud prevention were noted, the Bundeskartellamt indicated that a comprehensive proportionality evaluation regarding necessity and balance required further detailed analysis,[89] demonstrating proportionality analysis's ongoing and dynamic nature.

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[82] European Commission, Commission Decision of 27 June 2017 in Case AT.39740 — *Google Search (Shopping)* C(2017) 4444 final [2018] OJ C9/11, para 287, 341.

[83] ibid para 615.

[84] Case T-612/17 *Google LLC and Alphabet Inc v Commission* EU:T:2021:763, paras 118-133; Case C-48/22 *P Google LLC and Alphabet Inc v Commission* ECLI:EU:C:2024:726, paras 71-83.

[85] European Commission, Commission Decision of 18 July 2018 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 — *Google Android)* C(2018) 4761 final [2019] OJ C 402/19*,* para 225-358.

[86] ibid paras 770-890.

[87] Bundeskartellamt, *Meta / Facebook Marketplace – inter-service data combination* (Decision B6–103/22, 4 May 2023), paras 449-457.

[88] ibid para 460.

[89] ibid paras 481-500.

Collectively, these case analyses robustly illustrate the implicit presence and consistent application of the proportionality-based fairness test within contemporary fairness-based competition enforcement, reinforcing its value as a structured, coherent analytical framework. The examination presented above reveals that the EU and NCAs consistently utilise an implicit proportionality-based analytical framework when addressing fairness-related market abuses. However, despite its regular and implicit use, this framework has historically been applied inconsistently and without explicit systematic articulation. The formalisation and explicit codification of this proportionality-based fairness test serve several critical purposes. Firstly, it establishes well-defined thresholds for assessing market power and identifying protected competitive interests, thereby enhancing legal predictability and coherence in the enforcement of competition law. Secondly, it introduces an explicit legitimacy criterion requiring firms to present credible, evidence-based justifications for potentially restrictive practices, thereby promoting analytical transparency and consistency. Thirdly, by integrating an explicit necessity and balance test aligned with established EU public law proportionality principles, the test ensures balanced evaluation of contested business conduct. Moreover, this structured codification is particularly valuable within digital markets, where traditional price focused analyses often fail to capture nuanced competitive harms such as privacy erosion, diminished consumer autonomy, and reduced market contestability. By operationalising fairness as a structured analytical tool rather than promoting it as a vague, overarching normative objective, the test facilitates ex post examination of complex digital market behaviours. This analytical clarity allows competition enforcement to address emerging challenges effectively without necessitating the contentious introduction of new, standalone fairness objectives. In doing so, the test transforms fairness from a loosely defined rhetorical concept into a precise and practically applicable legal instrument. This sets a strong foundation for the next analytical step outlined in the subsequent section, which systematically addresses residual ambiguities by directly linking each defined protected interest to specific, observable market behaviours within the fairness behaviour catalogue.

6.4.2 Fairness Behaviour Catalogue

The emergence of fairness-related harms within competition enforcement has often been viewed with scepticism, especially given the existing frameworks under continental unfair competition law and the more recent DMA enactment. Critics frequently argue that if these

regulatory regimes already address deceptive or exploitative behaviours, then the reactivation of Article 102(a) TFEU may appear redundant or unnecessary. However, several compelling justifications underline the significance of maintaining and indeed revitalising Article 102(a) TFEU within the broader regulatory landscape.

First, there exists a constitutional imperative underscored by the EUCFR. Specifically, Article 16 Charter mandates a balanced approach to entrepreneurial freedom, explicitly requiring that regulatory interventions are proportionate, justified, and non-arbitrary limitations on business autonomy. Concurrently, Article 38 Charter highlights the Union's commitment to consumer protection, authorising scrutiny of practices that erode consumer privacy, distort consumer choices, or unfairly limit market access. When read collectively, these provisions establish a robust constitutional foundation, legitimising and simultaneously constraining the use of Article 102(a) TFEU. Relying solely on ex ante regulations like the DMA to manage fairness-related abuses may inadequately address situations where market dominance exacerbates the severity of harms. Conversely, employing Article 102 TFEU through a structured proportionality-based fairness test ensures that dominant undertakings are subjected to a proportionate, ex post regulatory assessment, providing comprehensive enforcement aligned with fundamental rights.

Historical continuity provides a second persuasive rationale. Initially, continental unfair competition law encompassed broad notions of contractual and competition fairness, addressing both business-to-business and business-to-consumer imbalances, alongside the leveraging of market power. Over recent decades, however, unfair competition law progressively narrowed its focus, evolving into a more consumer protection-centric body of micro rules, relegating structural market abuses predominantly to competition law. Nevertheless, as the academic literature emphasises, the underlying economic harm to markets remains consistent regardless of the legal categorisation.[90] Abusive contractual practices in B2B contexts can distort market competition and economic outcomes just as significantly as explicit competitive distortions like self-preferencing. Thus, reintegrating these behavioural patterns into Article 102 TFEU does not generate redundancy but rather restores doctrinal coherence and comprehensive coverage within the competition law framework.

[90] Chirita (n 8).

Lastly, practical clarity constitutes a critical benefit of explicitly codifying fairness standards within Article 102's unfair trading conditions logic. Established jurisprudence, including landmark cases such as *United Brands,*[91] *Tetra Pak I,*[92] and *Servizio Elettrico Nazionale*,[93] clearly demonstrates the historical efficacy of Article 102(a) TFEU in addressing diverse fairness concerns. Recent digital market cases further illustrate that authorities already implicitly rely on fairness concepts without systematically mapping protected interests to concrete market practices. Without clear categorisation, enforcement risks becoming overly reliant on intuition, potentially leading to inconsistency and uncertainty. To address this, a structured fairness behaviour catalogue seems essential. This catalogue directly links each protected interest identified in the test, such as privacy protection, consumer autonomy, and market contestability, to explicitly defined market behaviours. Each identified practice is grounded in foundational Charter values, historical precedents, and, where applicable, specific obligations under the DMA. Thus, the catalogue effectively mitigates vagueness critiques, clarifies analytical thresholds, such as focusing on dominance in combination with significant network effects rather than merely numeric market shares, and facilitates consistent enforcement across multiple sectors, including those not explicitly covered by the DMA, yet susceptible to market dominance abuses.

6.4.2.1 Normative Rationale of the Behaviour Catalogue

As explained above, fairness-related conduct in the context of European competition law broadly encompasses what can be described as competitive unfairness on one hand and contractual unfairness on the other. Both categories have been explicitly recognised and codified within the DMA, raising questions about the necessity and rationale for maintaining a parallel enforcement path under Article 102 TFEU. The initial concern arises from the possibility of redundancy, considering the DMA already covers significant aspects of both competitive and contractual unfairness. Nevertheless, as argued throughout this research, maintaining a robust and clearly defined enforcement avenue under Article 102 remains critical. This helps ensure legal coherence and mitigates potential frictions arising from the overlapping

[91] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* EU:C:1978:22, [1978] ECR 207.

[92] Case 326/82 *Commission v Tetra Pak Rausing SA* EU:C:1985:277, [1985] ECR 1647.

[93] Case C-377/20 *Servizio Elettrico Nazionale and Others v AGCM* ECLI:EU:C:2023:11.

application of competition law and the DMA, particularly in addressing the complex and evolving behaviour of dominant firms in digital markets.

A second prominent concern relates to the discernible divide between pre-digital and post-digital jurisprudence. Historically, Article 102(a) TFEU cases predominantly focused on contractual unfairness and exploitative abuses. Classical jurisprudence vividly illustrates this, with landmark decisions like *United Brands*, which scrutinised excessive pricing within export markets, establishing benchmarks for contractual fairness.[94] *British Leyland* similarly addressed excessive and arbitrary import fees, further embedding the necessity for fair contractual practices within the competition regime.[95] Subsequent influential cases, including *Tetra Pak I*[96] and *Tetra Pak II,*[97] reinforced these principles by condemning unfair tied purchase obligations and discriminatory supply refusals. Additionally, *Deutsche Bahn* examined discriminatory freight charges in business-to-business contexts,[98] while *Servizio Elettrico Nazionale* evaluated compulsory product tie clauses upon renewal.[99]

In contrast, contemporary digital market cases have shifted enforcement attention predominantly towards competitive unfairness. High-profile investigations have spotlighted exclusionary and restrictive market practices. For instance, *Apple Music/Spotify* critically examined Apple's self-preferencing practices and anti-steering rules, which effectively excluded rival streaming services.[100] Similarly, *Facebook Marketplace* decision identified unfair trading conditions whereby exclusive advertising data was leveraged to foreclose competing sellers.[101] The AdlC's *Apple ATT* case highlighted unfair terms imposed on rivals in

[94] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* EU:C:1978:22, [1978] ECR 207.

[95] Case 226/84 *British Leyland Public Limited Company v Commission* EU:C:1986:321, [1986] ECR 3263.

[96] Case 326/82 *Commission v Tetra Pak Rausing SA* EU:C:1985:277, [1985] ECR 1647.

[97] Case T-83/91 *Tetra Pak International SA v Commission* EU:T:1994:246, [1994] ECR II-755.

[98] Case C-264/16 P *Deutsche Bahn AG and Others v Commission* EU:C:2018:58.

[99] Case C-377/20 *Servizio Elettrico Nazionale and Others v AGCM* ECLI:EU:C:2023:11.

[100] European Commission, Commission Decision of 30 April 2021 in Case AT.40437 – *Apple App Store (Music Streaming)* C(2021) 2844 final.

[101] Commission Decision of 14 November 2024 relating to proceedings under Article 102 TFEU (Case AT.40684 – *Facebook Marketplace*).

ad tech through changes in tracking transparency.[102] Such digital era cases clearly demonstrate an enforcement trend focused on maintaining competitive neutrality and preventing more exclusionary practices.

Due to this thematic difference in the historical treatment of fairness-related issues in the context of Article 102 TFEU and given that potential anti-competitive conduct in the digital sphere continues to evolve, uncertainty may arise as to which unfair practices require attention. However, when it comes to the digital economy, there is also a reality that can prevent such concerns. Indeed, digital market realities frequently blur the traditional boundaries between competitive and contractual unfairness, resulting in hybrid enforcement scenarios. For example, *Google Online Ads* investigation scrutinised unilateral data access restrictions and exclusionary tactics against rival ad servers, manifesting both contractual and competitive unfairness simultaneously.[103] *Facebook Data* also addressed combined consumer exploitation and competitive foreclosure through cross-platform data amalgamation practices.[104] Additionally, *Google Neighbouring Rights* examined non-transparent negotiation terms that significantly disadvantaged news publishers, clearly illustrating contractual imbalance intertwined with competitive distortions.[105] Recognising the coexistence and hybrid nature of competitive and contractual unfairness, the functional fairness framework, particularly through the structured proportionality-based fairness test, is designed to address all three scenarios effectively. This framework systematically aligns clearly defined protected interests to specific market practices, offering analytical clarity and practical enforceability. Given the hybrid character of digital era unfairness, it is essential to clearly and explicitly transpose the DMA's existing conduct catalogue into Article 102 TFEU enforcement. This integration resolves potential confusion by delineating each identified conduct's applicability under Article 102 TFEU. Once explicitly listed within this catalogue, conduct falling under contractual, competitive, or hybrid categories unambiguously becomes actionable under competition law. Such a clear delineation

[102] Autorité de la concurrence, Decision 22-D-12 of 16 June 2022 concerning practices in the online advertising sector *(Meta/Facebook – Apple ATT)*.

[103] Autorité de la concurrence Decision 21-D-11 *Google AdTech* (7 June 2021).

[104] Bundeskartellamt Decision B6-22/16, *Facebook – Exploitative Business Terms (User Data)* (6 February 2019); Case C-252/21 Meta Platforms Inc. and Others v Bundeskartellamt and Others ECLI:EU:C:2023:537, Judgment of the Court (Grand Chamber), 4 July 2023.

[105] Autorité de la concurrence, Decision 24-D-03 of 15 March 2024 regarding compliance with the commitments in Decision 22-D-13 of 21 June 2022 *concerning practices implemented by Google in the press sector.*

significantly enhances predictability and legal certainty. The illustrative table below adopts exactly that logic.

Table 6: Sample of Behavioural Catalogue

Conduct pattern	Protected interest	Type of Unfairness
Self-preferencing in ranking	Contestability and choice	Competitive
Default OS pre-install tying	Contestability	Competitive
Cross-service data lock-in	Contestability and privacy	Hybrid
Discriminatory API access	Innovation	Competitive
Excessive data via bundled consent	Privacy and autonomy	Hybrid
MFN / parity clauses	Choice and autonomy	Contractual
No-escape tying of ancillary services	Choice and innovation	Contractual
ranking discrimination	Contestability	Hybrid
Ad-tracking opt-in asymmetry	Privacy and contestability	Hybrid
Zero-fee neighbouring-rights licence	Pluralism and contestability	Contractual

The proposed fairness catalogue thus serves primarily as a tool for clarification rather than limitation. Issued as soft law guidance, it does not amend Article 102 TFEU nor constrain the discretionary powers of the Commission or Union courts. Instead, it translates recurrent market behaviours into an openly accessible reference list. Its nature as soft law allows for flexibility and adaptability, making it readily expandable in response to new market practices and technological developments, such as algorithmic discrimination, AI-driven manipulation tactics (dark patterns), or evolving digital practices.

Additionally, the catalogue functions effectively as a systematic bridge, incorporating the DMA obligations into the Article 102 TFEU ecosystem. This ensures transparency and clarity regarding fairness obligations applicable ex post, once dominance thresholds are crossed. Moreover, recognising the varied and sector-specific risks in markets beyond the digital context, the catalogue adopts a triennial stakeholder review cycle for ongoing updates. Stakeholders, including firms, consumer advocacy groups, and national regulatory authorities, are invited to submit proposals for consideration. Following consultation, the Commission

would publish consolidated updates, mirroring DMA's periodic review mechanisms.[106] This dynamic approach ensures the catalogue remains responsive, relevant, and future-proof, capturing emergent market harms such as artificial intelligence biases, deceptive sustainability claims, or other novel unfair practices without resorting to rigid legislative amendments. In conclusion, the establishment and continual refinement of this fairness catalogue significantly enhance coherence, consistency, and transparency within European competition law enforcement. By systematically linking protected legal interests with explicitly defined market behaviours, it effectively addresses both traditional and contemporary fairness challenges. This approach ensures proportionate, targeted regulatory interventions aligned with constitutional mandates, ensuring continued regulatory effectiveness in dynamically evolving market environments.

6.4.2.2 Dominance Threshold

A critical challenge to applying Article 102 TFEU to both contractual and competitive unfairness stems from the dominance threshold intrinsic to the provision itself. When dealing with hybrid or purely competitive unfairness, such as self-preferencing or strategic data exclusion, this issue tends to diminish significantly. These kinds of practices typically occur within contexts where the undertaking in question already exercises substantial market influence, thus naturally meeting Article 102's requirement of dominance. Indeed, the current case law, much of which has directly inspired the DMA, clearly demonstrates this point.

In contrast, purely contractual unfairness presents a more complicated scenario, as it often occurs without necessarily altering the market structure significantly enough to cross conventional antitrust thresholds. The emerging concern is exemplified by several prominent companies that clearly occupy a critical market position yet fail to meet traditional antitrust dominance criteria. Firms such as Booking.com, which operates as a significant player within the hotel meta search market; Amazon's FBA logistics, which dominate logistics provision without necessarily holding a conventional market dominant position; Valve's Steam platform, central to digital video game distribution; and Strava, influential in the social fitness application space, represent clear examples of entities that have qualified as, or have been proposed to

[106] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L265/1, Art 12.

qualify as, gatekeepers under DMA thresholds, despite not being dominant according to classical antitrust measures. These cases vividly illustrate a regulatory blind spot, which might be described as the "gatekeeper but not dominant gap," and complicates effective competition law enforcement in contemporary digital market contexts.

Given these complexities, one might question whether the DMA's thresholds should simply be expanded, or whether the dominance threshold within Article 102 TFEU itself should be lowered. While theoretically plausible, both approaches carry practical risks. A wholesale adjustment or a revision of the Article 102 TFEU dominance threshold would entail procedurally burdensome legislative processes and potentially destabilise the carefully balanced internal coherence of established competition jurisprudence. Such broad, sweeping changes would also risk unintended market consequences and considerable regulatory uncertainty.

Instead, this research advocates for the preservation of the existing dominance threshold within Article 102 TFEU, accompanied by the introduction of an explicit, ex post analytical mechanism grounded in proportionality principles derived from the EUCFR. This functional fairness framework allows for detailed, case-by-case examination of potentially unfair practices imposed by dominant firms, addressing both contractual and competitive dimensions of unfairness. The advantage of this nuanced, proportionate approach is twofold. Firstly, it ensures normative precision. Each regulatory intervention under this framework can be thoroughly examined and reviewed judicially, with tailored reasoning explicitly aligned with factual evidence. This contrasts sharply with the inherently speculative and broad-stroke character of ex ante regulatory mechanisms. Thus, the proposed fairness framework ensures each enforcement action remains proportionate, justified, and specifically targeted to the identified harm, enhancing overall legal clarity and certainty.

Secondly, the framework is explicitly designed to be compatible with innovation incentives. Given the distinctive winner-takes-all nature of digital markets, significant innovation frequently emerges from established incumbents. The ex-post proportionality-based fairness assessment disciplines exploitative or exclusionary behaviours only after dominance is firmly established, thereby safeguarding the crucial incentive to innovate during earlier stages of market entry and competition. In contrast, overly rigid and broad regulatory obligations risk

stifling innovation from firms, many of which are international or non-European, potentially depriving European consumers of beneficial technological advancements.

Thus, by integrating the proposed fairness catalogue within Article 102 TFEU enforcement, the functional fairness framework adeptly balances critical public policy interests, including privacy protection, consumer autonomy, and media pluralism, without inadvertently undermining technological progress and innovation. When gatekeeper status exists in the absence of market dominance, a revised DMA with appropriately adjusted thresholds and streamlined regulatory requirements should remain the primary enforcement tool. In scenarios where firms surpass dominance thresholds, Article 102 TFEU provides an essential, proportionate check mechanism. Moreover, this dual structure, clearly delineating responsibilities between DMA and Article 102 TFEU, avoids potential regulatory blind spots and eliminates redundancy. A system relying exclusively on ex ante regulation risks regulatory rigidity and potential market distortions, while a system depending solely on ex post competition enforcement may inadequately address rapidly evolving digital market dynamics. Hence, a dual track approach, combining the DMA for non-dominant gatekeepers with rigorous Article 102 TFEU enforcement for dominant firms, constitutes the most practical, legally coherent, and innovation-sensitive solution available. Further deterrence and effective enforcement can be reinforced through calibrated financial penalties. Adjusting such fines provides a straightforward, less disruptive alternative to major legislative revisions of dominance thresholds. In conclusion, adopting a dual track regulatory and competition enforcement framework enables effective responses to emerging digital market challenges, preserves legal certainty, protects vital public interests, and maintains the delicate balance necessary for fostering continuous innovation and technological development.

The fairness behaviour catalogue proposed in this chapter is not intended to be exhaustive. Its purpose is not to establish a closed list of prohibited practices, but to provide a structured and transparent reference point that maps recurrent fairness-related conduct patterns observed in contemporary enforcement practice. Given the dynamic nature of digital markets and the continuous evolution of platform strategies, any attempt at exhaustiveness would risk rapid obsolescence. Accordingly, the catalogue is conceived as an open and adaptive instrument, capable of incremental expansion in response to emerging market behaviours.

Beyond temporal adaptability, the catalogue is also designed to be functionally transferable. As a fairness-based analytical tool structured along proportionality and institutional safeguards, it is capable of guiding the assessment of conduct that falls outside the immediate scope of the DMA but nonetheless raises comparable fairness and contestability concerns under competition law. Conceived as a soft law–oriented framework, the catalogue can therefore be revised, expanded, and contextually adapted through future case law, enforcement practice, and regulatory guidance, in a manner consistent with the evolutionary logic of EU competition law and the periodic review mechanisms embedded in the DMA.

6.4.3 DMA Alignment and the Single Gateway Rule

The functional fairness framework articulated in the research incorporates two initial and foundational elements. Firstly, the proportionality-based fairness test provides a structured, analytical framework for assessing potential fairness-related infringements. Secondly, a detailed behaviour catalogue explicitly identifies and categorises specific market practices that threaten fairness and market integrity. Together, these two components expand and enhance the enforcement capacity of Article 102 TFEU, ensuring it can adeptly address contemporary fairness-related issues across diverse sectors, particularly within the rapidly evolving digital economy. They achieve this by offering analytical pathways, thereby reducing much of the friction and potential conflicts arising from the simultaneous operation of regulatory frameworks like the DMA.

However, despite these advancements, the digital economy's exceptional dynamism presents distinct and ongoing challenges for conventional antitrust approaches. Rapid market evolution, swift innovation cycles, and the speed at which competitive harm can materialise all underscore the necessity for complementary regulatory measures. Furthermore, within digital markets, a critical enforcement gap exists concerning entities identified as gatekeepers but not meeting traditional dominance thresholds under Article 102 TFEU. These undertakings can wield substantial market influence, enabling them to inflict significant harm on market fairness, consumer welfare, and competitive integrity, which may nonetheless escape effective scrutiny under current dominance-based competition frameworks. In recognition of these unique and pressing challenges, the third pillar of the framework, DMA alignment and the single gateway rule, is proposed. This third component is designed not merely to coexist alongside traditional

competition law enforcement but to complement it directly. The principal objective is to ensure that regulatory interventions under the DMA do not redundantly overlap or conflict with antitrust enforcement but rather provide an integrated and seamless extension of it. This approach aims to create a regulatory environment where the DMA genuinely augments Article 102's enforcement capabilities, offering proportionate, coherent, and targeted interventions. By aligning regulatory actions through a single gateway rule, the framework ensures that fairness and contestability are consistently safeguarded across the spectrum of market power scenarios, from sub-dominant gatekeepers to thoroughly dominant market players.

6.4.3.1 From Parallel Systems to a Single Gateway Architecture

In addressing the complexities arising from parallel enforcement under both competition law and the DMA, the proposed solution is the introduction of a single gateway architecture. This model systematically delineates the operational boundaries between regulatory instruments to ensure coherent and complementary enforcement, rather than overlapping and potentially conflicting interventions. In practice, this necessitates a precise redefinition of gatekeeper status under the DMA, ensuring it exclusively captures undertakings that do not meet the structural dominance threshold required by Article 102 TFEU. This clarity of definition is crucial, as it explicitly prevents the DMA from encroaching upon traditional antitrust territory. Notable examples of undertakings that illustrate the precise scope of this redefined gatekeeper concept include Booking.com, with its influence in hotel meta search markets; Amazon's FBA logistics services; Valve's Steam platform in digital gaming; and Strava's social fitness ecosystem. Each of these firms exerts significant market influence through the strategic control of key digital ecosystems and user engagement platforms, yet crucially falls short of the traditional dominance benchmarks stipulated by competition law. Such undertakings represent precisely the intended beneficiary of a regulatory regime distinct from Article 102 TFEU, as they occupy a significant but intermediate position within market structures, exerting substantial influence without crossing the threshold into outright dominance.

Conversely, current DMA enforcement practices demonstrate an increasingly problematic tendency toward overlap with Article 102 TFEU. This convergence is clearly evidenced by recent cases involving dominant firms such as Apple's App Store, Alphabet (Google), Meta (Facebook), and Amazon. Specifically, the European Commission's first DMA imposed fine

against Apple, concerning its anti-steering rules, and the ongoing DMA-based investigations into Alphabet, Meta, and Amazon highlight an explicit evidentiary and jurisdictional overlap with antitrust enforcement criteria. Such cases illustrate the risk that the DMA, initially designed to complement competition law, may inadvertently begin to supplant it, thus creating potential crowding-out scenarios.

The adoption of a single gateway approach ensures more precise jurisdictional boundaries and prevents this form of regulatory encroachment. Under this regime, gatekeeper status would exclusively trigger ex ante regulatory obligations, policing contractual or hybrid unfair practices that traditional antitrust enforcement via Article 102 TFEU is currently unable to reach effectively. Conversely, dominance status unequivocally triggers Article 102 enforcement, bolstered by the proportionality-based fairness test and a detailed catalogue of fairness conduct, with DMA duties operating strictly as interpretative benchmarks rather than independent regulatory standards. This structured distinction preserves coherence within the regulatory landscape, ensuring proportionate and precisely targeted enforcement action, eliminating redundancy, and safeguarding innovation incentives within the digital economy.

6.4.3.2 Penalty Calibration and Deterrence

Before elaborating on the calibrated sanctioning structure proposed in this section, it is necessary to clarify its legal foundations. The fining architecture discussed below does not purport to replace or amend the existing statutory frameworks governing EU competition sanctions. Instead, it operates within, and builds upon, the dual legal bases currently applicable to digital market enforcement. Where conduct falls within the scope of Article 102 TFEU, the statutory fining ceiling and deterrence logic continue to derive from Regulation 1/2003, as interpreted through the Commission's Fining Guidelines. Conversely, where enforcement proceeds under the Digital Markets Act, the applicable sanctioning framework is governed by Article 30 DMA. The differentiated calibration proposed in this section should therefore be understood as an interpretative and operational refinement of these existing regimes, aimed at enhancing proportionality and deterrence in digital markets, rather than as the introduction of a novel or autonomous fining system.

Addressing fairness-related abuses within competition law and regulatory frameworks necessitates a calibrated yet robust sanction regime that accurately reflects the market power dynamics and economic realities of digital markets. For undertakings identified as gatekeepers under the DMA but not yet meeting the dominance threshold defined by Article 102 TFEU, a proportionate yet effective sanction mechanism is essential.[107] The underlying objective is to deter anti-competitive practices effectively, without disproportionately penalising smaller or emerging gatekeepers that operate below traditional dominance thresholds.

To achieve this balance, the proposed framework introduces a revised sample ceiling for DMA gatekeepers based on their global turnover. Under the new structure, gatekeepers with a global turnover of less than €10 billion face a reduced maximum fine of 4% of their worldwide revenue. This modification recognises the potential for excessive punitive impact if these smaller entities were subject to the uniform 10% ceiling, which is generally more suitable for larger firms. Consequently, this lower tier prevents the inadvertent discouragement of investment and innovation among nascent platforms or niche market participants. An intermediate tier is set for gatekeepers whose global turnover ranges from €10 billion to €50 billion, facing a ceiling of 7%. This tier acknowledges the distinct economic realities of mid-sized gatekeepers, balancing the need to impose credible deterrents against anti-competitive behaviour with the necessity of recognising their comparatively modest financial scale and market influence. For the largest and most economically influential gatekeepers, those with global turnovers exceeding €50 billion, the maximum sanction remains unchanged at 10%.[108] This tier continues to target entities with systemic market influence, such as major digital platforms, whose economic power and impact on competitive dynamics necessitate maintaining stringent regulatory oversight and credible financial penalties. In addition to this structured penalty regime, the framework maintains a repeat infringement multiplier mechanism.[109] If the same DMA obligation is breached again within an eight-year period, the resulting sanction is increased by an additional 20%. Such a multiplier serves as a meaningful deterrent, reinforcing compliance among gatekeepers while upholding proportionality.[110] Similarly, the daily non-

[107] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, recital 4 and art 23(2) (stressing the need for effective and deterrent sanctions).

[108] DMA, Art 30(2).

[109] DMA, Art 30(3).

[110] Case T-201/04 *Microsoft Corp v Commission* EU:T:2007:289, para 91.

compliance penalty remains at a maximum of 5% of daily global turnover, aligning enforcement incentives across different regulatory obligations.[111] Importantly, once Article 102 TFEU is activated, only a single daily penalty may be enforced, preventing duplication and maintaining proportionality.

Turning to dominant firms covered by Article 102 TFEU, the sanctioning approach recognises their greater market responsibility and the significantly broader impact of their conduct on consumer benefits and market competition. Dominant digital platforms often generate substantial welfare effects, positive or negative, justifying stronger deterrent measures to address and prevent abusive behaviour effectively. To achieve this heightened deterrence, the base calculation for fines retains the statutory maximum of 10% established under Regulation 1/2003, Article 23. Still, it recalibrates the initial point of reference to the affected turnover specifically. This means fines are calculated based on revenue derived explicitly from the market segments directly impacted by the infringement, rather than total global turnover. Such an approach enhances the accuracy and fairness of penalties, directly tying the sanction to the precise economic scale and gravity of the infringement. Further reinforcing this approach, a 25% increase might be levied when infringements involve hybrid abuses, conduct combining contractual and competitive unfairness. Recidivism within a ten-year period attracts a substantial 50% multiplier, reinforcing the principle of escalating penalties for repeated misconduct. Crucially, even when these multipliers apply cumulatively, the total sanction remains capped at the statutory maximum of 10%, safeguarding the proportionality of fines as confirmed by the CJEU.[112] The daily penalty for non-compliance with decisions issued under Article 102 TFEU is harmonised with the DMA rate, maintaining consistency and predictability in enforcement across different legal frameworks. Additionally, to address concerns over double jeopardy, an offset rule ensures that penalties previously paid under the DMA for identical facts are deducted from any subsequent Article 102 TFEU fines and vice versa, thereby avoiding punitive duplication as clarified by the Court.[113]

[111] DMA, Art 30(2).

[112] Case C-10/18 P *Marine Harvest ASA v European Commission* ECLI:EU:C:2019:984, Judgment of the Court (17 December 2019), para 534.

[113] Case C-857/19 *Slovak Telekom a.s. v Protimonopolný úrad Slovenskej republiky* ECLI:EU:C:2021:139, Judgment of the Court (Grand Chamber) of 25 February 2021.

Some may question the necessity of maintaining separate regulatory frameworks, such as the DMA and Article 102, and propose simplification by lowering the dominance threshold or integrating DMA provisions directly into competition law. Such proposals, however, carry procedural complexities and risks, potentially destabilising the carefully calibrated internal balance established within Article 102 TFEU jurisprudence. Furthermore, a wholesale amendment of Article 102 could inadvertently impact areas of law far beyond the scope of digital markets. This framework, therefore, advocates for maintaining clear delineations between DMA-based regulation and traditional competition law enforcement under Article 102. This dual-track system ensures proportional deterrence. For instance, a flat 10% penalty on a smaller firm with €5 billion in turnover could severely disrupt its economic viability, potentially stifling innovation and market entry. Conversely, the same penalty might be insufficient to deter a €250 billion dominant firm, underscoring the need for differentiated, tiered approaches and carefully calibrated multipliers.

Another advantage of this differentiated approach lies in its neutrality towards innovation. By enabling smaller and emerging gatekeepers to retain more capital for research and development, the system supports continued innovation and market dynamism. At the same time, entrenched incumbents face more stringent enforcement measures only once they cross into dominance and engage in abusive practices, thus preserving competitive incentives without prematurely penalising successful innovators.

Moreover, the practical advantages of this dual approach include regulatory agility and procedural simplicity. While revising the legal definition of dominance within the Treaty framework would be politically complex and procedurally burdensome, adjusting the Commission's fining guidelines and issuing targeted DMA amendments represent more straightforward, legally feasible options. This approach allows the regulatory landscape to remain responsive to technological advances and evolving market dynamics without compromising legal certainty or market stability.

To illustrate these concepts in practice, consider the cases of Apple's *App Tracking Transparency (ATT)* and Amazon's *Buy-Box* algorithm. In the Apple ATT scenario, assuming a hybrid abuse case involving €4 billion of affected iOS advertising revenue, the base fine calculation starts at 10%, resulting in €400 million. Subsequent aggravating factors, such as a 20% overlap multiplier for a DMA violation and a further 25% hybrid multiplier, elevate the

fine progressively to €600 million. Conversely, Amazon's Buy-Box case, involving a non-dominant gatekeeper with €25 billion in turnover, employs the tier-two ceiling at 7%, limiting the maximum fine to €1.75 billion. Practically, the Commission might set the fine at 4% of Amazon's affected €10 billion European marketplace revenue, resulting in a €400 million fine, accompanied by daily penalties until compliance is ensured.

Ultimately, this framework provides a calibrated sanctioning environment, ensuring proportionality, protecting innovation, and maintaining regulatory coherence, thereby fulfilling the EU law's proportionality mandate while delivering precise and consistent enforcement outcomes.

6.4.3.3 Procedural Coordination

The procedural dimension of integrating the DMA and Article 102 TFEU enforcement regimes is as crucial as their substantive alignment. The functional fairness framework, which harmonises proportionality-based fairness testing, a clear catalogue of prohibited conduct, and calibrated ex ante and ex post mechanisms, requires robust procedural coordination to prevent conflicts and duplication. Achieving such coordination involves several complementary measures that collectively create a streamlined, transparent, and predictable enforcement landscape.

Initially, the process must begin with a clear and structured case opening sequence. When potential breaches of fairness standards emerge, authorities may naturally consider simultaneous actions under both the DMA and Article 102 TFEU. To maintain procedural clarity and resource efficiency, however, authorities should conduct a preliminary market power analysis at the outset to categorically designate one instrument, either DMA regulation or antitrust enforcement, as the lead basis for action. This choice will be guided by preliminary assessments of dominance levels and gatekeeper criteria, ensuring coherent and non-duplicative investigation pathways from the outset. The designated lead instrument will then drive the inquiry, with the complementary regime providing only secondary support where necessary. To support this coordinated investigative approach, it is imperative to introduce systematic and comprehensive evidence-sharing protocols. Authorities would benefit significantly from joint procedural actions such as coordinated dawn raids and a centralised, secure digital evidence

repository. These joint procedures would enhance efficiency by avoiding the repetitive collection of identical evidence sets, thereby economising administrative resources. Equally importantly, unified evidence collection and management practices would better protect undertakings' rights of defence, as firms would face a single, consolidated evidence repository rather than fragmented and potentially conflicting evidence sets managed independently by separate authorities. This consolidated approach also facilitates greater transparency and reduces the risk of procedural rights violations, thereby strengthening overall legitimacy and judicial acceptance of enforcement actions.

Another procedural innovation is the establishment of a regular triennial concordance review. Every three years, the Commission would issue a comprehensive fairness catalogue and DMA concordance note, explicitly inviting stakeholders, including firms, consumer organisations, national authorities, and academia, to propose additions or amendments to either instrument. This systematic review process would replicate the DMA's own Article 12 mechanism concerning new gatekeeper obligations, thereby ensuring regulatory frameworks remain responsive, flexible, and continually relevant.[114] The stakeholder-driven periodic review ensures that both DMA obligations and Article 102 TFEU conduct catalogues evolve in sync with market innovations, technological advancements, and emerging competitive practices. This responsiveness is crucial for maintaining regulatory relevance and efficacy in rapidly changing markets, particularly the digital economy.[115]

Practical scenarios clearly illustrate the benefits of this structured approach. For example, the Apple ATT tracking transparency case would invoke Article 102 TFEU due to Apple's evident market dominance and resulting harms to privacy and market contestability. The proportionality-based fairness test would then effectively condemn the hybrid nature of Apple's abusive conduct, applying fine multipliers for overlap and hybrid infringements.[116] In contrast, Amazon's Buy-Box practices, although influential, might not meet the traditional dominance criteria, thus placing them squarely within DMA regulation. Amazon would face obligations

[114] DMA, Art 12.

[115] Damien Geradin and Dimitrios Katsifis, 'Strengthening Effective Antitrust Enforcement in Digital Platform Markets' (2021) <https://ssrn.com/abstract=3945004> accessed 9 September 2025.

[116] Autorité de la concurrence, Decision 22-D-12 of 16 June 2022 concerning practices in the online advertising sector *(Meta/Facebook – Apple ATT)*.

such as enhanced ranking transparency, with a carefully tiered fine cap calibrated to its market size and economic impact. Furthermore, platforms like Booking.com, which display significant influence but currently fall below dominance thresholds, would clearly remain within the DMA's regulatory orbit. In this scenario, the DMA's obligations, such as prohibitions on self-preferencing, serve as proactive measures, with fines offset against potential future Article 102 TFEU sanctions if dominance is later established. This clarity and foresight streamline enforcement processes and clarify expectations for regulated entities, significantly reducing legal uncertainty and compliance costs.

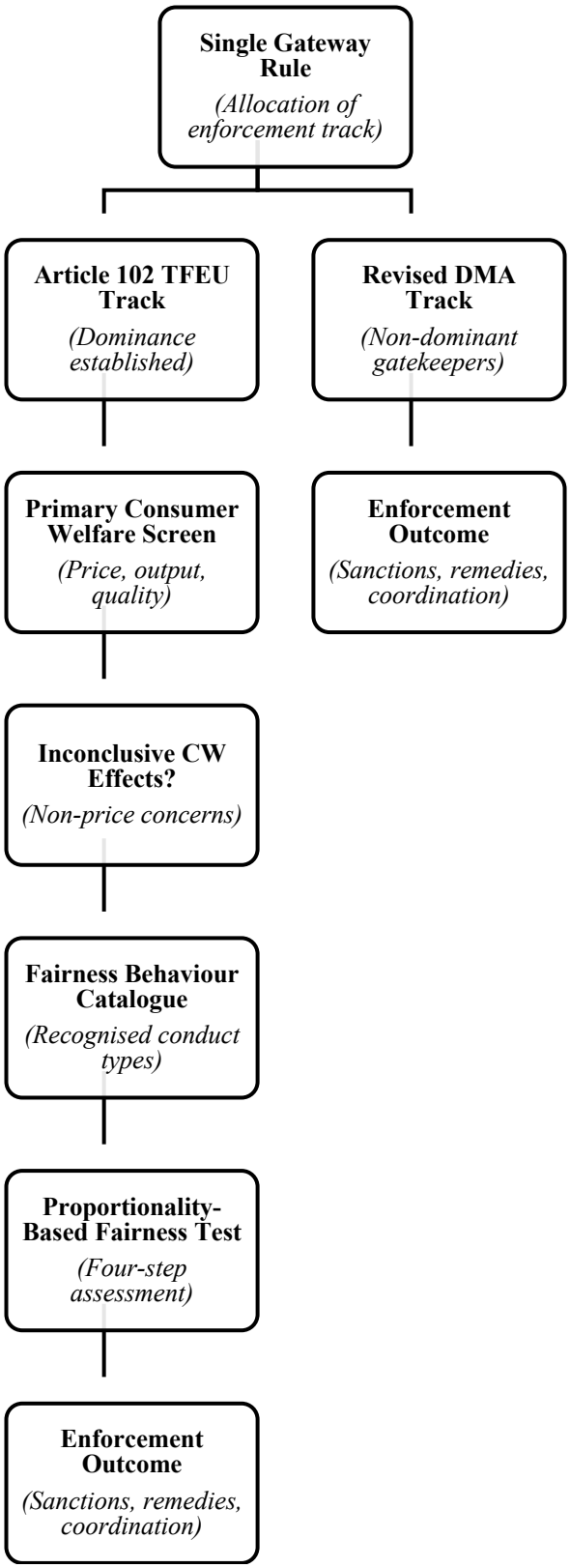
Overall, the third pillar of the functional fairness framework ensures robust procedural coordination. By redefining gatekeeper status to avoid overlapping with established dominance thresholds explicitly, the DMA's scope remains precisely targeted at sub-dominant yet influential market actors. Simultaneously, the single gateway rule effectively prevents parallel enforcement efforts, double penalties, and conflicting remedies. The tiered fine structure further contributes to procedural proportionality, calibrating regulatory burdens according to market power and economic significance, thus aligning enforcement intensity with innovation incentives and fundamental rights considerations embedded in the EU Charter. With these procedural mechanisms in place, the framework emerges fully equipped to manage contemporary challenges in digital markets and adaptable enough to extend effectively to other emerging sectors in the future.

Collectively, these comprehensive structural elements yield three significant, cumulative benefits. First, the framework effectively repositions fairness within EU competition law, transitioning it from a nebulous, standalone policy objective to a rigorously defined functional interface. This transition resolves longstanding conceptual ambiguities surrounding the aims and instruments of competition enforcement, providing much-needed doctrinal clarity. Second, the framework significantly enhances ex ante compliance certainty, offering articulated guidelines without sacrificing the essential flexibility and nuance that judicial review provides through case-specific proportionality assessments. Third, the framework systematically addresses critical enforcement gaps and overlaps, eliminating the dual risks of regulatory lacunae concerning non-dominant gatekeepers and unnecessary duplication or conflict in cases involving dominant entities subject to both DMA and antitrust scrutiny. The following section now transitions from theoretical and institutional development to examining practical application and sector-specific adaptability. It illustrates how the functional fairness framework

integrates with traditional price-oriented competition analyses, first demonstrating its effectiveness in digital markets and subsequently illustrating its potential applicability across other economically significant sectors, such as energy, finance, and healthcare. With the foundational elements comprehensively established, demonstrating both necessity and conceptual robustness, the following section focuses explicitly on operational deployment, thereby enriching the practical utility and cross-sector relevance of this innovative enforcement paradigm.

To consolidate the analytical structure developed throughout this chapter, Figure 8 below provides a schematic overview of the proposed enforcement sequence. The flow chart visually synthesises the interaction between the single gateway rule, the consumer welfare screen, and the proportionality-based fairness test, illustrating how fairness operates as a structured analytical filter within Article 102 TFEU enforcement, while remaining coordinated with the revised DMA track.

Figure 8: Operational Flow of the Single Gateway Rule and Fairness-Based Enforcement



6.5 Cross-Sector Transferability

The prominence and rapid expansion of digital platforms in recent years have vividly illustrated a more profound structural transformation in modern economies. This transformation involves the emergence and increasing dominance of data-driven gatekeeping mechanisms, initially most visible within sectors traditionally associated with technology, such as search engines, e-commerce, and social media platforms. However, this phenomenon is not confined to the technology sector alone. Instead, data-driven gatekeeping dynamics are increasingly permeating areas historically insulated from such two-sided market interactions, including essential utilities, financial services, healthcare, and energy sectors. This broader diffusion of gatekeeping power into previously unaffected sectors presents substantial implications for EU competition law enforcement. If fairness analyses, as conceptualised and developed in earlier chapters, remain narrowly confined to high-profile "Big Tech" cases, EU competition law risks repeating past mistakes. Historically, regulators allowed market power in digital sectors, such as search and social media, to become deeply entrenched before initiating rigorous and meaningful scrutiny. Such delayed responses resulted in protracted market distortion, weakened competition, and diminished consumer welfare.[117]

To prevent a recurrence of these regulatory gaps, the behaviour catalogue introduced in previous discussions is deliberately designed to serve as an adaptable analytical framework. Rather than being exclusively tailored for traditional digital markets, this catalogue aims to function as a versatile inter sector key capable of systematically identifying and addressing gatekeeper driven fairness concerns across diverse economic domains.[118] While it is acknowledged that the migration of this analytical tool from its digital origins to broader sectors will require certain adjustments, primarily concerning evidentiary standards, market specific metrics, and the precise thresholds used to define and identify unfair behaviour, the fundamental conceptual underpinnings remain robust and broadly applicable. Thus, extending fairness analysis through the behaviour catalogue into these increasingly digitised yet traditionally

[117] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (Report for the European Commission, 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 14 December 2023, 17-25.

[118] Nicolas Petit and David J Teece, *Innovating Big Tech Firms and Competition Policy: Favoring Dynamic over Static Competition* (DCI Working Paper No 2, 20 July 2021).

distinct sectors ensures that EU competition law maintains its responsiveness, coherence, and effectiveness across evolving market structures.

To that end, the subsequent analysis aims to demonstrate concretely how the functional fairness framework, initially derived from digital platform case law, can be effectively extended to various economic sectors beyond the core tech industries. With this aim, three illustrative yet representative sectors, energy, finance, and healthcare, are selected. Each sector presents its own unique features and complexities, highlighting the framework's versatility and adaptability in addressing fairness-related market distortions beyond its original digital context.

The selection of energy, financial services, and healthcare as illustrative sectors is neither exhaustive nor intended to suggest that fairness-related concerns are confined to these domains. Rather, these sectors are deliberately chosen because they represent structurally distinct yet analytically comparable environments in which gatekeeping dynamics, data-driven intermediation, and control over essential interfaces increasingly mirror those observed in digital platform markets. Energy markets exemplify infrastructural gatekeeping through data access and network control; financial services provide a paradigmatic case of mandated interoperability combined with persistent informational asymmetries; and healthcare illustrates high-stakes decision-making environments where self-preferencing and referral bias directly affect autonomy and welfare. Together, these sectors allow the proposed proportionality-based fairness framework to be tested across different regulatory traditions, market architectures, and public interest sensitivities, thereby demonstrating its adaptability beyond its digital origins without diluting its analytical coherence. The purpose is thus not sectoral completeness, but analytical representativeness.

Firstly, the issue of energy data access is considered. With the accelerating transition towards renewable energy and the proliferation of smart grids, control over consumer data and network interfaces has become strategically significant. Similarly, attention shifts to the financial services sector through the lens of open-banking APIs. The EU's PSD2 has mandated banks to provide open access application programming interfaces to third-party providers.[119] Yet, similar to digital platforms, banks that control these critical interfaces may retain the ability to

[119] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] OJ L337/35.

manipulate access conditions unfairly, discriminating against innovative rivals or restricting consumer choice in subtle but harmful ways. Finally, the analysis considers the healthcare sector, particularly the area of digital health triage and self-referral bias. Digital platforms increasingly act as gatekeepers in healthcare, managing patient referrals, triage decisions, and appointment scheduling. A prominent fairness-related risk arises when platform providers unfairly prioritise or self-refer patients to affiliated clinics or diagnostic services, undermining patient autonomy, market contestability, and ultimately, patient outcomes.

Additionally, contemporary concerns around AI and sustainability will also be considered as AI technologies become increasingly embedded within market processes, new forms of algorithmic discrimination, exclusionary bias, and opaque decision-making emerge, posing profound fairness challenges that demand urgent attention. Similarly, sustainability initiatives, notably in markets prioritising ecological goals, can inadvertently create or exacerbate market distortions if dominant firms leverage their influence to promote sustainability measures selectively or anti-competitively. The analysis will explore how the existing framework, particularly the proportionality-based fairness test and the fairness behaviour catalogue, can address these emerging fairness issues, providing a principled yet flexible regulatory approach to navigate the complex intersections between market dominance, technological innovation, and broader societal objectives. By systematically engaging with these three distinct sectors and addressing the contemporary policy concerns posed by AI and sustainability, the subsequent analysis aims to demonstrate the adaptability and practical value of the functional fairness framework. It highlights the framework's potential as a coherent and consistent analytical instrument, capable of proactively addressing fairness concerns across a diverse array of economic environments, thereby safeguarding competition and broader public interests in an increasingly digitised and socially responsible economic landscape.

6.5.1 Energy Data Access and Smart-Meter Gatekeepers

Energy markets are undergoing a fundamental transformation driven by widespread digitisation, decentralisation of power generation, and increasing integration of smart grid technologies. At the forefront of this transformation are grid-edge platforms, notably smart meter operators, many of which are vertically integrated entities. These operators acquire exclusive control over highly detailed consumer consumption data due to contractual

concession arrangements.[120] In practice, this privileged access often enables vertically integrated entities to collect fine-grained, real-time consumption and behavioural insights. However, rather than sharing equally detailed and actionable datasets with rival demand response aggregators or third-party providers, these grid edge operators typically restrict data sharing to coarse-grained or aggregated forms.[121] Simultaneously, these operators utilise the fine-grained data internally, offering enhanced optimisation services solely to their downstream affiliates. Such practices create significant competitive distortions and represent an example of hybrid fairness abuses as cross-service data lock-in with selective disclosure.

The market power dimension in these cases frequently manifests at a local rather than national scale. This localisation arises from municipal or regional concession contracts that provide smart meter operators with exclusive access to potentially millions of households. Such exclusivity naturally confers considerable market power, particularly given the substantial barriers to entry posed by infrastructure costs and regulatory constraints. Moreover, these localised monopolies or dominant positions are reinforced by pronounced network effects stemming from large-scale consumer data accumulation. For example, predictive maintenance algorithms, energy optimisation models, and grid balancing techniques become increasingly accurate and cost-efficient as the underlying datasets expand. This dynamic inherently favours incumbents who can continuously improve and refine their analytical capabilities through data lock-in, further marginalising competitors and new entrants unable to access comparable datasets.[122]

Applying the proportionality-based fairness test in this context reveals clear infringements of protected interests, particularly relating to energy autonomy and consumer privacy. Consumers' rights to control their own energy data and maintain confidentiality of sensitive personal information are fundamentally undermined when vertically integrated operators selectively disclose data. Regarding legitimate aims, these grid-edge operators frequently justify restrictive data practices by invoking cybersecurity concerns, arguing that open data-sharing could

[120] Petit and Teece (n 118).

[121] Giulio Giaconi, Deniz Gündüz and H V Poor, 'Smart Meter Data Privacy' (arXiv preprint arXiv:2009.00474, 2 September 2020).

[122] ibid.

potentially expose critical infrastructure to malicious cyberattacks.[123] While cybersecurity is undeniably an essential public policy objective, proportionality analysis typically demonstrates that operators' broad data refusal policies are disproportionate. More specifically, cybersecurity objectives can usually be equally well achieved through less restrictive means, such as securely encrypted APIs, standardised secure data exchange protocols, and data privacy-preserving mechanisms like differential privacy masking.[124]

Addressing this fairness-related potential abuse requires remedies precisely calibrated to restore fair competition without unduly compromising legitimate security and privacy objectives. According to the framework's remedy logic, this scenario would typically trigger several measures, encompassing an interoperability mandate accompanied by obligations to provide access to real-time consumption data through FRAND conditions. This regulatory intervention ensures that third-party providers can effectively compete on equal footing, restoring market contestability and consumer autonomy. Simultaneously, privacy and cybersecurity safeguards are maintained through advanced encryption techniques, privacy-preserving data practices, and robust regulatory oversight.

In practical enforcement terms, many grid-edge operators currently exhibit a sub-dominant market presence at the national level, due to their predominantly municipal or regional footprint. Consequently, initial regulation would fall under the revised DMA, which imposes baseline data sharing and interoperability obligations. However, as an operator's local or regional market share of smart meter installations surpasses a clearly defined dominance threshold, for instance, around 60 per cent, the jurisdictional focus would shift from DMA to ex post enforcement under Article 102 TFEU. This jurisdictional transfer enables authorities to leverage the more robust deterrence mechanisms and fine structures provided by competition law, thereby ensuring proportional and effective remedial actions tailored to the specificities of energy sector fairness abuses. Such a calibrated, multilayered approach reinforces regulatory coherence, preserves innovation incentives, and safeguards critical consumer and public interests in rapidly evolving digital energy ecosystems.

[123] Michèle Finck and Frank Pallas, 'They Who Must Not Be Identified – Distinguishing Personal from Non-Personal Data under the GDPR' (Max Planck Institute for Innovation and Competition Research Paper No 19-14, 2019).

[124] ibid.

6.5.2 Open Banking APIs and Access Discrimination in FinTech

The rapidly expanding FinTech ecosystem has dramatically reshaped consumer finance, significantly driven by regulatory frameworks like the PSD2.[125] This legislation compels traditional banking institutions to grant third-party payment initiation service providers (PISPs) access to consumers' current account data via standardised application programming interfaces. Such open-banking frameworks foster competition, facilitate innovation, and enhance consumer choice in the financial services market.[126] However, incumbent universal banks, often with entrenched market positions and extensive consumer bases, frequently maintain control over critical gateway infrastructure, namely, these mandated open-banking APIs. In certain instances, these incumbents leverage their infrastructural advantage by selectively throttling the response speed of data provided to third-party FinTech operators, unless these competitors agree to pay additional fees for access to a premium lane.[127] Conversely, the banks' own in-house applications face no such latency constraints, thus benefiting from significantly enhanced response speeds and overall user experiences. This deliberate differentiation of API response speed based on additional premium payments clearly aligns with the identified unfairness behaviour catalogue, categorised explicitly as discriminatory API access.[128]

Evaluating the market power dimension, traditional definitions of dominance may not always be met by individual banks, especially given the competitive fragmentation of retail banking markets across the EU. Nevertheless, banks can still wield substantial gatekeeper power over critical infrastructure, particularly where they have been formally designated as gatekeeper PISPs under PSD2 frameworks. In these cases, the incumbent bank's API infrastructure may effectively represent the only viable access point to current-account data for millions of consumers. Such exclusive gateway control creates substantial dependency relationships for third-party providers, significantly constraining market contestability and limiting consumer

[125] Directive 2015/2366 (n 119).

[126] Finck and Pallas (n 123).

[127] Thomas F Dapp, *PSD2, Open Banking and the Value of Personal Data* (Deutsche Bank Research, 29 June 2021) <https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000471102/PSD_2%2C_open_banking_and_the_value_of_personal_data.pdf?&realload=WaNHgWPuAMPgi8YwSQxKBDtwTt/RxmZwNXSESQvpyN4PfRiixKG9TnXZHr6N66/V> accessed 23 June 2025.

[128] Finck and Pallas (n 123).

choice. Hence, even in the absence of classical dominance indicators such as market share, these banks hold substantial strategic power due to their unique gatekeeper position over essential data-access interfaces.[129]

Applying the proportionality-based fairness test to this conduct may reveal clear infringements upon critical protected interests, specifically, the contestability of financial services markets and the protection of consumer autonomy. Consumer autonomy, particularly regarding choice and availability of competing financial services, is fundamentally compromised when banks impose discriminatory API access conditions. Regarding the legitimate aim asserted by these incumbent institutions, banks typically justify such API access discrimination on the grounds of recovering substantial infrastructure-related costs associated with the provisioning and maintenance of open-banking interfaces.[130] While cost recovery and investment sustainability represent genuine and legitimate business considerations, proportionality analysis might show that premium fees levied significantly exceed reasonable cost thresholds. Moreover, less restrictive measures, such as fair, transparent, tiered quota structures calibrated strictly to marginal-cost benchmarks, clearly exist and could achieve the same legitimate objective of infrastructure cost recovery without discriminatory throttling.

Given this scenario, an appropriate remedial measure would involve the imposition of behavioural obligations such as FRAND latency parity, coupled with a transparent, strictly cost-oriented fee schedule. To ensure effective compliance, rigorous ongoing oversight could be implemented via synthetic API monitoring and benchmarking by dedicated bodies. Such proactive supervision ensures incumbents do not circumvent regulatory requirements through opaque pricing or latency discrimination tactics, effectively preserving competitive neutrality and consumer welfare. Regarding institutional frameworks, many universal banks, despite their substantial regional market presence, remain below traditional thresholds of dominance within EU-wide retail banking markets. Thus, enforcement in such cases would initially fall under the revised DMA regime, serving as the active regulatory instrument addressing sub-dominant yet significant gatekeeper conduct. Article 102 TFEU enforcement would remain dormant until an individual bank either surpasses clearly established national market share thresholds, signifying

[129] Douglas W Arner, Ross P Buckley and Dirk A Zetzsche, *Open Banking, Open Data and Open Finance: Lessons from the European Union* (forthcoming in Linda Jeng (ed), *Open Banking*, Oxford University Press 2021).
[130] ibid.

unequivocal dominance, or leverages its data gatekeeper position into adjacent market monopolies, such as credit scoring or lending, where Article 102's stronger ex post intervention mechanisms become critical. By structuring regulatory responses and compliance monitoring in this nuanced manner, the functional fairness framework effectively balances innovation incentives, consumer protection, and market contestability, ensuring proportional and robust enforcement that can address fairness-related conduct across both dominant and subdominant financial market operators.

6.5.3 Digital-Health Triage and Self-Referral Bias

The rapid proliferation of digital healthcare applications, particularly AI-powered symptom checker platforms, underscores an urgent need for a systematic framework capable of addressing fairness-related abuses within this increasingly crucial sector. These AI applications play a pivotal role in digital health triage,[131] guiding patients to the most appropriate healthcare services by assessing clinical urgency based on reported symptoms.[132] However, concerns have emerged regarding potential biases arising from vertical integration,[133] particularly when these triage systems are owned and operated by healthcare groups that concurrently manage clinical facilities.[134] Consider, for example, a symptom checker application that is developed and controlled by a hospital group. This AI-driven triage system consistently ranks the hospital group's own affiliated clinics as destinations of high urgency, disproportionately directing patient flows towards internal services. Critically, this preferential ranking occurs despite the presence of independent medical providers with equivalent clinical qualifications, comparable diagnostic capabilities, and similarly strong clinical risk scores. This conduct illustrates a clear instance of unfairness, as it aligns simultaneously with two distinct lines of conduct defined within the fairness behaviour catalogue: self-preferencing in ranking and unilateral contract changes.

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[131] European Commission, Study on eHealth, Interoperability and Artificial Intelligence in Healthcare (2020) <https://op.europa.eu/en/publication-detail/-/publication/fb8d8ec2-55a0-11ed-92ed-01aa75ed71a1/language-en> accessed 9 September 2025.

[132] Arner, Buckley and Zetzsche (n 129).

[133] Brent Mittelstadt, 'Principles Alone Cannot Guarantee Ethical AI' (2019) 1 Nature Machine Intelligence 501.

[134] W Nicholson Price II and I G Cohen, 'Privacy in the Age of Medical Big Data' (2019) 25 Nature Medicine 37.

The issue of market power in digital health triage is notably complex due to the relatively nascent stage of market definitions and the multi-dimensional nature of patient referral funnels. Nonetheless, a first-mover advantage, coupled with substantial data aggregation and established brand trust, can effectively confer substantial gatekeeper status upon incumbent digital health platforms.[135] Such platforms often possess significant influence over patient decisions and referrals, especially when they command referral shares exceeding 50 per cent for critical medical specialities. Under these conditions, dominance may be established based on the gatekeeper's ability to steer patient flow and significantly impact the healthcare market structure.

Applying the proportionality-based fairness test to this scenario reveals multiple protected interests at stake, notably consumer autonomy, pluralism in healthcare choices, and, most critically, patient safety. The EUCFR explicitly recognises the fundamental significance of human dignity[136] and health protection,[137] underscoring the elevated duty to prevent manipulative practices in healthcare services. The dominant undertaking, the vertically integrated hospital group, may seek to justify its conduct on the grounds of clinical responsibility, suggesting that internal referrals ensure greater oversight and patient safety. However, an analysis to be conducted may also show that independent healthcare providers have the same level of clinical competence, liability insurance and compliance with regulatory health standards. Consequently, the self-preferencing conduct clearly fails the necessity prong of the test, as less restrictive yet equally effective means of safeguarding patient safety exist through transparent and objective triage criteria.

In terms of remedies, a proportional and effective remedy would entail an independent algorithmic audit conducted by a dedicated medical AI regulatory authority.[138] Furthermore, the incumbent platform would be required to implement mandatory disclosure protocols, transparently detailing the criteria and variables that influence ranking decisions within the

[135] OECD, Competition Trends (2021) <https://www.oecd.org/en/publications/oecd-competition-trends-2021_308565fd-en.html> accessed 5 September 2025.

[136] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Art 1.

[137] ibid, Art 35.

[138] Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) Columbia Business Law Review 494.

triage algorithm.[139] Such transparency and independent oversight collectively serve to neutralise biases, protect patient autonomy, and ensure that clinical decisions remain objectively rooted in medical necessity rather than commercial interests. If persistent recidivism is observed, whereby the hospital group continues to engage in discriminatory self-preferencing despite regulatory interventions, structural remedies such as functional separation between the triage AI platform and the clinical ownership would become justified.

Furthermore, this framework-centred enforcement strategy may demonstrate significant synergy with existing sector-specific regulatory frameworks. Notably, the EU Medical Device Regulation already classifies AI-driven triage software as medical devices, imposing stringent pre-market evaluation and quality assurance obligations.[140] Integrating the functional fairness framework enforcement mechanism within this regulatory architecture would reinforce these pre-market checks, effectively ensuring that dominant digital health providers undergo comprehensive algorithmic audits before entering the market. Consequently, this integrated approach ensures alignment between competition law and medical device regulation, promoting robust, consistent, and patient-centred oversight across digital health markets. Through such nuanced application, the functional fairness framework provides a clear and systematic regulatory response, effectively balancing the promotion of innovation in digital health technologies with rigorous safeguarding of patient safety, autonomy, and equitable competition in healthcare service provision.

6.5.4 Further Suggestions for Contemporary Risk Domains

The adaptable and soft law-based structure introduced for sectors such as energy, finance, and healthcare has potential for further extension to rapidly emerging cross-sectoral challenges, including AI-driven bias and sustainability-related deception. Both issues are gaining

[139] European Parliamentary Research Service (EPRS), Artificial Intelligence in Healthcare: Applications, Risks, and Ethical and Societal Impacts (Panel for the Future of Science and Technology (STOA), PE 729.512, June 2022) <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/729512/EPRS_STU(2022)729512_EN.pdf accessed> 3 September 2025.

[140] Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices [2017] OJ L117/1, Art 51(5)(c).

prominence as markets become increasingly digitised and societal expectations shift decisively towards greater transparency, equity, and corporate responsibility.[141]

Integrating AI fairness and sustainability deception directly into the fairness behaviour catalogue can demonstrate the framework's versatility and ability to effectively absorb risks that are simultaneously sector agnostic and public policy critical. This integration can highlight three key strategic advantages of the proposed approach. Firstly, the framework's horizontal scalability is evident because AI-driven bias and sustainability deception are defined by functional rather than industry-specific attributes, namely, algorithmic decision weighting and environmental misrepresentation, the same proportionality-based fairness test logic can traverse a variety of sectors, from e-commerce and mobility to cloud computing, requiring only minor adjustments to the evidentiary metrics. Secondly, the integration into the framework can ensure substantial regulatory synergies. The emerging EU regulatory landscape, including the AI Act's risk-classification regime[142] and the forthcoming Green Claims Directive, already mandates specific disclosures.[143] These regulatory disclosures can seamlessly fulfil the evidentiary requirements outlined under the second step of the test, thus effectively embedding already collected datasets into the DG COMP's existing evidence pipelines. This approach reduces duplicative reporting burdens for undertakings. It strengthens the operational effectiveness of the single gateway rule, aligning competition law closely with other EU regulatory instruments in a coherent enforcement architecture. Finally, by explicitly treating AI-driven bias and sustainability deception as priority entries in the catalogue, the framework can establish a future-proof governance model. The triennial review cycle proposed in the catalogue thus gains concrete and actionable test cases that stakeholders can reference when evaluating potential emergent harms, such as quantum secure encryption lock-ins, synthetic data exclusivity, or

[141] Solon Barocas, Moritz Hardt and Arvind Narayanan, *Fairness and Machine Learning: Limitations and Opportunities* (MIT Press 2023).

[142] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 [2024] OJ L1689/1.

[143] European Commission, Proposal for a Directive of the European Parliament and of the Council on the Substantiation and Communication of Explicit Environmental Claims (Green Claims Directive) COM(2023) 166 final.

circular economy foreclosure.[144] Through such iterative updating mechanisms, the framework can dynamically benchmark and lower the threshold for integrating new forms of competitive harm, ensuring robust responsiveness and adaptability as market and technological developments evolve. With these strategic considerations in place, the detailed analysis of specific fairness risks, notably AI-driven bias and sustainability deception, becomes particularly timely and practically relevant. This section proceeds to examine these challenges in detail, beginning first with an analysis of the fairness implications associated with algorithmic bias and subsequently addressing concerns surrounding deceptive environmental sustainability claims.

6.5.4.1 AI-Driven Bias

The rapid expansion of artificial intelligence-driven systems has fundamentally altered decision-making across various markets, including consumer credit and employment decisions, as well as product visibility and supplier selection. Such AI systems typically involve sophisticated machine learning algorithms that automate and scale the allocation of valuable opportunities, often influencing millions of decisions regularly.[145] Given their opaque and algorithmic nature, these decision-making processes raise significant concerns, particularly when their outcomes exhibit biases or systematically disadvantage specific groups, such as women, minorities, or rival suppliers.[146] A critical and increasingly prominent concern arises when a dominant or gatekeeper platform systematically deploys algorithms that consistently downgrade individuals or firms from protected or competitive groups despite their having objectively equivalent qualifications, scores, or quality metrics.[147] Such behaviour would clearly fall within what this research proposes as an addition to the existing fairness conduct catalogue, namely, algorithmic disparate-impact self-preferencing.[148] By explicitly classifying this conduct, the catalogue would directly address the specific fairness concerns inherent in

[144] Barocas, Hardt and Narayanan (n 141).

[145] European Commission, White Paper on Artificial Intelligence: A European Approach to Excellence and Trust COM (2020) 65 final, 2–3.

[146] Barocas, Hardt and Narayanan (n 141).

[147] Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI' (2021) 41 Computer Law & Security Review 105567.

[148] Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2021) 43 World Competition 417.

discriminatory algorithmic decision-making, providing clarity for enforcement authorities, undertakings, and affected parties alike. This catalogue entry seeks explicitly to safeguard the protected interests of equality and individual autonomy. The primary objective of these provisions is to protect against systematic and unjustifiable differential treatment that can distort fair competition, diminish individual autonomy, and erode trust in digital markets and algorithmic governance more generally.

To ensure the proportionality and clarity of enforcement, the dominance threshold triggering scrutiny in this catalogue entry should be clearly defined. For example, dominance would be presumed where the algorithmic model affects more than one million individual decisions per month or where it determines the de facto reference price or decision criterion for at least one quarter of the relevant market.[149] This clear quantitative threshold ensures that only platforms with significant market impact, and therefore the potential to cause substantial and widespread harm, are subject to rigorous fairness screening, while smaller businesses are exempt from overly stringent obligations. Regarding evidence, a structured analytical approach can be adopted to determine whether algorithmic bias actually occurs. Robust counterfactual fairness checks meet the burden of proof. These checks involve comparing the outcomes of disadvantaged groups with those of individuals or companies in similar situations and setting a threshold for inequality. This isolates and defines the specific impact of protected characteristics, such as gender, ethnicity, or competitive affiliation, on decision outcomes. This analytical framework enables a rigorous and evidence-based assessment of algorithmic fairness.[150]

Once algorithmic bias is demonstrated through this approach, the burden of proof shifts to the undertaking under scrutiny. The firm must provide evidence of a proportionate and legitimate justification for the observed disparities. An acceptable justification might include compliance with legal obligations or objective functional necessities that unavoidably result in differential outcomes.[151] However, absent a clear, proportionate, and objectively justifiable reason for the

[149] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (2017) <https://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm> accessed 9 September 2025

[150] Barocas, Hardt and Narayanan (n 141).

[151] Moritz Hardt, Eric Price and Nathan Srebro, 'Equality of Opportunity in Supervised Learning' in Advances in Neural Information Processing Systems 29 (NeurIPS 2016) 3315.

disparity, the conduct will fail the proportionality balance step in the proportionality-based fairness test. If an undertaking cannot successfully demonstrate proportionate justification for its biased algorithmic practices, the framework may provide for structured remedies depending on the severity and repetition of the violation. Specifically, the framework would mandate remedies. This can include an independent audit of the model's algorithmic decision-making procedures, the implementation of a public fairness API to ensure ongoing transparency, and, in cases of repeated infringements, functional separation between the machine-learning lab and downstream business units.[152] These remedies collectively aim to correct market distortions, restore fairness and transparency, and prevent future recurrences through heightened scrutiny and transparency obligations, thereby safeguarding competition and consumer protection in algorithmically governed markets.[153]

6.5.4.2 Sustainability Deception

With increasing global awareness of sustainability and climate change, consumer preferences have notably shifted towards environmentally friendly products and services. As a result, platforms are increasingly incentivised to market their offerings through claims of environmental sustainability. While legitimate claims offer significant benefits, both environmental and reputational, there is a growing concern over deceptive sustainability practices, often referred to as greenwashing.[154] In digital markets, this phenomenon frequently manifests as green self-preferencing, wherein dominant or gatekeeper platforms systematically rank their own eco-labelled products or services above objectively greener alternatives offered by competitors. Additionally, platforms may use misleading or exaggerated carbon footprint claims to capture consumer demand disproportionately, distorting competition and misguiding consumer choice.[155] To directly address this emerging form of unfair competition, the catalogue of behaviours might be expanded with a new special line called preferential eco-claims with exclusionary ranking. This addition explicitly categorises, and targets conduct whereby platforms leverage their algorithmic ranking systems to preferentially promote their own

[152] Wachter and Mittelstadt (n 138).

[153] European Parliament, *The Impact of Algorithms for Online Content Filtering or Moderation* (2020) PE 657.101.

[154] Barocas, Hardt and Narayanan (n 141).

[155] Magali A Delmas and Vanessa C Burbano, 'The Drivers of Greenwashing' (2011) 54 California Management Review 64.

products based on unverified or exaggerated environmental credentials, thus systematically disadvantaging environmentally superior products from third-party rivals. The categorisation clearly positions this practice within the broader context of unfair competitive behaviour, providing authorities with precise guidelines for enforcement.

The protected interests that this new catalogue entry seeks to uphold are grounded firmly in the EUCFR. Specifically, environmental pluralism[156] and consumer choice are directly threatened by practices involving sustainability deception. Ensuring pluralism in environmentally sustainable offerings guarantees that consumers have access to a variety of genuinely sustainable options, enabling informed choices that align with their ecological preferences. Misleading claims erode consumer trust and distort purchasing decisions, undermining the integrity and pluralism of green product markets.

To trigger scrutiny under this new conduct category, clear and proportionate thresholds can be established. Platforms meeting a gatekeeper threshold, defined as capturing at least five per cent of the total EU Gross Merchandise Volume (GMV), or those achieving a dominant position in a specific product or service category, defined by a thirty percent market share, will activate detailed regulatory review. These articulated thresholds will ensure targeted scrutiny, focusing enforcement resources on platforms that possess significant market influence and, consequently, the capacity to materially distort competition through deceptive sustainability claims. For evidentiary purposes, an objective and transparent methodology might be proposed. An independent third-party life-cycle analysis (LCA) would assess the environmental claims made by platforms.[157] This analysis involves verifying each product's declared carbon footprint and comparing it with independently audited metrics. If this independent verification reveals that a platform's claimed carbon footprint diverges by more than thirty per cent from the verified footprint, this discrepancy shifts the evidentiary burden onto the undertaking under the proportionality-based fairness test. The undertaking must then provide a compelling and proportionate justification for the discrepancy, such as documented improvements in sustainability practices that have not yet been updated in formal reports. In the absence of

[156] Charter, Art 37.

[157] International Organization for Standardization (ISO), *ISO 14044:2006 – Environmental Management – Life Cycle Assessment – Requirements and Guidelines* (ISO, 2006) <https://www.iso.org/standard/38498.html> accessed 23 June 2024.

adequate justification or a credible explanation for the misleading sustainability claims, the proportionality test may require a behavioural remedy. This may involve establishing a verified eco-label registry, where sustainability claims must be independently certified before being marketed. It further requires platforms to disclose their ranking algorithms publicly, providing clarity on the criteria by which products are prioritised or demoted, along with algorithm-audit rights for third-party rival sellers to verify fairness continuously. In cases of persistent or deliberate breaches, enforcement may escalate to a further level, mandating the forced disclosure of environmental data APIs. This more stringent measure ensures that competitors and external auditors can directly access relevant sustainability data, thereby maintaining rigorous and transparent market conditions and safeguarding consumer trust and environmental integrity.

6.6 Conclusions

This chapter has sought to establish that the notion of fairness, despite longstanding ambiguities within doctrinal interpretations, can be effectively reconceptualised into a practical and analytically rigorous component of EU competition law enforcement. To substantiate this argument, the analysis has been structured around three central methodological innovations, namely the formulation of a four-step proportionality-based fairness test, the systematic categorisation within the behaviour catalogue, and alignment with the DMA. Through case studies, critical evaluation of soft law instruments, and considered institutional adjustments, the discussion demonstrates that integrating fairness alongside the conventional price-centric consumer welfare standard is achievable without undermining legal predictability or discouraging innovation. The chapter concludes by summarising its key theoretical advancements, contextualising its original contributions within broader antitrust scholarship, and highlighting avenues for subsequent academic inquiry and policy development.

This chapter makes a fundamental conceptual contribution by reframing fairness within EU competition law from a broadly defined normative aspiration to a structured analytical mechanism rooted in proportionality. Traditionally, the term ‘unfair’ in Article 102(a) TFEU has been interpreted as signifying a standalone objective of the EU Treaties, an interpretative error akin to the historical elevation of consumer welfare into a singular enforcement priority. To rectify this, the proposed framework systematically anchors fairness in the public law

proportionality sequence well established in EU jurisprudence, comprising legitimacy, suitability, necessity, and balancing. By restoring the classical distinction between objectives and enforcement instruments, the chapter mitigates the confusion and dilution that have typically arisen whenever fairness has been rhetorically misappropriated for policy-driven ends. In addition to this theoretical clarification, the chapter also provides an empirical contribution. The analysis of ten recent decisions in digital markets reveals that European courts and competition authorities have implicitly, albeit inconsistently, applied proportionality logic. Thus, the explicit codification of this logic significantly enhances legal certainty without introducing extraneous legal criteria. Through an examination and synthesis of recurring analytical approaches found in landmark digital competition cases, the chapter articulates a coherent and administrable four-stage test comprising dominance coupled with leverage, identification of the protected interest, assessment of the legitimacy of aims pursued by undertakings, and finally, evaluation through necessity and balancing criteria. Although elements of this test can be identified individually within existing decisions, they have not previously been consolidated into a single doctrinal template. Consequently, the proportionality-based fairness test presented here addresses enduring criticisms of fairness as inherently indeterminate or susceptible to inconsistent application, ensuring a transparent analytical structure that can capture non-price competitive harms, such as privacy erosion and threats to market contestability.

The second contribution advanced by this chapter, the behaviour catalogue, explicitly addresses the longstanding critique of fairness as an empty vessel, lacking specific content or practical enforceability. By establishing a structured linkage between each protected interest identified during the second step of the fairness test and a clearly defined yet adaptable set of market practices, the catalogue translates abstract normative values of fairness into actionable criteria for enforcement. Crucially, it accomplishes this by incorporating both contractual unfairness and competition unfairness, thereby explicitly recognising the doctrinal lineage, extending from continental traditions of unfair competition law to contemporary regulatory frameworks governing digital platforms. Embedding this catalogue within a soft law instrument provides the necessary flexibility for the enforcement of Article 102 TFEU. Competition authorities are empowered to periodically revise and update the list of prohibited practices through a triennial review cycle, directly mirroring the mechanism introduced by Article 12 DMA. This dynamic, iterative approach ensures that the enforcement regime remains responsive and resilient, capable of accommodating evolving market dynamics and technological innovations. At the

same time, the structured yet adjustable nature of the catalogue enhances legal certainty, clearly delineating permissible and impermissible practices. Furthermore, by anticipating the emergence of new competitive threats, such as algorithmic biases introduced through artificial intelligence or misleading claims related to sustainability, the behaviour catalogue not only addresses present concerns but also proactively equips the enforcement framework to manage and mitigate future competitive harms effectively.

The third contribution of the chapter addresses the necessity for regulatory coherence in EU competition law enforcement. Specifically, it proposes a structured division of regulatory competence through the introduction of a single gateway rule. Under this approach, gatekeepers that, while systemic in nature, do not yet meet dominance criteria would fall under the reinforced framework of the DMA. Conversely, firms already characterised by dominance would continue to be governed primarily by the ex-post enforcement mechanism of Article 102 TFEU. This bifurcated structure mitigates two significant risks inherent in existing regulatory arrangements. It prevents the exclusion of economically significant gatekeepers due to overly rigid dominance thresholds, and it reduces the potential for overlapping and duplicative enforcement actions across parallel regulatory regimes. This conceptualisation also reconfigures the structure and severity of sanctions. Under the proposed recalibration, penalties for DMA infringements are moderated, with fines reduced from the current standard of 10% down to 6% of a firm's global turnover. In contrast, Article 102 infringements, once assessed through the proportionality filter framework and identified as breaching multiple protected interests, could attract substantially increased penalties, potentially reaching as high as 20% of global turnover. These tailored sanctions profiles ensure that penalties appropriately reflect both the degree of market power exercised and the systemic risks posed by the conduct in question, all while adhering strictly to proportionality requirements outlined in the EUCFR.

Although digital platforms provided the empirical foundation for the analysis conducted in this chapter, the proposed fairness framework, underpinned by its soft law methodology, is explicitly designed to be horizontally scalable and applicable across diverse regulatory domains. This adaptability becomes evident through illustrative examples from various sectors. For instance, in the context of energy markets, dominant transmission operators managing critical data hubs might become subject to data sharing obligations, evaluated according to proportionality criteria. Similarly, within financial markets, gatekeepers facilitating high-frequency trading could face scrutiny regarding unfair competitive advantages arising from

latency discrepancies. In the digital health sector, artificial intelligence-driven triage systems might be systematically audited to prevent biased self-preferencing in patient referrals. Moreover, by integrating these sector-specific scenarios into the established behaviour catalogue, the framework effectively demonstrates how existing regulatory disclosures, such as audit trails mandated by the Medical Device Regulation, sustainability related filings required by the Sustainable Finance Disclosure Regulation, or risk assessments stipulated by the AI Act, can simultaneously serve as evidence within the second step (protected interests) of the proportionality-based fairness test. This dual functionality reduces administrative burdens and compliance redundancies for regulated entities. Consequently, the chapter provides an actionable, pre-configured enforcement template that is readily adaptable by diverse regulatory bodies, extending beyond the DG COMP. National competition authorities, energy market regulators, and data-protection agencies can therefore integrate fairness analyses into their respective enforcement practices without necessitating repeated engagement with foundational debates on Treaty objectives, thus enhancing both regulatory coherence and institutional efficiency.

This chapter also addressed prevalent prudential concerns traditionally associated with the enforcement of fairness standards in EU competition law, specifically, the risks of over-enforcement and legal uncertainty. Firstly, the potential for regulatory overreach is mitigated effectively by establishing dominance as a preliminary threshold for intervention. Furthermore, the requirement of evaluating the legitimacy of business objectives within the proportionality analysis provides a safeguard, protecting behaviours that demonstrably enhance market efficiency. Additionally, the necessity component ensures that remedial actions are proportionate by precluding interventions when less restrictive alternatives could achieve the intended outcome. To counteract concerns regarding legal uncertainty, the proposed framework introduces clearly codified analytical stages and systematically documented catalogue entries, thereby providing transparent and objective reference points for judicial and regulatory assessments. This synchronisation, combined with the proactive publication of detailed soft-law guidance before enforcement, ensures predictability and legal certainty for market participants. Collectively, these precautionary measures effectively address and mitigate criticisms of fairness as inherently subjective or excessively discretionary. Instead, the proposed fairness framework emerges as a structured and analytically diagnostic tool designed to complement, rather than replace, the traditional consumer welfare-oriented approach in EU competition law enforcement.

Taken collectively, these distinct yet complementary contributions position this research squarely at the intersection of antitrust doctrine, public law proportionality principles, and regulatory governance. This synthesis not only facilitates enriched academic discourse but also provides a practical foundation for potential legislative and policy refinements. Ultimately, the functional fairness framework developed throughout this chapter advances a balanced and pragmatic path for EU competition law enforcement. By anchoring novel market challenges, such as privacy breaches, biases induced by artificial intelligence, and deceptive sustainability claims, in well-established doctrinal methodologies, the framework equips regulators with a flexible yet rigorous analytical toolkit. Crucially, it achieves these goals without compromising the legal certainty and incentives for innovation that have traditionally driven Europe's competitive structure design. By engineering this proportionality-based fairness filter, the chapter demonstrates that the European Union need not choose between doctrinal pluralism and regulatory predictability; instead, both concepts can coexist harmoniously within a single coherent enforcement architecture.

CHAPTER 7: CONCLUSIONS

This thesis set out to resolve a twofold impasse at the heart of contemporary EU competition law. The first concerns the limitations of the consumer welfare standard, which was initially designed to assess harm in price-centred, industrial era markets. As demonstrated in response to the first sub-question of the research, this framework is poorly equipped to capture the rivalry-distorting dynamics of digital platform ecosystems, particularly those that operate through zero-priced transactions, data monetisation, and cross-side network effects. The second impasse arises from the European Union's regulatory response, most notably the adoption of the DMA. By elevating fairness and contestability to the status of autonomous legal objectives, the DMA introduces the risk of conceptual fragmentation and enforcement overlap with Article 102 TFEU, thereby raising concerns about doctrinal coherence and institutional coordination. Through an integrated methodology, combining doctrinal analysis, empirical text mining of key enforcement decisions, and the normative design of an operational framework, this thesis has demonstrated how fairness can be reimagined not as a rival to consumer welfare but as a complementary analytical tool embedded within the enforcement logic of Article 102 TFEU. In doing so, it restores internal coherence to EU competition law while enhancing its ability to address the complex challenges posed by the power of digital platforms.

Six research questions guided this thesis to explore both the conceptual tensions and enforcement challenges arising from the interplay between traditional consumer welfare analysis and the evolving role of fairness in EU competition law, particularly in the context of digital platform regulation. The answers to these questions collectively build the argument for a functional integration of fairness within Article 102 TFEU. The first question investigates the shortcomings of the consumer welfare standard in the context of digital markets. The thesis demonstrates that traditional price-based tests are structurally incapable of capturing harms that arise not from price increases or output reductions, but from more complex dynamics such as data appropriation, algorithmic self-preferencing, and attention capture. These forms of harm remain undetected because the consumer welfare metric is inherently reliant on observable and quantifiable price or output signals, which are often absent in zero-priced digital ecosystems. The second question explores the evolution of fairness as a concept within EU enforcement practice. Through computational content analysis of fifteen landmark decisions delivered by the Commission and NCAs, the thesis provides empirical evidence that references to fairness,

once marginal and occasional, have become increasingly prominent and structured. This trend demonstrates that fairness is no longer merely rhetorical but has begun to operate implicitly as an analytical tool in practice.

The third question of the research addresses the interaction between the DMA and Article 102 TFEU by examining whether the DMA's elevation of fairness and contestability to stand-alone regulatory objectives creates doctrinal friction. By mapping individual DMA obligations against the constituent elements of abuse under Article 102 TFEU, the thesis reveals considerable substantive overlap. This overlap introduces the risk of double jeopardy in enforcement, where identical conduct may be pursued simultaneously under both legal tracks, thereby undermining legal certainty and institutional coherence. The following research question identifies the root of conceptual deadlock in ongoing policy debates. The thesis argues that positioning fairness as a normative goal inevitably triggers conflict with the well-established consumer welfare paradigm. However, by reframing fairness as an operational instrument, rather than a rival objective, the thesis offers a doctrinally coherent and analytically productive resolution to this impasse. The fifth question advances a concrete proposal in the form of a functional fairness test. Anchored in the proportionality principles developed by the CJEU, the four-step decision tree translates fairness into a predictable legal standard. In doing so, it broadens the evidentiary aperture beyond price metrics, offering a structured method for recognising harm in platform markets without abandoning analytical rigour. Finally, the sixth research question addresses institutional design by introducing two additional components, namely, a behaviour catalogue and a single gateway rule. The behaviour catalogue systematically links recurring platform strategies, such as leveraging or data siloing, to presumptive remedies. At the same time, the single gateway rule allocates cases ex ante to either the DMA or Article 102 TFEU based on whether the harm in question is structural or conduct-specific. This dual mechanism reduces the risk of overlapping remedies and provides an adaptable template for application in future regulatory contexts or emerging digital sectors. Taken together, these responses to the six research questions form the intellectual architecture of the thesis and support its central claim that fairness, redefined as a functional analytical tool, can restore coherence to EU competition enforcement and enhance the effectiveness of Article 102 TFEU in addressing the realities of platform power.

As can be seen from the above, at the institutional level, the framework ultimately developed in this thesis is grounded in three interdependent components, each designed to enhance the

coherence and operational clarity of EU competition law in the digital age. Together, these elements offer a new perspective on the doctrinal interpretation of the application of fairness and the sharing of enforcement responsibilities between the DMA and Article 102 TFEU. The first component is a proportionality-based fairness test that brings normative structure and legal predictability to fairness analysis. Drawing inspiration from the jurisprudence of the CJEU on fundamental rights, the test is structured around four sequential questions. These ask whether the undertaking exercises gatekeeper-like control over a digital ecosystem, what legitimate aim the contested conduct pursues, whether the chosen means are necessary to achieve that aim, and whether the conduct's overall effect remains proportionate. This structured approach imports the discipline of constitutional proportionality analysis into competition law, enabling fairness to be operationalised without abandoning legal precision. The second component is a behavioural catalogue that bridges the gap between abstract legal doctrine and real-world enforcement. It clusters recurring platform strategies, such as self-preferencing, data siloing, leveraging, and algorithmic bias, under pre-defined remedial categories. Importantly, its modular architecture is designed to accommodate future developments, allowing them to be integrated without undermining the framework's analytical consistency. The third component is a single gateway rule that allocates enforcement responsibility between the revisited DMA and Article 102 TFEU. This division neutralises the risk of double jeopardy enforcement and supports procedural economy by clarifying jurisdictional boundaries and reducing duplicative proceedings. In combination, these three elements form a cohesive institutional architecture that operationalises fairness in a legally disciplined, empirically informed, and practically implementable manner.

The thesis delivers original contributions in three interconnected dimensions, which are theoretical, methodological, and policy institutional. At the theoretical level, it reconceptualises the notion of fairness not as a competing normative goal but as a functional analytical lens. By doing so, it resolves the long-standing debate concerning the hierarchy of objectives within EU competition law. It constructs a principled bridge between the dominant consumer welfare paradigm and the emerging emphasis on fairness in digital enforcement. This reframing allows fairness to complement, rather than displace, consumer welfare by assigning it a distinct yet integrative analytical role. Methodologically, the thesis introduces a novel systematic application of computational text mining techniques to assess the presence and evolution of fairness rhetoric in Commission and NCAs decisions concerning digital platforms. These empirical findings are then embedded into a normative framework consisting of a

proportionality-based decision tree and an expandable behaviour catalogue. This integrated design not only enhances doctrinal clarity but also offers a replicable and adaptable model for future researchers examining enforcement discourse or platform-specific remedies. At the policy and institutional level, the thesis proposes a single gateway rule that provides a clear procedural mechanism for allocating cases either to the DMA or to Article 102 TFEU. This rule offers a concrete blueprint for mitigating jurisdictional overlap and could also inform analogous reforms in other jurisdictions. For the European Commission and NCAs, the framework supplies an off-the-shelf proportionality protocol that can be inserted into abuse investigations without statutory amendment. For legislators, it identifies specific DMA clauses, most notably Articles 1(5) and 5(2), where a gateway allocation could avert duplicate remedies. Cross-jurisdictionally, any other national regime and OECD discussions on platform regulation can adopt the catalogue gateway logic to keep national ex ante tools in cadence with ex post abuse rules.

Two important caveats should be acknowledged to contextualise the scope and methodological boundaries of the thesis. First, with respect to scope, the empirical analysis conducted in response to the second research question is based on a curated corpus of limited published decisions by the Commission and various NCAs. While this dataset was sufficient to detect and map the emerging trajectory of fairness rhetoric within current enforcement practice, it necessarily excludes both unpublished decisions and forthcoming jurisprudence under the DMA. As new cases emerge, particularly under the DMA framework, it will be essential to revisit and update the empirical mapping and to recalibrate the behaviour catalogue in line with evolving enforcement patterns.

Second, concerning methodology, the scenario testing employed in Chapter 6 is designed to illustrate the internal coherence and conceptual feasibility of the proposed normative framework, including the proportionality-based fairness test and the single gateway rule. However, these stylised case studies do not aim to predict specific adjudicative outcomes. Upcoming enforcement proceedings will inevitably sharpen proportionality thresholds and expose edge cases not currently visible within the stylised framework. Future research could usefully build on this foundation by expanding the text-mining dataset to include judgments from national courts outside the EU, empirically validating the single gateway allocation mechanism through analysis of actual parallel proceedings, and testing the broader applicability

of the proposed framework in adjacent regulatory domains such as cloud computing, digital advertising, and fintech.

In summary, while consumer welfare analysis has served as the dominant guiding principle in EU competition enforcement for nearly forty years, the emergence of platform-based market structures has revealed fundamental limitations in this traditional framework. As demonstrated in the thesis, the price-centred logic of the consumer welfare paradigm struggles to account for digital harms that do not manifest through observable changes in price or output, such as those arising from data exploitation, algorithmic discrimination, or exclusionary platform design. This thesis refers to the resulting conceptual terrain as the consumer welfare challenge land. Rather than abandoning consumer welfare altogether or proposing fairness as an entirely new normative objective, the thesis develops and defends a functional fairness framework that treats fairness as a doctrinally grounded analytical instrument. This reframing enables competition law to retain the discipline and precision of welfare-based metrics while extending its reach to capture price-silent distortions of rivalry. If operationalised through the proportionality test, behaviour catalogue, and single gateway rule proposed in the research, the framework would allow the Commission, NCAs, and courts to apply a common legal vocabulary while navigating the increasingly complex realities of the digital and post-digital economy. In this respect, the thesis aims to serve as both a constructive bridge to current reform efforts and a forward-looking invitation to scholars and practitioners. It encourages the ongoing calibration, adaptation, and practical deployment of fairness, not as a rhetorical flourish, but as a coherent and enforceable component of a more contestable, transparent, and competitive European market.

APPENDIX: CENTRAL PARAGRAPH CORPUS[1]

Case	Year	Theme	Para	Quote
Google Shopping (Commission)	2017	Fairness	642	"…By positioning and displaying more favourably, in its general search results pages, its own comparison-shopping service compared to competing comparison shopping…"
Google Shopping (Commission)	2017	Fairness	664	"...Fourth, a requirement on Google to treat competing comparison-shopping services no less favourably than its own comparison shopping service within its general search…"
Google Shopping (Commission)	2017	Fairness	669	"...In the fourth place, any restriction on Google's rights and freedoms is necessary to…"
Google Shopping (Commission)	2017	Consumer welfare	561	"...The large cost difference cannot be explained by traffic coming from AdWords being…"
Google Shopping (Commission)	2017	Consumer welfare	593	"...First, the Conduct has the potential to foreclose competing comparison shopping services, which may lead to higher fees for…"
Google Shopping (Commission)	2017	Consumer welfare	596	"...In the third place, the Conduct is likely to reduce the incentives of Google to improve…"
Google Android (Commission)	2018	Fairness	1398	"…clauses restricted manufacturers' freedom to sell rival Android devices, undermining fair competition…"

[1] This appendix provides the full corpus referenced in Chapter 5 (see especially Sections 5.2 and 5.3).

Google Android (Commission)	2018	Fairness	1030	"…obligations restricted fair access to alternative Android versions…"
Google Android (Commission)	2018	Fairness	1158	"…obligations prohibit OEMs from supporting Android forks competing with GMS devices…"
Google Android (Commission)	2018	Fairness	1202/2	"…portfolio-based payments hindered access to national search markets…"
Google Android (Commission)	2018	Consumer welfare	1191	"…efficiency gains may offset exclusionary effects of exclusivity payments…"
Google Search (AdSense) (Commission)	2019	Fairness	573	"…Authorising Equivalent Ads Clause restricted access to search ad intermediation market…"
Google Search (AdSense) (Commission)	2019	Fairness	599	"…Authorising Equivalent Ads Clause deterred rivals from innovating and scaling via Direct Partners…"
Google Search (AdSense) (Commission)	2019	Consumer welfare	417	"…Exclusivity Clause in GSAs likely raised ad prices and consumer costs…"
Apple App Store Music Streaming (Commission)	2021	Fairness	568	"…Anti-Steering Provisions constitute unfair trading conditions detrimental to users and not proportionate to any legitimate objective…"
Apple App Store Music Streaming (Commission)	2021	Fairness	569	"…Apple unilaterally defines and imposes Anti-Steering Provisions on app developers, risking app removal or update rejection…"
Apple App Store Music Streaming (Commission)	2021	Consumer welfare	576	"…Anti-Steering Provisions are detrimental to iOS music streaming users, causing both direct monetary and non-monetary harm…"

Apple Pay – NFC / Mobile Wallets (Commission)	2024	Fairness	4.3	"…unlawful, unfair, misleading or deceptive business practices in relation to Your Licensed HCE Payment Application…"
Facebook Data (Bundeskartellamt)	2019	Fairness	528	"…appropriate balance of interests in unbalanced negotiations where one party unilaterally imposes business terms…"
Facebook Data (Bundeskartellamt)	2019	Fairness	532	"…terms and conditions that violate data protection or unfair contract terms principles constitute an abuse under Section 19(1) GWB where a sufficient degree of market power is involved…"
Facebook Data (Bundeskartellamt)	2019	Consumer welfare	911	"…data collection creates false incentives for companies, leading to harvesting 'too much' data from the consumer welfare point of view…"
Amazon Marketplace (Bundeskartellamt)	2022	Fairness	436	"…Amazon exerts influence on third-party sellers by imposing T&Cs that reflect Amazon Retail's decisions, framing them as necessary for a level playing field, thereby conditioning access to end customers…"
Amazon Marketplace (Bundeskartellamt)	2022	Fairness	443	"...requires fairness and transparency in T&Cs, ranking, preferential treatment, and complaints, enforceable under UWG…"
Amazon Marketplace (Bundeskartellamt)	2022	Consumer welfare	229	"…no sufficient innovation-driven competitive pressure to relativize Amazon's market position; alternative offerings represent substitution competition at the margins…"

Google AdTech (Autorite de la concurrence)	2021	Fairness	470	"…allowing fair access to information on the progress of auctions for third-party SSPs via header bidding…"
Google AdTech (Autorite de la concurrence)	2021	Fairness	179	"…internal documents expressly mention the unfairness of the right of last look enjoyed by AdX…"
Google AdTech (Autorite de la concurrence)	2021	Consumer welfare	393	"...Furthermore, maintaining higher prices than its direct competitors…"
Apple ATT (Autorite de la concurrence)	2022	Fairness	275	"…Google applied Google Ads Rules in a non-transparent, non-objective and discriminatory manner; unfair trading conditions exist if conduct lacks objective justification and proportionality…"
Apple ATT (Autorite de la concurrence)	2022	Fairness	321	"…Meta committed to maintain the objectivity, clarity and non-discriminatory application of the Ad Tech MBP Performance Criteria and provide public access and Partner Center tracking…"
Apple ATT (Autorite de la concurrence)	2022	Consumer welfare	251	"…Meta's large audience and range of services allow it to benefit from economies of scale and leverage more data to improve personalisation and monetisation…"
Google Shopping (General Court)	2021	Fairness	433	"…competition takes place on a fair basis not adversely affected by agreements or abusive unilateral conduct of dominant undertakings…"

Google Shopping (General Court)	2021	Fairness	552	"…objective necessity may stem from legitimate commercial considerations, such as protecting against unfair competition…"
Google Shopping (General Court)	2021	Fairness	622	"…equal treatment requires that comparable situations not be treated differently unless objectively justified…"
Google Shopping (General Court)	2021	Consumer welfare	553	"…dominant undertaking must show efficiency gains counteract negative effects on competition and consumer welfare, are conduct-driven, necessary, and do not eliminate effective competition…"
Google Android (General Court)	2022	Fairness	325	"…contested evidence concerns 'status quo bias' created by pre-installation, which Google defines narrowly but also uses in wider sense as factory set-up by OEMs and MNOs…"
Google Android (General Court)	2022	Fairness	890	"…AFAs abusive as they restrict OEMs from supporting non-compatible forks, beyond interoperability within the Android ecosystem…"
Google Android (General Court)	2022	Consumer welfare	180	"…SSNDQ test does not require a precise quantitative standard; a small but significant and non-transitory quality degradation suffices…"

Servizio Elettrico Nazionale (Court of Justice)	2022	Fairness	102	"…discriminatory consent-seeking by SEN and EE was capable of impairing effective, undistorted competition, regardless of competitors' actual responses…"
Servizio Elettrico Nazionale (Court of Justice)	2022	Consumer welfare	85	"…conduct that broadens consumer choice or improves quality falls within competition on the merits…"
Facebook Data (Court of Justice)	2023	Fairness	50	"…access to and use of personal data are of great importance in the digital economy, as shown by Facebook's personalised advertising model…"
Facebook Data (Court of Justice)	2023	Fairness	51	"…access to personal data is a key competition parameter; excluding data protection rules risks undermining competition law…"
European Super League Company (Court of Justice)	2023	Fairness	234	"…a fair share of profit is redistributed in solidarity, benefiting consumers and EU citizens…"
European Super League Company (Court of Justice)	2023	Fairness	97	"…Union action aims to develop the European dimension in sport by promoting fairness, openness in competitions, and protecting sportspersons' integrity."
European Super League Company (Court of Justice)	2023	Fairness	151	"…rules on prior approval and participation must rely on transparent, objective and precise criteria, applied in a non-discriminatory manner, and must not impose discriminatory or disproportionate requirements on third-party organisers."

European Super League Company (Court of Justice)	2023	Consumer welfare	5	"...If FIFA and UEFA block the Super League, does the resulting restriction on innovation and consumer choice fall under Article 101 TFEU's exception or amount to an abuse under Article 102 TFEU?..."
European Super League Company (Court of Justice)	2023	Consumer welfare	196	"...Legitimate goals do not exempt associations from proving that the rules produce genuine efficiency gains outweighing their anticompetitive effects…"
Google Shopping (Court of Justice)	2024	Fairness	111	"...Even without indispensability, unfair conditions may still amount to abuse under Article 102 TFEU…"
Google Shopping (Court of Justice)	2024	Fairness	113	"...Since Google grants access to its general search service but under discriminatory conditions…"
Google Shopping (Court of Justice)	2024	Fairness	177	"...It is appropriate to first examine the appellants' claim that the conduct was not classified as discriminatory in the decision, and that such a classification would be incorrect…"
Google Shopping (Court of Justice)	2024	Fairness	267	"...Google's discriminatory conduct in favouring its own shopping service in search results significantly reduced rivals' traffic and harmed competition…"

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